tiated, rather than imposed and therefore legitimate interim constitutions, especially with strict rules for final constitution making, is to allow learning to take place under constitutional rules that block the way to renewed dictatorship. Putting the learning after the making of the final constitution on the other hand means to obliterate the line between constitutional and normal politics, to the detriment of constitutionalism and the advantage of incumbents whoever they may be.

A final constitution, though it will inevitably be interpreted and constructed, must settle some fundamental matters if it is to be a constitution in the full formal sense, or a constitutionalist constitution in the material sense. One can defer matters and learn under a constitution only if some of the most important matters are settled. One cannot learn when there is no structure, with everything perpetually open. Yes, it may be necessary to leave some issues, beyond constitutional principles and values, open for future construction. Yet, the most important thing to be settled is the identity of those who will be able to construct all fundamental matters, including what is deferred. Informal change can never be fully excluded, nor should it be even if it should hold a hierarchically lower position than either constitutional review or constitutional amendment. Because of such a hierarchy of the modalities of change, the formal rule(s) of change and the entity charged with enforcing it against "unconstitutional law" remain the most important things to settle whatever else is left open to future interpretation and construction. Only then can one begin to speak of "constitutions *with* constitutionalism."

Andrew Arato
New School for Social Research
Email: arato@newschool.edu
doi:10.1093/icon/mou034

Michael Herz & Peter Molnar, eds. *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. Cambridge University Press, 2012. 544 pages. $47 (pbk). ISBN: 9780521138369.

The title of the book under review, *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, is well chosen for the collection of essays assembled by Michael Herz, Professor of Law at Cardozo Law School in New York, and Peter Molnar, Senior Research Fellow at Central European University in Budapest. To the extent that this can be done in a few words, it encapsulates an important part of the debate over what to do about hate speech. The essays reflect a broad consensus that hate speech is one of the afflictions of our era and that there is a need to counter it. The issue that divides the scholars who contributed to this volume is when it should be legally prohibited. In most of the world, the decisive factor is the *content* of hate speech. On the other hand, in the United States, the critical question is the *context* in which hate speech takes place.

The American approach reflects a system of constitutional rights in which the core value is liberty and in which the rights set forth in the First Amendment, especially freedom of speech, are of central significance in embodying the concept of liberty. Americans prize freedom of speech as an essential aspect of who they are as human beings; as a necessary component of democracy; and also as the means to protect all other rights as it ensures that they may speak out when any right is threatened. There are few countries, if any, where the protection of freedom of speech is as extensive and as robust as in the United States. Although Americans generally agree that hate speech is loathsome, it is nevertheless legally protected in public discourse except when it involves incitement of lawless action in circumstances in which it is likely to produce such action.[1] That is, incitement of

[1] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

violence, by itself, does not warrant proscription. It is only when incitement takes place in a context in which such violence is imminent that American jurisprudence provides that the state may step in to prohibit or punish those engaged in hate speech.

Elsewhere, other values are as significant, or even more significant, in concepts of rights. The Preamble of the Universal Declaration of Human Rights, adopted by the United Nations in 1948, begins with the assertion that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Charter of Fundamental Rights of the European Union, adopted in 2000, states in its Preamble that, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity." Similarly, the constitutions of many countries reflect a belief that dignity and equality are as important, or more important, than liberty, as values that should be upheld. As hate speech is considered an assault upon the dignity of those who are its targets, and a threat to equality, it follows that legal systems elsewhere are more ready to accept prohibitions, and that they consider it appropriate that determinations should be based on the content of hate speech. Indeed, the International Covenant on Civil and Political Rights, promulgated by the United Nations in 1966, requires that, "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (art. 20(2)). The Covenant has been ratified by 168 countries. The United States made clear its departure from the global consensus when it ratified the Covenant in 1992 by entering a reservation with respect to the hate speech provision on the basis that it conflicts with the First Amendment.

Another difference between the American approach to hate speech and the one that is prevalent elsewhere is that Americans tend to focus on the instrumental role of such speech in fomenting violence or other violations of law. This is a concern in other countries as well, but it is not the primary consideration. Bhikhu Parekh, a member of the British House of Lords and a former Professor of Political Philosophy at the University of Westminster and the University of Hull, argues in a particularly thoughtful and eloquent essay that:

> Hate speech is objectionable . . . [because] it views members of the target group as an enemy within, refuses to accept them as legitimate and equal members of society, lowers their social standing, and in these and other ways subverts the very basis of a shared life. It creates barriers of mistrust and hostility between individuals and groups, plants fear, obstructs normal relations between them, and in general, exercises a corrosive influence on the conduct of collective life. Hate speech also violates the dignity of the members of the target group by stigmatizing them, denying their capacity to live as responsible members of society, and ignoring their individuality and differences by reducing them to uniform specimens of the relevant racial, ethnic, or religious group (at 44).

Parekh considers the arguments against a legal ban on hate speech and finds six to be the most common, though he finds none of them convincing. To summarize his statement of these arguments, they are: first, that free speech is a highly important value and that tolerance of the harm done by hate speech is a small price to pay in the larger interest of free speech; second, that evil ideas are best defeated by critical scrutiny and by confronting them or, as Americans often put it, by more speech; third, that banning hate speech would open the floodgates to all kinds of restrictions on speech; fourth, that the state should not judge the content of speech but should maintain moral neutrality; fifth, that citizens are responsible and autonomous individuals who can evaluate speech on their own without bans imposed by a paternalistic state; and sixth, that law cannot change attitudes and eliminate hatred.

Though all of these objections to hate speech laws are familiar to those who have participated in controversies over such mat-

ters, they do not include an argument that is particularly important to some who have been practitioners in the defense of freedom of speech. It is that hate speech laws necessarily vest a great deal of discretion in the hands of the authorities and that discretion is frequently abused.

By their nature, prohibitions on speech are usually vague. They seek to ban such harms as defamation, obscenity, sedition, violations of national security, violations of privacy, and promoting hatred or hostility. What they cannot do, of course, is to specify what words are banned. That is because those who express themselves may do so in a myriad ways. They can convey messages directly or indirectly, overtly or subtly and through a host of rhetorical devices. It is very easy for anyone intent on insulting or stigmatizing someone on racial or religious grounds to come up with a novel slur that accomplishes that purpose. Inevitably, therefore, law enforcement authorities must be vested with broad discretion to act against those who are engaged in hate speech if they are to try to punish or deter the practice. Such discretion is required by the need to interpret the meaning and intent of words that are not explicitly prohibited by law. As should be apparent, the authorities that engage in such interpretations generally represent and reflect the interests and the biases of the segment of the population that is dominant in any society. Accordingly, it should not be surprising that, in practice, hate speech laws that lend themselves to discretionary enforcement may be used to silence disfavored segments of the population. The very minorities that are often the targets of hate speech, and that are supposedly protected by laws prohibiting hate speech, may be disproportionally subject to prosecution for themselves violating the laws.

The Ethiopian legal scholar, Yared Legesse Mengistu, a former judge of the Federal High Court of his country, points out in his essay that there have been many deadly ethnic conflicts in Ethiopia. He notes that "the government itself has extensively engaged in hate speech against the opposition . . . [And that] The government abuses its power to silence and, even worse, decapitate the opposition." According to Mengistu, "Ethiopia's hate speech regulation stifles important political debate." He argues that the same takes place in Rwanda where article 33 of the Constitution adopted in 2003 provides that, "[p]ropagation of ethnic, regional, racial discrimination or any other form of division is punishable by law." According to Mengistu, "newspapers critical of the government are often accused of inciting ethnic hatred" and, as in Ethiopia, "[h]ate speech regulations are manipulated to serve the interests of the government and suppress dissent" (at 371–374). It is apparent that laws punishing hate speech are particularly dangerous in the hands of an authoritarian government. The problem is not restricted to Africa. In Hungary, where a populist political party, Fidesz, has consolidated its control of the government in recent years under the leadership of Prime Minister Viktor Orbán, there has been extensive hate speech, and also many violent hate crimes, against the Roma and other minorities. These practices are particularly associated with the far right Jobbik Party. Though these do not seem to lead to criminal prosecutions, alleged hate crimes against ethnic Hungarians by members of the Roma minority are prosecuted vigorously.

Most of those contributors to Herz and Molnar's book, who espouse the prosecution of hate speech, come from democratic countries where it is unlikely that such laws will be used as abusively as in Ethiopia, Rwanda, or, under present circumstances, in Hungary. Yet questions of enforcement probably should trouble them as well. That is because, despite a rising tide of xenophobia and intolerance in many countries in Europe, marked by such displays of hate speech as explicitly racist chants at football games against players of African descent and against the Roma, the laws criminalizing hate speech in those countries seem to have no effect. The essay by Stephen Holmes, Professor of Law at New York University, is scathingly critical of what he refers to as "First Amendment fetishism." He writes that, "if we Americans were rational, we would be convinced by the arguments for regulating hate speech" (at 347). Yet Holmes betrays no recognition that rationality should

extend to his thinking about why hate speech is so much more widespread and blatant in the European democracies that have laws punishing hate speech than it is in the United States where the First Amendment fetishism that he scorns has made such prosecutions virtually impossible. Though racism is probably as deeply ingrained in the United States as in Europe, its manifestation as hate speech is far less frequent. It is almost inconceivable that an American sporting event would be marked by racist chants such as those that are commonplace in Europe, or by spectators throwing bananas on the field in the vicinity of African athletes. Hate speech laws and prosecutions are not the cause of racist displays in Europe. Rather, the laws seem to be irrelevant. Enforcing them against thousands of spectators at a sporting event would be virtually impossible. The consequence, of course, is that most of those who engage in hate speech do not take such laws seriously. The hate speech laws that are in place throughout Europe do not appear to serve their intended purpose of suppressing verbal assaults on the dignity of minorities.

There is much to admire in the essays collected in Herz and Molnar's book. They include a debate between the well-known legal philosophers Jeremy Waldron, a proponent of hate speech prosecutions, and the late Ronald Dworkin, an advocate of the view that imposing such restrictions on speech subverts democratic legitimacy; and an outstanding contribution by the late C. Edwin Baker of the University of Pennsylvania Law School, who describes himself as "an advocate of almost absolute protection of free speech." Highlights of the book also include wide ranging and probing interviews conducted by Peter Molnar, one of the editors, with Robert Post, Dean of the Yale Law School, with Nadine Strossen, former President of the American Civil Liberties Union and with Theodore Shaw, former Director-Counsel of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund.

Though Theodore Shaw's career has been largely devoted to upholding the rights of African-Americans who may be the targets of hate speech in the United States, he makes clear in his interview with Molnar his endorsement of the standard that has become accepted in American jurisprudence in which the imminence and likelihood of violence are crucial in determining when such speech may be prohibited. Shaw argues that vigorous defense of free speech is essential for minorities, telling Molnar that:

> I can't imagine the Civil Rights Movement of the 1960s, or the gay rights movement of more recent years, or the women's rights movement, or any movement, being possible without free speech, given the way those movements were carried out. Free speech is essential for minority group members who are challenging systems of subordination, segregation, discrimination, particularly if they are attacking the complicity of government in creating and maintaining those systems of subordination. If we lose rights to free speech, the ground on which we stand with respect to other civil and human rights becomes quicksand (at 411).

If Shaw speaks for leading proponents of minority rights in the United States, as seems probable, there is little basis for thinking that there will be a serious effort emanating from that quarter to alter the American focus on context any time in the foreseeable future. Yet it also seems improbable that a shift will take place elsewhere to bring Europe and other parts of the world more in line with the American approach. The influx of migrants to Europe from Africa, Asia, and the Middle East, and the migration of some Roma from the new member states of the European Union to Western Europe have been accompanied by a surge in xenophobia and in hate speech. Though the laws criminalizing such speech appear to have little or no effect, European states are unlikely to abandon them in these circumstances. Government officials who fear the rise of populist political parties are unlikely to promote measures that might have a greater impact in mitigating racial tensions. It seems probable that the divisions articulated in the essays in Herz and Molnar's book will be with us for a long time to come.

Individual Contributions

Miklos Haraszti, *Foreword: Hate Speech and the Coming Death of the International Standard Before it was Born (Complaints of a Watchdog)*;
Adam Liptak, *Foreword: Hate Speech and Common Sense*;
Peter Molnar & Robert Post, *Interview with Robert Post*;
Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*;
C. Edwin Baker, *Hate Speech*;
Peter Molnar & Kenan Malik, *Interview with Kenan Malik*;
Jamal Greene, *Hate Speech and the Demos*;
Floyd Abrams, *On American Hate Speech Law*;
Frederick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*;
Julie Suk, *Denying Experience: Holocaust Denial and the Free Speech Theory of the State*;
Kwame Anthony Appiah, *What's Wrong with Defamation of Religion?*;
Peter Molnar, *"Hate Speech" and Imminent Danger of Violence*; *Katharine Gelber, Reconceptualizing Counter-Speech in Hate Speech Policy (With a Focus on Australia)*;
Arthur Jacobson & Bernhard Schlink, *Hate Speech and Self-Restraint*;
Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*;
Andrei Richter, *One Step Beyond Hate Speech: Post-Soviet Regulation of "Extremist" and "Terrorist" Speech in the Media*;
Alon Harel, *Hate Speech and Comprehensive Forms of Life*;
Jeremy Waldron, *Hate Speech and Political Legitimacy*;
Ronald Dworkin, *Reply to Jeremy Waldron*;
Stephen Holmes, *Waldron, Machiavelli, And Hate Speech*;
Yared Legesse Mengistu, *Shielding Marginalized Groups from Verbal Assaults without Abusing Hate Speech Laws*;
Peter Molnar & Nadine Strossen, *Interview with Nadine Strossen*;
Peter Molnar & Theodore Shaw, *Interview with Theodore Shaw*;
Toby Mendel, *Does International Law Provide for Consistent Rules on Hate Speech?*;
Irwin Cotler, *State-Sanctioned Incitement to Genocide: The Responsibility to Prevent*;
Tarlach McGonagle, *A Survey and Critical Analysis of Council of Europe Strategies for Countering "Hate Speech"*;
Eduardo Bertoni & Julio Rivera, Jr., *The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression*;
Monroe Price, *Orbiting Hate: Satellite Transponders and Free Expression.*

Aryeh Neier
President Emeritus of the Open Society Foundations and Distinguished Visiting Professor at the Paris School of International Affairs of Sciences Po
Email: aryeh.neier@opensocietyfoundations.org
doi:10.1093/icon/mou053

Andrea Bianchi & Anne Peters.
Transparency in International Law.
Cambridge University Press, 2013. Pp. xx + 620. £90. ISBN: 9781107021389.

1. The twilight of transparency

At first glance, the title of the book is an oxymoron, or, as jurists like to say, a *contradictio in adiecto*. International law, as a normative framework of inter-state relations which in times of peace are maintained by means of diplomacy, seems to be the classical field of secrecy, the very opposite of transparency. How, then, can we conceive of transparency as a mode of inter-state relations without depriving states of their single most important property—their secrets as the pledge of their security as sovereign powers? Note that a state's spying on another country is not a wrongful act under international law; it is supposed to be an indispensable instrument of protecting state security. Even among friendly allies, as we have learned