

Balancing Expression and Protection: Comparing Free Speech in the European Union and United States

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Abstract

This paper explores the differing approaches to free speech of the United States (U.S.) and the European Union (E.U.), evaluating how the two balance the protection of freedom of expression and the rights of marginalized groups. With an established link between hate speech and hate crimes, this paper analyzes how the legal frameworks of the U.S. and E.U. address this issue. The U.S. has an absolutist approach to free speech with its First Amendment, and a high standard for prosecuting hate speech with its Brandenburg Test. Conversely, the E.U. has criminalized hate speech and added other regulations to its legal framework. With a clear need to address the prevalence of hate crimes in the U.S., the paper also recommends certain steps the U.S. can take to protect against hate speech while protecting freedom of expression.

Keywords: free speech, First Amendment, European Union

1. Introduction

Free speech is a cornerstone of democratic society, but its boundaries vary across nations. In an increasingly polarized world, the way governments allow expression and deter hate carries major implications. The United States (U.S.) and European Union (E.U.) share a history of democratic values and practices; however, they differ greatly in how they protect and regulate speech.

The U.S. takes a more absolutist approach to free speech with its First Amendment—prohibiting the

government from interfering with “freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”¹ While there are a few exceptions to the rule, the U.S. generally protects hate speech, and its Supreme Court has reaffirmed the importance of free expression regardless of content. Thus, hate speech does not have a legal definition under U.S. law, but is defined by the Supreme Court as “any form of expression through which

¹ [U.S. Const. Amend. 1.](#)

speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin color, sexual identity, gender identity, ethnicity, disability, or national origin.”²

On the other hand, the E.U. has added free speech regulations to its legal framework through various acts such as the Digital Services Act and Council Framework Decision 2008/913/JHA. Under E.U. law, illegal hate speech is defined as “public incitement to violence or hatred on the basis of certain characteristics, including race, colour, religion, descent and national or ethnic origin.”³

Citizens of both the U.S. and the E.U. witness and experience hate speech and hate crimes. The U.S. Federal Bureau of Investigation (FBI) defines hate crimes as “a criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”⁴ Freedom of expression is key to democracy and allows people to speak out against the government or citizens, but the consequences of hate speech are significant and damaging. According to the European Commission against Racism and Intolerance, the relationship between hate speech and hate crimes is “well-documented,” and such crimes “undermine core principles of equality, dignity, and justice” that form an

integral part of democratic society.⁵ In other words, hate speech can “lead to acts of violence and conflict on a wider scale” and “contribute to hate crime.”⁶

Thus, this paper evaluates the differing approaches to free speech by the E.U. and U.S. and answers: How do U.S. and E.U. free speech laws differ in their effectiveness at preventing hate crimes while protecting democratic principles? Given the U.S.’s very limited exceptions to freedom of expression, this paper considers whether the government should update its legislation as the E.U. has to more effectively protect citizens from hate speech and hate crimes.

2. The United States’ Approach to Free Speech

1.1 *The First Amendment*

The First Amendment to the U.S. Constitution is the basis of the nation’s free speech law: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁷ Ratified in 1791, the First Amendment reflected the framers’ “desire for democracy and openness,” formed by the nation’s history of repression under British colonization.⁸

⁵ European Commission against Racism and Intolerance, “[Hate speech and violence.](#)”

⁶ Ibid.

⁷ [U.S. Const. Amend. 1.](#)

⁸ Illinois Press Association, “[The First Amendment.](#)” (Springfield, 2025).

² American Library Association, [Hate Speech and Hate Crime.](#) (Chicago).

³ Ibid.

⁴ American Library Association, [Hate Speech and Hate Crime.](#)

While the First Amendment encompasses virtually all speech, there are some exceptions. Unprotected speech in the U.S. includes libel, speech that jeopardizes national security, burning draft cards, and “words likely to incite imminent violence.”⁹ The latter is the most relevant for the prosecution of hate speech, but it stands against a high standard of enforcement set by the Supreme Court.

1.2 *Brandenburg v. Ohio*

The *Brandenburg v. Ohio* case took place in 1969 after a Ku Klux Klan leader made an inflammatory speech promoting revenge against the government, as well as African American and Jewish people.¹⁰ He was later convicted under an Ohio criminal syndicism law that prohibited “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”¹¹ Set with the task of evaluating the constitutionality of the Ohio law, the Supreme Court ultimately decided that it “violated Brandenburg’s right to free speech” because it “made illegal the advocacy and teaching of doctrines” while not accounting for whether such advocacy “would actually incite imminent lawless action,” making the law “overly broad and in violation of the Constitution.”¹²

As a result of this decision, the Court established the Brandenburg Test to “define when inflammatory speech intending to advocate illegal action can be restricted under

the First Amendment.”¹³ The test states that speech can be prohibited if it “is directed to inciting or producing imminent lawless action, and the speech is likely to incite or produce such an action.”¹⁴ The Brandenburg Test replaced the previous ‘bad tendency’ and ‘clear and present danger’ tests, “making a decisive shift towards stronger protections of political expression.”¹⁵ Today, this test still determines the limits of speech, ensuring “that the government cannot punish speech based solely on its content or perceived offensiveness unless it poses an immediate, concrete threat of illegal activity.”¹⁶

1.3 *Brandenburg Test Applications*

Since its establishment, the Brandenburg Test has been used to determine other Supreme Court decisions, further elucidating how its application implicates freedom of expression in the U.S.

In the 1973 *Hess v. Indiana* case, the Supreme Court decided that the phrase “we’ll take the fucking street later,” made by an anti-war protestor, was protected speech because “it merely advocated illegal action at some indefinite time in the future, and not imminent lawless action.”¹⁷ This case demonstrates how the U.S. approach to free speech protects speech made in protest against the government, which plays an important role in democratic society.

⁹ Ibid.

¹⁰ Justia U.S. Supreme Court Center, [“Brandenburg v. Ohio, 395 U.S. 444 \(1969\).”](#)

¹¹ Oyez, [“Brandenburg v. Ohio.”](#)

¹² Ibid.

¹³ Legal Information Institute. [“Brandenburg test.”](#)

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Legal Information Institute. [“Brandenburg test.”](#)

Similarly, in the 1982 *NAACP v. Claiborne Hardware Co.* case, the Supreme Court protected a civil rights organizer's free speech rights after he threatened "consequences for nonparticipants" in a boycott.¹⁸ The Court declared "that strong and impassioned rhetoric is constitutionally safeguarded unless it incites imminent lawless action."¹⁹ Both of these cases therefore demonstrate how the U.S.'s absolutist approach to free speech can bolster democratic practices by protecting the speech of marginalized communities and those expressing grievances against the government.

However, there are also cases in which the strict nature of the Brandenburg Test endangers marginalized communities and the democratic process. For example, U.S. President Donald Trump's January 6th speech advocated for the "unsubstantiated claim that rampant fraud tainted the 2020 election."²⁰ Similar to Brandenburg, some claim Trump's speech was inflammatory and targeted Congress with threatening language. Shortly thereafter, the Capitol was "vandalized and looted" in a "riot," and five people were killed.²¹ Thus commenced a debate surrounding Trump's culpability, and whether his speech led to imminent violence, bringing into question how the Brandenburg Test applies to his speech. Some have criticized the test for its "lack of guidance on how courts

should evaluate the probability that an inciting speech act will cause an imminent offense."²²

This criticism can also be applied to hate speech against minority groups. The lack of accountability from President Trump further demonstrates the U.S.'s absolute adherence to freedom of expression, even when the expression threatens the democratic process. This precedent thus leaves minority groups vulnerable to the repercussions of hate speech and hate crimes.

2. The European Union's Approach to Free Speech

In contrast to the U.S. First Amendment's broad approach to free speech, the E.U. legal framework contains free speech regulations. With hate crimes having a significant impact on victims and their communities, as well as the region's historical connection to ethnic conflict and genocide, the E.U. has taken steps to deter such crimes through legislation.

According to the European Parliament, "hate speech and hate crime are incompatible with the E.U.'s shared values and fundamental rights," which has led to decisive legislative action.²³ Thus, all twenty-seven E.U. member states have "criminalised hate speech" targeting "race, colour, religion, descent or national or ethnic origin," while a portion of the states have included other factors like sexual orientation and disability.²⁴

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Joshua Azriel, "['We Fight Like Hell': Applying Brandenburg to Trump's Speech Surrounding the U.S. Capitol Siege.](#)" (Washington D.C., American University Washington College of Law, 2022).

²¹ Ibid.

²² Ibid.

²³ Beatrix Immenkamp, "['Criminalisation of hate speech and hate crime in selected EU countries.'](#)" (European Union, 2024).

²⁴ Ibid.

As for the legal framework, the European Convention on Human Rights “guarantees freedom of expression” but prohibits “discrimination on any ground.”²⁵ With that, the E.U. has a significantly more regulatory approach to free speech than the U.S., and its legal framework is more flexible and adaptable.

In 2008, the E.U. adopted the Council Framework Decision 2008/913/JHA combatting racism and xenophobia. The legislation criminalises the incitement of violence against groups of people or members of marginalized groups, or the dissemination of such material, as well as the condonation, denial, or trivialisation of genocide and war crimes against humanity.²⁶ This comprehensive legislation thus protects all E.U. citizens from targeted hatred and hold offenders criminally liable.

Furthermore, the Digital Services Act was introduced in 2022 and later implemented in 2024, which “requires all online platforms to have in place notice and action systems to allow for user reports on illegal content, including hate speech.” It also requires online platforms to “inform law enforcement agencies if they become aware of a serious criminal offence involving a threat to life or safety.”²⁷ This recent update to E.U. legislation demonstrates that the member states are beginning to adapt to the digital era and combat online hate speech.

This preventative approach to deterring hate crime definitively protects marginalized groups from

²⁵ Ibid.

²⁶ European Union, “[Council Framework Decision 2008/913/JHA](#).” (Brussels, 2008).

²⁷ Immenkamp, “Criminalisation of hate speech.”

discrimination and violence, and allows for hate speech to be prosecuted.

3. Comparative Analysis

3.1 Legal Comparison

The U.S. approach to free speech is absolutist—prioritizing freedom of expression over protection against hate speech. This approach allows U.S. citizens to speak against the government and encourages a broad marketplace of ideas, including those that are harmful or offensive. The U.S. faces “a battle between priorities,” as it attempts to balance free speech while “avoiding the perpetuation, or exacerbation, of racism.”²⁸ Because free speech is codified in the Constitution, legislators are limited in their ability to pass legislation on free speech, and previous Supreme Court decisions have upheld its liberal nature. The E.U. does not have the same binding free speech legislation as the U.S., which has a constitutional amendment. The framers of the U.S. Constitution deliberately made it difficult to repeal amendments, with the process only occurring once throughout U.S. history.²⁹

E.U. member states do not have the same binding framework for free speech; thus, they have been able to pass legislation regulating it. The criminalization of hate speech provides protection for members of minority groups, but

²⁸ John D.H. Downing, “[‘Hate Speech’ and ‘First Amendment absolutism’ discourses in the US](#).” (Sage Publications, 1995).

²⁹ Scott Bomboy, “[What does it take to repeal a constitutional amendment?](#).” (Philadelphia, National Constitution Center, 2018).

also impedes upon freedom of expression when compared to the U.S.

3.2 Hate Crime Statistics

The U.S. FBI reported 10,602 hate crimes in the past year alone, the most common biases being Anti-Black or African American and Anti-Jewish, with 2,781 and 1,385 incidents reported, respectively.³⁰ These statistics demonstrate the large scale of hate crime occurrences in the U.S., many of which are virtually impossible to prosecute unless they verge into actual violence or threaten imminent violence.

E.U. hate crime statistics are not as accessible and difficult to compare on a national level, as data collection and reporting differ across member states. However, the existence of hate speech legislation provides a level of accountability and safeguarding that the U.S. does not have.

3. Policy Recommendations

While both approaches have their benefits and trade-offs, the U.S. could adjust to its free speech approach to set a standard for nondiscrimination and to protect marginalized groups from hate speech, while still honoring its Constitution and culture of free expression.

One way to implement protective measures without threatening the First Amendment is to intensify punishment for hate crimes and create a unified criterion for prosecuting those crimes to provide broader protection

against hate crimes across all fifty states. Sixteen states do not include sexual orientation as a bias category in their laws, fourteen states do not include gender/sex, thirty-five states do not include gender identity, and fourteen states do not include disability.³¹ Broadening the criteria for hate crimes and unifying them across states can be an effective way to ensure consistent accountability and prosecution. Having uniform standards for protected classes and penalties for crimes against those groups would signal a cohesive stance against all bias-motivated crimes while also further deterring them.

Furthermore, another way to target hate speech and deter hate crimes is to implement media literacy and anti-discrimination curriculum into schools. With social media increasing the circulation of hate speech and other discriminatory rhetoric, teaching students to recognize biases can be a long-term mechanism to reduce susceptibility to harmful ideologies by young people. Like the E.U.'s Digital Services Act, this step can target hate speech in the digital sphere without infringing upon constitutional rights.

Additionally, marginalized groups can be given support services and federal grant funding for security and other community protection measures. Such funding could be used by community centers, schools, and religious institutions to improve security, seek legal assistance, and support advocacy and education. With that, marginalized communities can build resilience and access to resources,

³⁰ FBI, [“Hate Crime in the United States Incident Analysis.”](#) (2025).

³¹ U.S. Department of Justice, [“Laws and Policies.”](#) (2025).

while also receiving protection from the government without limiting free expression.

While the U.S. cannot place as many restrictions on hate speech as the E.U., with its binding First Amendment, it can take these steps to align itself with the E.U.'s democratic practices and better protect its citizens without sacrificing freedom of expression.

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