# Application of European Model to Curtail Hate Speech in the U.S.

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*As hate speech increases we may need to revisit the question of how to respond to it and whether to limit it within free speech or other areas of law. This article compares free speech law in the United States and the European Union in an effort to explore how one might improve our care of ourselves and each other in the realm of free speech.*

The United States is one of several countries around the world that attempts to balance democratic ideals, historical prejudice, and practical concerns when it considers whether to restrict hate speech. Both the United States and the European Union have histories of racial prejudice and movements filled with hateful conduct and speech. Despite this commonality, the two have attempted to deal with this behavior in different ways. American constitutional law and its Supreme Court have been very protective of free speech, allowing for the theoretical "marketplace of ideas" to thrive. While legal definitions vary, hate speech is defined by Merriam Webster as "speech expressing hatred of a particular group of people."[2] An example of this is the recent case *Speech First v. Fenves* in which the U.S. Court of Appeals for the Fifth Circuit struck down a college campus code restricting free speech as a First Amendment violation. In an effort to maintain such strong free speech protections, American courts have gone to great lengths to restrict only the most harmful speech: that speech which actually incites violence. They have not restricted "hate speech" as such. The nations of the European Union, by contrast, understood the impact of free speech from their historical experience, particularly during World War II. The European Union is made up of 27 member states including Belgium, Germany, France, and the Netherlands.[3] Backed by this understanding, the European Union aims to prevent hate speech that might lead to a similar genocidal path. While the United States allows for hate speech unless it is a threat or incites imminent violence, the EU and specifically the European

1 Brandeis University Undergraduate, Class of 2023.
2 "Definition of HATE SPEECH." Accessed September 24, 2021. https://www.merriam-webster.com/dictionary/hate+speech.
3 "List of Countries in the European Union," accessed September 24, 2021, https://worldpopulationreview.com/country-rankings/european-union-countries.

Convention on Human Rights restricts hate speech. In the United States, the worry in restricting hate speech stems from the fear that it would be too restrictive of free speech. The United States has erred on the side of caution for protecting Constitutional ideals while the European Union has erred on the side of limiting speech, fearing a return to its troublesome history. [4]

These differences need not represent a deep and impassable divide. Rather, a standard should be created that would encourage American courts to look elsewhere to gain greater understanding of potential alternatives where new and difficult issues arise, especially where they are crucial to democratic values. In particular, when looking for other tactics to resolve legal issues that embrace core democratic values, American legal experts should look towards Europe, Canada, and other parts of the world which place a similar emphasis on democracy and free expression. Alternatives to America's free speech absolutism should be considered, especially those proven to be successful. American courts could be inspired by other countries' approaches especially when venturing into a new area of law. This should be akin to how Ukraine developed its intellectual property law through what is sometimes called "sideways integration."[5] Specifically in the Texas case *Speech First v. Fenves* and other hate speech cases, the United States legal system would have benefited from learning about the European stance on hate speech. While it may not be best to change our legal stances given the differences in both history and legal tradition of the United States, there should at least be an understanding of what other democratic countries have done, and that these sources may offer possibilities for improvement.

In *Speech First v. Fenves*, the court held that the University of Texas at Austin's policies regulating hate speech were unconstitutional, based on the United States' traditionally-broad freedom of speech interpretations. The University of Texas at Austin's policies restrict freedom of speech in order to protect students against many forms of speech, ranging from the merely offensive to those that may rise to the level of hate speech. The court case

4 Ioanna Tourkochoriti, "Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide between (France) Europe and the United States," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 23, 2014), https://papers.ssrn.com/abstract=2400105.

5Andrii Neugodnikov, Tetiana Barsukova, and Roman Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes," *Journal of Politics and Law* 13, no. 3 (2020): 203-11.

discussed the claim "that students 'are afraid to voice their views out of fear that their speech may violate University policies."[6] A democracy, particularly one with our constitutional history, relies on free discourse, the exchange of ideas, and dissent in order to come up with solutions to political issues. The Court notes "that Speech First's three student-members at the University have an intention to engage in a certain course of conduct, namely political speech" which is the focus of First Amendment protections.[7] As noted in the case, their policies restrict "verbal harassment" and speech qualifying as "'harassment,' 'intimidation,' and 'incivility,'" in addition to "the Hate and Bias Incidents policies against 'bias incident[s]' and 'campus climate incident[s].'"[8] The Court ruled that these terms are too unclear and vague to be allowable restrictions on freedom of speech. Instead, these terms "arguably cover the plaintiffs' intended speech" including the area of political speech, and therefore violate the First Amendment's protections.[9] Unlike other school settings where some necessary discipline is protected under the *Tinker* rationale, public universities have fewer prerogatives to restrict speech based on educational purposes. The case of *Tinker v. Des Moines* underlining the *Tinker* rationale provides the basis for freedom of speech application in the public school setting.[10] *Tinker* decided that public school students deserve the same free speech guarantees as adult citizens with the only exception being where schools' educational interest is being hampered.[11] Universities educate adult students, provide a greater level of independence, and cultivate engagement within civil society. Freedom of speech is a core value that Americans cherish. While this case shows the First Amendment at work through American legal theory, Europe's outlook on free speech, expression, and hate speech could provide insight into alternative balances.

6 Edith H. Jones. *Speech First, Incorporated, v. Gregory L. Fenves, In His Official Capacity as President of the University of Texas at Austin*, No. 19-50529 (United States Court of Appeals for the Fifth Circuit October 28, 2020) 18.
7 *Fenves*,18-19.
8 *Fenves*, 19.
9 *Fenves*, 19.
10 "Facts and Case Summary - Tinker v. Des Moines," United States Courts, accessed September 24, 2021, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-tinker-v-des-moines.
11 "Facts and Case Summary - Tinker v. Des Moines."

"Sideways integration" occurs when a country's courts look towards other countries for insight into alternative resolutions of a certain legal issue. What scholars call the "common core" is an attempt to encourage legal integration through extensive research into specific legal issues, with a view towards finding commonalities in legal responses around the world. These commonalities and common trends are then used to present best practices which judges can incorporate into their reasoning in decisions. The United States maintains a unique position in free speech law as the least restrictive country, as evidenced in its allowance of hate speech. Europe, however, serves as an example of a legal system that balances complexities in the maintenance of democratic values. The U.S. courts need to rely on the U.S. Constitution and statutes in their decisions, but that still allows for them to incorporate the experience of other countries. We could learn from the experience of Europe that restricting hate speech and harassment actually allows for freer speech since potential participants in public discourse are not discouraged from engaging. The courts could justify allowance of restrictions like those found in the University of Texas at Austin by applying European experience. Free speech could be enhanced through hate speech restrictions as seen through the European experience because hate speech intimidates and discourages other voices. These restrictions could help protect speech and be consistent with the greater goals of the First Amendment, in contrast to the court's ruling in *Fenves*.

If the Court had implemented sideways integration from Europe or the common core, *Speech First v. Fenves* would have had the opposite outcome. While there is no international definition of 'hate speech,' there are several provisions of international law outlawing particular aspects of hate speech.[12] Article 20 of the International Covenant on Civil and Political Rights (1966) focuses on advocacy of hate while Article 4 of the International Convention on the Elimination of Racial Discrimination (1965) focuses on disseminating hateful ideas.[13] Such provisions arguably protect free discourse in respect to a democracy by enabling marginalized groups greater security when expressing ideas. In Article 10 of the European Convention on Human Rights, for example, the right to free speech is

12 Sejal Parmar, "The Legal Framework for Addressing 'Hate Speech' in Europe" (International Conference: Organised by the Council of Europe in partnership with the Croatian Agency for Electronic Meeting, Zagreb, Croatia, November 6, 2018).
13 Parmar, "The Legal Framework for Addressing 'Hate Speech' in Europe."

maintained through freedom of expression, but comes along with duties and restrictions including protecting other citizens, national security, and protection of reputation. Article 17 restricts speech or conduct leading to interference with other rights and freedoms which also can result in conflicts in the application of Article 10. Merely "offensive speech" is allowed, but the European Court of Human Rights' decision in *Erbakan v. Turkey* noted that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance." Despite the success of such approaches in Europe, American law still maintains that restricting speech, especially political speech, is always problematic and restrictive of democracy. This claim may be wrong, as shown in Europe through their continued maintenance of strong democracies, discussed later, while still restricting hate speech. Democratic principles evolve, and given the harmful impacts of hate speech, free speech could potentially be better protected and encouraged in an environment in which virulent hate speech has no place.

For example, consider the *Féret v. Belgium* case, which directly handled political speech and the harmful effects of hate speech. The European Court of Human Rights ruled that the politician Daniel Feret was properly punished under Belgian law for speech that demeaned people on the basis of religion and national origin.[14] Since people could have felt threatened by this speech which demeaned them, they would probably be less likely to speak. The Court noted that statements like Feret's are a threat to peace and stability in Belgium as racist hate speech devalues democratic principles, including diversity and plurality. This reasoning is similar to the argument that by restricting hate speech the United States would actually enable political speech to thrive. Both this speech and this conduct are protected by the First Amendment, but incorporating some of the European Article 10's restrictions could make American constitutional law more faithful to its constitutional and underlying democratic ideals. This incorporation could allow for and protect more laws at both the state and federal level that are restrictive of hate speech while being specific and limited enough to keep almost all speech free. European free speech law restricts hate speech much more than American courts do, but also fosters

14 "Féret v. Belgium," Global Freedom of Expression, accessed September 27, 2021, https://globalfreedomofexpression.columbia.edu/cases/feret-v-belgium/.

democracy's ideal of allowing for extremely wide, legitimate political dissent.

Despite what an American may expect, European democracies thrive even with these restrictions on hate speech. The slippery slope argument, that any free speech restriction will lead to worse ones, is not inevitable or even likely. It has not happened in Europe. In fact, several European democracies show higher voter turnout than ours: six out of the 10 countries with the highest voter turnout are European, with a range from 87.21% to 71.65% of voter turnout.[15] The Netherlands has the sixth highest voter turnout at 77.31% and has several political parties, showing that political discourse is vibrant. The United States by contrast has a voter turnout of 55.70%.[16] Voter turnout is an important indicator of democracies' health as it shows the level of participation. Freedom of speech is a central component of democratic participation tied to voter turnout. Much like how voters voice their assessment of the government and government agents through their vote, freedom of speech allows further avenues of critique and idea development. The United States inspired several countries to become democratic through the American Revolution and its talk of freedom and representation. Despite how several countries modeled themselves on the American example, the United States is still quite unique. Some of this may be through differences in other countries' democratic development including revisions and potential improvements. The European outlook on hate speech, which has become more common across the world's democracies, may be one of these improvements.

As First Amendment precedents are well-founded, this would not clearly fall under the "new area of law" aspect of the standard. Nevertheless, it *would* fit the other aspect of the standard, which encourages a comparative approach in tricky legal issues, especially those balancing democratic values and protecting against harm. Current free speech law in the United States attempts to protect a "marketplace of ideas" vision of open dialogue and space for dissent. Among the few allowable restrictions are those that are placed in content-neutral ways that only restrict the time, place, and manner of the expression.[17] These laws and precedents' only content-based restrictions are those which aim to protect against harms like that of

15 "Voter Turnout by Country 2021," accessed September 24, 2021, https://worldpopulationreview.com/country-rankings/voter-turnout-by-country.
16 "Voter Turnout by Country 2021."

incitement to imminent danger, "fighting words," threats, obscenities, and a few torts. In balancing this duality, an evolving First Amendment interpretation could account for other aspects of the Constitution that work to protect competing democratic values of freedom. Hate speech could be restricted to some extent while keeping robust and constructive democratic debate unrestricted by authorities. This would allow for a truly free discourse and a lively engagement with ideas, similar to what European laws do.

Continuing in the First Amendment legal tradition, hate speech could be restricted as a defense of democracy and an unsullied "marketplace of ideas," similarly to the European law. Hate speech inhibits free speech by causing people in protected classes or marginalized groups to feel unwelcome and potentially unable to speak. Hate speech could prevent incredible thinkers from having the courage to express themselves and contribute productively to our communities. Hate tends to drown out productive thinking and overwhelm other opinions. By restricting hate speech, democracy would be encouraged and an open thriving dialogue would be more possible. The "marketplace of ideas" would be more open and encouraging for all participants.

While one may argue that courts are legal entities and should only focus on individual plaintiffs' rights at issue in each case and not care about enhancing democracy, hate speech and harassment raise both of these vital roles that the courts hold. Courts serve as a check to political entities and various political interests. Through serving as this important balance, courts act to resolve legal problems as their decisions are applicable beyond each individual case and each individual case brings with it important legal issues. Courts are both legal and political entities, as some of their more contentious cases touch on political issues, and their decisions may unavoidably affect life and political actions. An independent judiciary is crucial to democracy, in part because it adds a different perspective to a wide range of difficult questions. The judiciary also helps define terms and legal ranges of possibility. Courts decide issues through legality, fairness, reason, rationality, and predictability. They also rely on past experience, expertise, and a wealth of knowledge through precedent, expert witnesses,

17 Kevin Francis O'Neill, "Time, Place and Manner Restrictions," accessed September 27, 2021, https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions.

and research. The legal argumentative process allows for the airing of both sides of arguments in a "marketplace of ideas" where each side is on equal footing. The courts are naturally involved in democracy including the enhancement of it through their complementary role.

Legal and historical backgrounds provide divergent contexts between the United States and Europe which help explain their differences in free speech law. Their different contexts produce different approaches, both of which can be beneficial for the other to learn from. This is especially true when approaching new areas of law. When the United States develops a new area of law, it could make sense to refer to other countries for insight, similar to the practice of referring to precedent. Prior experience can help other judicial systems see what to do and what not to do, and see what types of law and legal practices lead to what kinds of outcomes. In the development of new areas in other fields, we regularly look towards expertise. We should do the same in the legal arena through the use of sideways integration and common core incorporation.

Ukraine provides an example in the case of intellectual property. Ukrainian legislation in intellectual property "began to take shape in 1993" protecting certain intellectual property rights.[18] These laws mainly focused on patents out of which other intellectual property rights could and would grow. The article notes that "[i]n Ukraine, the development of legislative regulation of free software is very poor, so the involvement of foreign experience may be appropriate."[19] In developing their intellectual property law, "Ukraine must bring its legislation in line with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1993, which is one of the main legal documents of [the WTO]."[20] Ukraine adopted the European Community's patent laws, trademark law, licensing agreements, and copyright laws in a way that harmonizes their laws with the rest of Europe as a prime example of sideways integration. This could prove a helpful example in the United States' legal development.

18 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 204.
19 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 206.
20 Neugodnikov, Barsukova, and Kharytonov, "Protection of Intellectual Property Rights in Ukraine in the Light of European Integration Processes" 206.

Integration should not be compulsory in developing new areas of law, but American courts should respect this resource more than they presently do. Taking inspiration from the European example and creating improvements on American freedom of speech could create a new standard which can particularly help in situations when there are several core democratic values being balanced. European freedom of speech with its exclusion of hate speech takes into account more than simply a limitless idea of freedom. Expertise and a greater amount of experience helps and could only improve legal development. Given the variety within each area of law, the standard should not force acceptance or application of legal principles or rules that do not make sense. Despite this difficulty, the standard could and should encourage learning from outside experience and having clear comparisons especially with a focus on the contexts around each legal theory and history.

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