

Free vs. Hate Speech: Where Should the Legal Line Be Drawn?

Anika Butala

While the First Amendment of the U.S. Constitution protects free speech, there is an immense contention over just how far that protection should reach. The US takes an expansive approach to free expression, unmatched by most, which often puts limitations on hate speech in order to protect against harm. With digital platforms magnifying both speech and the prospect of harm, courts and policymakers must reconsider whether existing legal doctrines strike the right balance between free expression and protection from harm.

The U.S. Supreme Court has long supported a broad protection for speech. For example, *Brandenburg v. Ohio* (1969) held that speech may only be restricted when it can be interpreted as inciting imminent lawless action. In addition, *Texas v. Johnson* (1989) held the act of burning an American flag to be symbolic speech, thereby further protecting even offensive speech as well.

Nevertheless, some categories of speech remain unprotected. The Court has held in *Chaplinsky v. New Hampshire* (1942) that “fighting words” - speech that can provoke immediate violent reaction - may be restricted. *Virginia v. Black*, 2003 further established that “true threats,” such as cross-burning done with intent to intimidate, are not protected under the First Amendment. Moreover, libel and slander laws, established in *New York Times Co. v. Sullivan*, 1964 have shown that lies told that injure someone may be actionable under the law.

Unlike the United States, most democratic countries have more restrictive laws about hate speech. The U.K. criminalizes speech that intentionally stirs up racial or religious hatred and Canada criminalizes hate speech against identifiable groups. The European Court of Human Rights has upheld such laws, balancing free expression against the need to forestall

discrimination and violence. This illustrates another approach that puts social cohesion over pure speech freedom.

The Internet has changed how speech is regulated, and it has made hate speech easier to proliferate. Privately owned social media platforms like Facebook and Twitter independently have content moderation policies that are erratically enforced. Critics fear that such measures will stifle free expression. Advocates maintain that hate speech causes real harm, including harassment and radicalization.

More recent legislative proposals, such as the SAFE TECH Act, aim to make online platforms more accountable by limiting the scope of Section 230's protections, which protect them from liability for user-generated content. Debates continue over whether such proposals would effectively cut down on hate speech, or just contain censorship.

Should the U.S. reconsider its stance on hate speech? Some legal scholars argue that First Amendment protections need to be recalibrated in the face of the harms of digital hate speech, while others warn that government intervention risks setting a dangerous precedent for broader speech restrictions. The balance might well be struck in enhanced legal protection against threats, harassment, and cyberstalking while keeping core free speech principles intact.

The debate on hate speech and free speech remains one of the most contentious constitutional challenges. Though the U.S. boasts strong speech protections, existing exceptions demonstrate that free speech is not absolute. Legal frameworks must now evolve to adapt to the amplification of speech-related harms through digital platforms, but in a manner that protects the fundamental right to expression.

Works Cited

Electronic Frontier Foundation. "The History of Section 230." Last modified March 10, 2021.

<https://www.eff.org/deeplinks/2021/03/history-section-230>.

United Nations Human Rights Office. "Hate Speech and the International Human Rights Framework." Accessed January 25, 2025.

<https://www.ohchr.org/en/issues/freespeech/hatespeech>.

U.S. Federal Communications Commission. "The First Amendment and Censorship." Accessed January 25, 2025.

<https://www.fcc.gov/consumers/guides/first-amendment-and-censorship>.