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Erik Bleich
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Freedom of Expression versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe

Erik Bleich

The USA and European countries have developed radically different approaches to regulating racist hate speech over the past 50 years. This divergence is largely a function of rulings by the US Supreme Court and the European Court of Human Rights. While the Supreme Court has elected to uphold the freedom to express inflammatory racism in public, the European Court has almost always sided with its 47 member states when they have enforced laws curbing racist hate speech. Although a number of scholars have described the differences between the USA and Europe, there is currently no theoretically informed explanation of this important divergence. In this article, I draw on scholarship about comparative law and freedom of expression to develop and test hypotheses about judicial regulation of racist speech in the USA and Europe. I argue that political cultural variables, legal texts and differences in jurisprudential norms strongly influence the overarching patterns of outcomes we see across jurisdictions. Yet, preferences of individual judges also matter, especially in cases that have shifted the trajectory over time within a region, or that have cut against the grain of the predicted pattern. I examine the course of hate speech regulation in the USA and in Europe, illustrating how the variables identified in the model affected court decisions in each region and reviewing specific cases that constituted turning points in the regulation of racist speech.

Keywords: Hate Speech; Freedom of Expression; Racism; Law; Courts

Introduction

In 1992, the US Supreme Court voided the conviction of several teenagers who had burned a cross on a black neighbour’s lawn. The teens had been prosecuted under a
St Paul, Minnesota ordinance that penalised the display of any symbol that ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender’. The Court reasoned that the Constitution’s free speech protections were incompatible with a government ban on provocative racist speech that did not also outlaw provocative antiracist speech. In Justice Scalia’s memorable turn of phrase, the government had no authority ‘to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules’.¹

In sharp contrast to this decision, French author Roger Garaudy was quickly convicted of disputing crimes against humanity, defaming Jews, and inciting discrimination and racial hatred for publishing a 1995 book claiming the Holocaust was a myth. Garaudy appealed his case all the way to the 47-member Council of Europe’s European Court of Human Rights (ECtHR), which has the power to overturn member state court decisions in matters of human rights law and which has thus been equated to a European ‘constitutional review court’ (Shapiro and Sweet 2002, 155). In 2003, the ECtHR summarily refused to consider his case on the grounds that freedom of expression was not a licence to undermine justice and social peace. For the Court, Garaudy’s freedom to deny the Holocaust was clearly outweighed by the harm that came from such statements.

The European and American systems have developed radically different approaches to regulating racist hate speech. In the USA, it is virtually impossible to secure a conviction for racist expressions—including a cross burning—unless the words provoke immediate violence or constitute a direct threat. In most European jurisdictions, inciting racial hatred is viewed as a danger that may be penalised, even if it amounts to no more than a book that questions the Holocaust. Yet while this distinction has undoubtedly been valid since the 1990s, the two regions have not always been diametrically opposed in their positions on racist speech. In truth, American and European stances have evolved over time, with the 1960s serving as a turning point after which the USA became much more protective of racist speech and European countries became much more likely to punish it.

If we want to understand why the USA and European countries have treated hate speech so differently, we must begin by focusing on the high courts that regulate racist hate speech. High courts hold the ultimate authority for drawing the line between free speech and hate speech in both regions. In the USA, the Supreme Court has regulated freedom of expression since the 1920s. The European Court of Human Rights was established to enforce the 1949 European Convention on Human Rights (ECHR). It has made major rulings on free speech since the 1960s, and as the Council of Europe’s membership has expanded, the Court’s power to determine whether national-level judicial decisions violate Europe-wide protections for freedom of expression now covers almost the entire continent.

What explains why the US Supreme Court struck down a city ordinance banning cross burnings (a decision virtually inexplicable to most Europeans), while the ECtHR upheld a French decision penalising Holocaust denial (a judgement virtually inexplicable to most Americans)? Although a number of scholars have described
the differences between the USA and Europe (for recent examples, see Heinze 2009; Rosenfeld 2012; Zoller 2009a), there is currently no theoretically informed explanation of this important divergence. This article therefore draws on scholarship about comparative law and freedom of expression to develop and test hypotheses about judicial regulation of racist speech in the USA and Europe.

Existing scholarship suggests five different perspectives that may help us understand these outcomes. First, variation in the institutional strength of the courts—such as their insulation from legislative and executive powers—might explain why the American Supreme Court is able to take a firm stand to restrict racist speech, whereas the ECtHR defers to national legislatures on such a contentious issue. Second, differences political culture might make American society and its citizens more supportive of expansive free speech protections (in support of the value of liberty), whereas Europeans may weigh other values (such as human dignity and personal honour) relatively more heavily compared to unbridled free speech.

A third perspective suggests that we must examine the specific legal texts relevant to freedom of expression. The First Amendment of the US Constitution categorically upholds the value of free speech, whereas the ECHR’s Article 10 explicitly lists reasons that free expression can be constrained. Fourth, it is plausible that the divergence is the result of more focused differences in jurisprudence embedded in a high court’s doctrine, structures and methods. These differences are not embedded in legal texts, but are the rules and norms governing how systems have evolved in each jurisdiction. Finally, the fifth perspective emphasises the specific interests of judges that sit on the courts at any moment in time. From this standpoint, what matters most is not (i) the institutional power of the court, (ii) the political culture of the inhabitants, (iii) the foundational legal texts, or (iv) the rules and norms of the system, but rather (s) the way in which judges interpret those rules in light of their interests, their politics and the context of the case they are presented with.

In this article, I argue that political cultural variables, legal texts and differences in jurisprudence strongly influence the overarching patterns of outcomes we see across jurisdictions. Yet, preferences of individual judges also matter in cases that have shifted the trajectory within a region, or that have cut against the grain of the predicted pattern. The following section outlines the theoretical perspectives and develops the explanatory model. Sections three and four examine the trajectory of hate speech regulation in the USA and in Europe, illustrating how the variables identified in the model affected outcomes in each region and reviewing specific cases that constituted turning points in regulation of racist speech. Section five concludes.

Theoretical Perspectives and the Explanatory Model

The existing scholarly literature on comparative law and freedom of expression includes five perspectives that may account for high court decisions about racist speech in the USA and Europe. It is important to recognise that, although the variables identified by each perspective are analytically distinct, they are not mutually
exclusive, nor are they necessarily causally independent of one another. The goal of the analysis, therefore, is to try to understand the ways in which they interact. It is also useful to emphasise that I use variables like political culture in a relatively narrow way; I draw on specific arguments that have been made about how widespread (but not necessarily uniform) elements of American or European perspectives on the state, society or prevailing values affect ideas about freedom of speech.

The first perspective stresses that court-curbing mechanisms like legislative override, resource punishment, jurisdiction stripping, court packing, and judicial selection and reappointment can rein in the judicial branch and make it hesitant to overrule the legislature or the executive. These tools ultimately have little direct impact on the US Supreme Court or on the European Court of Justice (Clark 2011; Kelemen 2012), but we know less about their effect on the European Court of Human Rights. It is plausible that the ECtHR would respond to court-curbing mechanisms more strongly than its counterparts because of its relatively recent foundation, its fixed-term judicial appointments, the potentially sweeping impact of its rulings for all 47 member countries, and European citizens’ lack of knowledge of its role. If that were true, we would expect the ECtHR rarely to overturn national-level court rulings.

In fact, since the 1970s, the ECtHR has become increasingly capable of rendering decisions that run counter to the interests of member states (Christoffersen and Madsen 2011; Cichowski 2006, 57; Lester 2011). This trend has been reinforced since the 1990s, when Council of Europe institutional reforms made the ECtHR even more independent (Voeten 2011, 68). Moreover, according to data assembled by Cichowski (2006, 62–63), the Court ruled against the state in 71% of its 5441 decisions between 1960 and 2004. The ECtHR may thus be less insulated from external actors than the US Supreme Court by some measures, but there is no evidence that this difference accounts for divergent court outcomes in racist hate speech.

If variations in the institutional strength of the two courts cannot explain disparate outcomes, what can? Multiple scholars have emphasised that specific aspects of political culture affect the American and European approaches to freedom of speech. For James Whitman, German and French laws that restrict incivility are the product of a relatively greater value placed on honour and human dignity, as contrasted with America’s more liberal laws, which enshrine ‘the free and aggressive display of disrespect’ (Whitman 2000, 1397). Other scholars have noted differences between the USA and its European counterparts in beliefs about government neutrality and protecting citizens from an invasive state (Bird 2000, 400–401; Brems 2002, 485; Post 2009, 137); views about the relative threat to democratic stability or social solidarity posed by racist speech (Brems 2002, 495; Post 2009, 197–198); an understanding of freedom of expression as a negative versus positive liberty (Zoller 2009b, 916); and a faith in the validity of the marketplace of ideas concept (Brems 2002). Political culture is a broad category, but by pinpointing identifiable and widely shared elements within the USA and Europe that tend to diverge across jurisdictions, researchers have developed explanations for differences in regulating speech.
At the same time, Europeans and European jurisdictions also hold free speech in extremely high regard. Flauss (2009, 813–814) asserts that freedom of expression remains a cardinal value in Europe and points out that it is enshrined in most international documents on human rights. In its touchstone 1976 Handyside decision, the ECtHR itself affirmed that freedom of expression is ‘essential’, and must extend even to information or ideas that ‘offend, shock or disturb’. Moreover, the ECtHR has at times protected free speech even when incivility has amounted to an attack on honour or dignity. As influential as political cultural distinctions may be, therefore, they are not sufficient to account for how the USA and Europe have treated racist hate speech.

How much do foundational legal texts matter in determining court decisions? The texts that high courts enforce undoubtedly offer different sets of opportunities and constraints for judges. The First Amendment’s seemingly unambiguous assertion that ‘Congress shall make no law…abridging the freedom of speech…’ differs greatly from the ECHR’s Article 10, which explicitly permits limits on freedom of expression. Chief Justice John Roberts himself asserted that the wording of the text matters a great deal, when he stated in his Senate confirmation hearing in 2005: ‘Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them’. The view that the text determines decisions was also the working philosophy of Supreme Court Justice Hugo Black with regard to free speech issues. He wrote that the First Amendment (along with the 14th) ‘absolutely’ forbids laws restricting racist speech.

Yet this text-based perspective is also not enough to account for divergent outcomes between the USA and Europe. The ‘umpire’ ideal of judicial decision-making is unattainable in a world where politics and other influences frequently affect high court decisions (Siegel 2007; Voeten 2011, 63). In truth, the history of US Supreme Court opinions regarding free speech entails the Court defining the boundaries of free speech, shifting those boundaries and sometimes back-tracking or amplifying them (Bleich 2011, ch. 4; Walker 1994). As with insights about political culture, foundational texts may make some outcomes more or less likely, but they cannot fully explain why the USA and Europe have followed such different trajectories with respect to racist speech.

Looking beyond texts, it may be the case that jurisprudential doctrines and norms impact decisions regarding hate speech. For example, precedent (stare decisis) plays a significant role in Supreme Court jurisprudence, whereas the margin of appreciation doctrine (granting decision-making latitude to member states in sensitive areas) frequently influences ECtHR rulings.

If these were decisive factors, we would expect early Supreme Court decisions to strongly influence future rulings in the USA, as precedent-setting decisions guided future rulings. We would predict that the ECtHR would be unlikely to overrule the disparate decisions taken by member states, and that there would be a greater range of outcomes absent the unifying influence of precedent.
To a degree, this is accurate. Supreme Court decisions of the 1960s and 1970s laid the groundwork for the maximal free speech protections upheld since that era. As demonstrated below, the ECtHR has tended to side with member states in a number of highly controversial cases, nor has it developed a consistent position towards free speech cases in the manner of the US Supreme Court. At the same time, the ECtHR rendered judgments finding at least one violation by a member state in 987 of 1157 cases in 2011 (ECtHR 2012, 12–13), suggesting that it is not as deferential to member states as the margin of appreciation doctrine might imply.

The final perspective places great weight on individual judges, on their personal preferences, and on the effect of the context in which they make their decisions. After analysing decades of ECtHR decisions, Voeten (2011, 76) concludes that its judges ‘are politically motivated actors in the sense that they have personal preferences on how best to apply abstract human rights in concrete cases’. And Flauss (2009, 849) asserts that in the ECtHR, ‘the right to freedom of expression is without doubt one of the most sensitive to the political and ideological stances of the judges themselves’. These arguments with respect to European high courts parallel frequent observations that Supreme Court justices’ votes can often be predicted before a decision is rendered.

This variable appears particularly influential when analysing the result of any individual case, especially in split decisions where political leanings or the national origins of judges seem to predict the final vote count. Yet, we do not see a dramatically shifting terrain within each jurisdiction that is highly sensitive to evolving compositions of the high courts. Instead, while there are moments of significant change, there are also years of broad continuity, suggesting that more enduring forces are also at work in shaping judicial outcomes.

In sum, the explanatory model offered here identifies differences in political cultural variables, legal texts and jurisprudential norms as factors that, in combination, increase the probability that the US Supreme Court will forbid restrictions on racist hate speech whereas the ECtHR will uphold them. To gain a complete understanding of the two regions’ trajectories, however, it also examines the preferences and politics of judges, and the context in which key decisions have been made. Together, these four factors account for the broad and meaningful differences between the USA and Europe that exist with respect to punishing racist speech.

The US Supreme Court and Racist Hate Speech

Before the Supreme Court claimed jurisdiction over the country’s free speech cases in the 1920s, American states retained the power to pass laws restricting racist speech (Zoller 2009b, 888–889; Kersch 2003, 121–122). In keeping with American political culture, not many did so, although eight states had some type of provision against hate speech at the peak of their popularity (Yale Law Journal 1952, 255–256). By the late 1920s, justices Oliver Wendell Holmes and Louis Brandeis had become staunch
advocates of using the First Amendment to protect wide varieties of expression. Yet, in that same era, Justice Edward Sanford and Chief Justice William Howard Taft often favored restricting speech in an effort to uphold other important values, such as public morals. When Sanford and Taft were replaced by free speech sympathisers Charles Evans Hughes and Owen Roberts in 1930, the effects were felt almost immediately. In its 1931 *Near v. Minnesota* case, the Court voted 5–4 to overturn restrictions on a Minneapolis newspaper that trafficked in ‘malicious, scandalous and defamatory articles’ directed in part at ‘the Jewish race’.

While the Court protected provocative speech in a number of cases from the 1920s through the 1950s, it also restricted it on more than one occasion. Its unanimous 1942 *Chaplinsky* decision upheld New Hampshire’s right to punish ‘fighting words’, defined as ‘those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace’.

In its *Feiner v. New York* and *Dennis v. United States* decisions of 1951, six justices in each case voted to restrict expressions that authorities argued promoted breach of the peace or amounted to a conspiracy to overthrow the government. In the context of the Second World War, subsequent knowledge about the Nazi atrocities, and the perceived Communist threat at the onset of the cold war, the Supreme Court’s stance on free speech was not yet set in stone. This increased the uncertainty of the outcomes and meant that individual justice’s interests and interpretations of history and context played a greater role in determining Court rulings.

No case involving racist speech made this clearer than the 1952 *Beauharnais v. Illinois* decision. Joseph Beauharnais had been convicted by an Illinois court for organising the distribution of racist leaflets on Chicago street corners. He had been fined $200 under the state’s 1917 ‘group libel’ statute which forbade the portrayal of ‘depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed or religion’. In a 5–4 decision, the Supreme Court reasoned that since libel was a crime in all states, a law against group libel was a reasonable measure. Justice Felix Frankfurter’s opinion rested on two principles: first, that given the history and context of racial tensions in Illinois, the state’s law responded to a true problem; second, that courts must allow democratically elected legislatures to make decisions in difficult cases where the Constitution did not expressly forbid their actions. Writing for the Court, Frankfurter asserted: ‘it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power’.

In this case, five justices interpreted the norms of judicial restraint and of delegating power to the states as trumping Justice Hugo Black’s free speech absolutist interpretation of the First Amendment, as well as any potential precedents favouring freedom of expression in public places. Had the pattern of mixed Supreme Court decisions continued past the 1950s, it is plausible that the American and European outcomes with respect to racist hate speech would not be as different as they are today.
The foundation of the American maximal free speech position was laid in the 1960s and 1970s. To understand this shift, it is vital to recognise trends in American society, politics and Supreme Court jurisprudence that combined to influence free speech decisions. In particular, the rise of the civil rights movement was transformative in this history. If, by the 1950s, the Court had not laid down an unambiguous approach to regulating racist speech, it had begun to make itself clear on the topic of racism. Its landmark and unanimous 1954 *Brown v. Board of Education* decision rejected the separate but equal premise enshrined in the Court’s infamous 1896 *Plessy v. Ferguson* ruling. In addition, when Alabama, Arkansas, Florida and Virginia invoked state laws to try to discipline the National Association for the Advancement of Colored People (NAACP) in the 1950s and 1960s, the Supreme Court struck them down one by one.10

Then, in 1964, the Court issued a major ruling on a case directly involving freedom of speech. Under an Alabama law, four black ministers and the *New York Times* were convicted of libel for alleging in a full-page ad that Martin Luther King, Jr’s arrest in Montgomery was part of a campaign against King and the movement, and were sentenced to a $500,000 judgement. In its unanimous *New York Times v. Sullivan* decision, the court ruled that the First Amendment protected all statements about public officials unless made with actual malice.11

If in the European context, restrictions on inflammatory speech were most often a tool for protecting vulnerable minorities, in the American context, Southern states were using restrictions on inflammatory speech to repress vulnerable minorities protesting their societal status. Under these circumstances, expanding the right to free speech in the USA went hand in hand with fighting racism.

By the late 1960s and into 1970s, the expansive interpretation of the First Amendment had taken root in the Court. Protections for free speech were extended and were enshrined for racists themselves. In *Brandenburg v. Ohio*, the Supreme Court ruled in 1969 that a racist, rabble-rousing statement by a KKK leader was protected speech, and that an utterance could be penalised under the First Amendment only if it is ‘directed to inciting or producing imminent lawless action and is likely to incite or produce such action’.12 By the late 1970s, the Supreme Court refused to hear a challenge to the Illinois court rulings that allowed neo-Nazis to march through Skokie, Illinois, a predominantly Jewish neighbourhood with a large percentage of Holocaust survivors.13 By the time of this landmark case, protecting freedom of speech truly meant protecting Oliver Wendell Holmes’ ‘freedom for the thought that we hate’.14

The USA’s contemporary protection for public racist expressions is consistent with key elements of American political culture, especially in the broader domain of speech. It is also consistent with the text of the Constitution that is less equivocal than its European Convention counterpart. And, since the 1960s and 1970s, the norms of precedent and viewpoint neutrality have been invoked to further entrench protections for public racist speech, such as through the Court’s 1992 decision to strike down a city ordinance against displays of swastikas or burning crosses in *R.A.V. v. St. Paul*.15
Yet, these factors have not always determined the Court’s rulings. The historical context of decision-making and the specific balance of justices on the Court have also played a critical role. Any complete understanding of America’s strong protections for racist expression has to account not only for the overall propensity to arrive at free speech outcomes, but also for the specific rulings that have constituted decisive turning points along the way.

The ECtHR and Racist Hate Speech

Whereas only a handful of American states ever attempted legislation against racist speech, the majority of European countries have elected to do so. Germany, Great Britain and France enacted some of the earliest laws, in 1960, 1965 and 1972, respectively, precisely during the same era when the USA was expanding protections for freedom of expression. Through the 1980s and 1990s, provisions against racist expression were adopted by most West European countries, and the trend culminated in a 2008 European Union mandate that each of its 27 members punish incitement to racial hatred or violence.16

Many of the early laws coincided with coordinated United Nations (UN) initiatives on racist speech. Article 4 of the UN’s 1965 International Convention on the Elimination of All Forms of Racial Discrimination stated that countries should:

condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.

This sentiment was echoed in Article 20, paragraph 2 of the UN’s 1966 International Covenant on Civil and Political Rights. For its part, the Council of Europe institutionalised this antiracist culture through the creation of its European Commission against Racism and Intolerance (ECRI) in 1993. In 1996, the ECRI recommended that each of its 47 members make it a criminal offence to incite hatred, discrimination or violence against racial, ethnic, national or religious groups, a proposal that was endorsed by the Committee of Ministers in 1997.17

Turning from an examination of broad political cultural support across Europe for restricting racist hate speech, what about the role of the Council of Europe’s foundational legal text, the ECHR? It expressly declares the value of freedom of expression, while nowhere forbidding racist speech. Yet when faced with individuals claiming their right to free expression has been violated by member state court convictions for racist speech, more often than not, the ECtHR has upheld the convictions. It has done this through two key provisions of the ECHR text.

First, Article 17 of the ECHR reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of
any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

In short, Article 17 states that one part of the Convention cannot be used as a shield for actors attacking other parts. Because Article 14 prohibits discrimination based on race, colour, religion and national origin (among other factors), if an actor’s speech is deemed to contravene this proscription, the ECHR’s text provides a method for ruling it unprotected.

One of the earliest applications of Article 17 was in the 1979 Glimmerveen and Hagenbeek v. the Netherlands ruling. Two far right political leaders had been convicted for intending to distribute leaflets that incited discrimination through the use of terms like ‘our white people’, and claims that the party would ‘remove all Surinamers, Turks and other so-called guest workers’ from the country if elected.18

Dutch courts ruled that since most ‘Surinamers’ were of Dutch nationality, this call amounted to a serious form of racial discrimination. Under the pre-1998 institutions of the ECHR, the case was heard first by the European Commission of Human Rights, whose role was to determine if the case merited being forwarded to the Court for final adjudication.

In its ruling, the Commission recalled that freedom of expression is one of the ‘essential foundations of a democratic society’.19 Yet it also asserted that: ‘The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention’.20 It found that the leaflets clearly contained calls for discrimination that contravened the Convention’s Article 14 prohibitions. As a consequence, the Commission deployed Article 17 to dismiss Glimmerveen and Hagenbeek’s claim that their discriminatory speech was protected by the Convention’s freedom of expression provisions.

Article 17 has regularly been invoked since that time to uphold national-level convictions for racist hate speech. In its 2004 Norwood decision, the Court reviewed the case of a British far right party member who displayed a poster with a photograph of the Twin Towers in flames, the words ‘Islam out of Britain—Protect the British People’, and a symbol of a crescent and star in a prohibition sign. It used Article 17 to unanimously dismiss the claim of an infringement of freedom of expression, arguing that: ‘Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination’.21

This textual tool has also been applied to cases of Holocaust denial. The ECtHR has determined that questioning the Holocaust does not constitute a quest for truth, but rather is ‘one of the most serious forms of racial defamation of Jews and of incitement to hatred of them’.22 For the Court, such revisionism therefore contravenes the fundamental values of the Convention outlined in its preamble, namely justice and peace. It was on these grounds that the Court unanimously declared inadmissible Roger Garaudy’s complaint against France for penalising publication of his controversial 1995 book.23 Article 17 has, in short, become a potent tool for
dismissing complaints that freedom of expression has been curtailed when the Court deems that the expression amounts to racist hate speech. This is true not only if such speech contravenes Article 14 protections against discrimination, but also if it cuts against other fundamental values outlined anywhere in the Convention, including in its preamble.

The Convention provides a second textual path for upholding restrictions on racist speech. Article 10 opens with the seemingly unequivocal assertion that ‘Everyone has the right to freedom of expression’. Yet, unlike in the American constitution, the ECHR immediately qualifies that right in the second paragraph of Article 10:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

The 2010 Le Pen v. France decision illustrates how the Court balances freedom of expression with its duties and responsibilities. Far right political leader Jean-Marie Le Pen was convicted in French courts for stating in a 2004 interview ‘When I say that with 25 million Muslims here, French people will have to walk down the streets [in fear], people in the room tell me, not without reason, “But Mr. Le Pen, that’s already the case now!”’ Rather than simply dismissing Le Pen’s challenge on Article 17 grounds, the ECtHR adjudicated it in light of the two dimensions of Article 10. Explaining the rationale for protecting this type of expression, the Court stated that it attaches ‘the highest importance’ to freedom of expression in political discourse; that freedom of expression applies equally to ideas that ‘offend, shock or disturb;’ and that any individual—and especially a politician—engaged in a topic of public interest (such as debates about immigrant integration) has the right to engage in exaggeration and even provocation.

On the other hand, the Court noted that the French law used to convict Le Pen was based on the protection of the reputation and rights of others found in Article 10(2) of the Convention. It also highlighted the Court’s long-standing commitment to fighting racial discrimination in all its forms. Finally, it stressed that states were permitted a significant degree of discretion (in keeping with the ‘margin of appreciation’ doctrine, discussed below) to determine how to limit the freedom of expression surrounding the sensitive topic of immigrant integration. Taking these cross-cutting factors into consideration, the Court examined the specific case at hand. It found that Le Pen’s words were likely to convey a negative image of the Muslim community, and that they implied that the safety of French people hinged on rejecting Muslims. All told, it found that Le Pen’s statements were likely ‘to elicit a sentiment of rejection and hostility’ towards Muslims, and that ‘with regard to the circumstances of the case’, the limits on Le Pen’s freedom of expression met the
Article 10(2) standard of being ‘necessary in a democratic society’. In short, because the text of Article 10 is itself balanced between the right of freedom of expression and the limits of that right, the Court analyses the specific circumstances of individual cases to determine whether the facts tilt the scales in one direction or the other.

Looking beyond the legal text of the ECHR to the unwritten norms and principles of the Court, the ‘margin of appreciation’ doctrine has had a substantial effect on cases that involve controversial topics (Bakircioğlu 2007; Gross and Ní Aoláin 2001). The doctrine grants substantial discretion to states in how they enforce the Convention, on the grounds that local variations surrounding contentious topics warrant a degree of flexibility. In its early years, this doctrine arose out of a weak judiciary’s deference to Council of Europe member states, and also because it was consistent with the principle of subsidiarity embodied in the Convention (Bakircioğlu 2007, 717; Weber 2009, 31). Although it is the subject of sometimes heated debates in the contemporary period (Gross and Ní Aoláin 2001, 627–630), the doctrine remains in place even though its original rationales have declined in significance. It remains a potent norm in sensitive domains such as freedom of expression (Bakircioğlu 2007), particularly in cases related to ‘matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion’.28

Together, the margin of appreciation doctrine, the prevailing interpretation of the text of the Convention, and elements of political culture prevalent in Europe make it highly probable that the ECtHR will uphold restrictions on racist speech. These factors have each been more consistent than their counterparts in the USA. Even so, the history of ECtHR decision-making has not been unidimensional. The Court has reined in states’ ability to restrict freedom of expression in several significant cases. Split decisions and vocal dissents also suggest that there is far from a unified perspective on the Court, and that deference to curbing contentious speech is not foreordained.

In one landmark case, the Court’s sympathy for restricting racist speech was pitted against its value of protecting freedom of expression for the media. The 1994 Jersild v. Denmark case revolved around a televised interview of three members of a racist group called the Greenjackets. Danish courts found that such an expression of vehemently racist statements contravened national laws against threatening, insulting or degrading racist speech. The penalties were applied not only to the members of the group, but also to the journalist Jens Olaf Jersild on the logic that he had assisted in the commission of the offence. The European Court constituted a Grand Chamber of 19 judges to hear this case. By a 12–7 vote, it ruled that Denmark’s punishment of Jersild had contravened his Article 10 rights to freedom of expression. The majority reasoned that Jersild’s purpose was not to propagate racist views and that the press must be able to report on controversial issues in order to play its vital role as a ‘public watchdog’ in a democratic society. In this case, the Court limited a member state’s ability to punish the transmission of racist speech, carving out a strong protection for journalists who are reporting on problems of racism in their societies.
The Court has also ruled that not all convictions for challenging history are valid. In the 1998 \textit{Lehideux and Isorni v. France} case, the Court found that France had violated Article 10 by convicting two men of defending crimes of collaboration because they had praised Marshall Philippe Pétain in the hopes of rehabilitating his reputation. By a vote of 15–6, the Grand Chamber of the Court ruled that they had supported the man and not the Nazis, and that they had engaged a debate about history that had not been completely settled. In this way, the Court distinguished its finding of a breach of Article 10 protections in this case from any attempt to use freedom of expression provisions to shield statements of Holocaust denial.

Although the Court has granted a wide margin of appreciation for member states in the field of religion, it has not acceded to the findings of national courts in every instance. In \textit{Gündüz v. Turkey} (2003) and \textit{Giniewski v. France} (2006), the ECtHR overturned national convictions for inciting hostility based on religion and for public defamation of a religious group. In both cases, the Court emphasised the importance of nurturing public debate on issues of contemporary importance to society in spite of statements that were deemed offensive by secularists in Turkey and by Catholics in France. These cases were decided by margins of 6–1 (with the Turkish judge dissenting) and 7–0, respectively, suggesting that it is possible to build a consensus among ECtHR judges to uphold freedom of expression even in a particularly contentious domain.

Split decisions and dissenting opinions can also be quite revealing of the underlying tension among judges surrounding cases of racist speech. The Court divided 4–3 in its 2009 \textit{Féret v. Belgium} decision, ultimately upholding the conviction of a far right politician who distributed tracts and made statements that incited discrimination according to Belgian authorities. The Court’s majority invoked several of the same principles it subsequently articulated in the Le Pen case—that fighting racism was a core Convention value, and that politicians who made statements that reached a wide audience had a duty not to provoke racism. However, they also introduced the argument that inciting racial hatred did not require calling for a specific criminal act. Instead, ‘insulting, ridiculing or defaming’ groups could justify curtailing freedom of expression because it undermined the dignity and possibly the security of those groups. For the majority ‘political discourse that incites hatred based on religious, ethnic or cultural prejudices represents a danger for social peace and political stability in democratic states’.

In a lengthy 8-page dissent, Hungarian judge Andràs Sajó (supported by the two other dissenting judges) strongly objected to this standard. He articulated the fear that a slippery slope may lead to punishment of more forms of speech and would create a chilling effect on political discourse. Sajó notes that upholding penalties for statements that run counter to the ‘spirit’ of the Convention is a vague standard that ‘opens the door to abuse’. According to the dissent, the Belgian National Front leader issued a ‘panoply of unpleasant insinuations’ that did not rise to a level of racism justifying restrictions on a politician’s freedom of expression. Sajó and his colleagues thus interpreted the majority’s stance as stretching the definition of racism.
in order to punish disagreeable speech that may potentially infringe upon the rights of others. They worried that if the majority’s concept of ‘criminal discourse’ became entrenched in Court jurisprudence, it may eventually be extended to curtail other types of expression.35

Under what conditions and for what reasons are judges most likely to overrule states that punish racist speech? Voeten’s (2011, 69) data suggest that ECtHR judges are increasingly disposed to rule for the applicant and against the government. According to Voeten (2011, 67–69), a significant reason for this shift towards judicial activism was the accession of East European and EU-candidate country judges to the Council of Europe in the 1990s, and their desire to signal their commitment to human rights in the post-cold war era. If these factors affect decisions on racist hate speech, it should be the case that East European judges are systematically more likely to vote for freedom of expression and against punishing racist speech.

Even without reviewing every free speech case since the early 1990s, it is possible to probe the plausibility of this hypothesis by examining voting patterns in the cases reviewed in this article. In the 1994 Jersild case, all three East European judges voted to overturn the conviction of the applicant. Had each vote been the reverse, instead of a 12–7 majority upholding the journalist’s freedom of expression the outcome would have been a 10–9 decision maintaining Denmark’s power to restrict it. The 1998 Lehideux and Isorni ruling favoured the applicants against France’s restrictions on their speech by a margin of 15–6. Although the decision does not identify all 15 judges who overturned the conviction, at least five of the six East European judges voted with the majority. Had they voted in favour of France, therefore, the result would have been a speech-restrictive ruling in this case.

Yet, replacing these East European judges with West European ones would not necessarily have altered the outcomes. In these two cases, non-Eastern European judges voted in favour of free speech by margins of at least 9–7 and 7–6, respectively. They were, in short, roughly evenly divided in the Jersild and Lehideux cases, but tilted in favour of free speech in both instances. Looking beyond these two examples, the 2003 Gündüz decision (except for the Turkish judge’s dissent), and the 2003 Garaudy, 2004 Norwood, 2006 Giniewski, and 2010 Le Pen decisions were all unanimous, meaning that East European judges had no relevance to the outcome. Even in the contested 2009 Féret decision, the East European judges were split 2–2 over whether to protect freedom of expression or to punish racist speech. The West European judges tipped the scale, voting 2–1 to let stand Belgium’s conviction of Mr Féret in the ultimate 4–3 vote.

In sum, the evidence suggests that the underlying factors of political culture, the text of the Convention, and the margin of appreciation doctrine make it likely that the ECtHR will permit states to continue restricting a wide range of racist speech. More research needs to be undertaken to understand the pressures that counter these factors, as well as the forces that influence individual judges to limit penalties for racist speech by upholding freedom of expression. Identifying, as Voeten does, an increasing trend towards activism among judges and a greater likelihood of East
European judges to take an activist stance is a start. But it is not a complete explanation of the exceptions to the European Court’s rulings.

Conclusions

Peter Baldwin (2009) recently argued that the USA and Europe were more alike across a wide number of policy areas than is commonly supposed. Regulating racist hate speech, however, remains one area where they are worlds apart. In most European countries, it is against the law to assert in public that a racial, ethnic or religious group is to be feared or hated, and in many countries illegal to say that the Holocaust never happened. European courts have backed these steps as a logical part of efforts to curb pernicious forms of racism. American courts would strike down these provisions as an unwarranted and even dangerous infringement on the fundamental right of freedom of expression.

Differences in aspects of political culture, in foundational legal texts, and in jurisprudential norms go a long way towards explaining these broad tendencies. These three types of variables funnel outcomes in a particular direction, but do not to fix them. In part, this is because individual judges, their preferences, and short term shifts in social and political context can strongly impact decisions. In the USA, the rise of the civil rights movement in the 1950s and 1960s undoubtedly played a critical role in restructuring the Supreme Court’s approach to freedom of speech. In Europe, the expansion of the Council of Europe to the east in the 1990s may have had a parallel (though much more muted) effect. Individual judges are not immune to the overarching constraints of political culture, legal texts and jurisprudential norms. But when contexts change, or given a particular concatenation of individual preferences, judges can unmoor their decisions from these systemic constraints.

It is also important to understand that political cultures, the interpretation of legal texts and jurisprudential norms can evolve over time. In the early and middle parts of the twentieth century, there was a greater willingness among Supreme Court justices to uphold restrictions on speech that reflected what was then called a ‘bad tendency’. Doing so was viewed as perfectly compatible with the First Amendment. Now, beliefs about the value of contentious speech in the public sphere have become deeply entrenched among Supreme Court justices. In addition, concerns about allowing states the autonomy to choose a speech-restrictive path have ceded place to the weight of free speech precedents and to the principle of viewpoint neutrality.

Similarly, in Europe, the will to curb racist speech rose through the 1960s and into the subsequent decades. The ECHR was interpreted in light of these growing concerns, and textual tools such as Article 17 and Article 10(2) were applied to the task. At the same time, in recent years, the accession of former Eastern bloc countries may have raised the prospect of a shift in political culture that could nudge the Court some distance towards protecting freedom of expression even when statements amount to racist speech. This has coincided with the conflict between the margin of appreciation doctrine (which suggests the Court should give maximum leeway to
states in sensitive areas like regulating racist speech) and other principles, such as protecting the public watchdog function of the media, or the particular importance of allowing politicians to speak their minds about issues of general public interest.

In the end, the argument developed here helps to explain the tremendous gulf between the American and European approaches to regulating racist speech. Why do American courts void laws that punish people for dramatic racist gestures like burning crosses on their neighbours’ lawns, while European courts uphold convictions for much more subtle forms of racism such as publishing books contesting the Holocaust? Political cultural elements, legal texts and jurisprudential norms have tilted the balance of probable outcomes in these directions. But they have not completely determined them. To understand why the USA moved from its more balanced approach of the mid-twentieth century to its more absolutist position today, and to understand the conditions under which Europe has limited states’ abilities to penalise forms of racist speech, we also need to look to the context of the turning points in which key high court decisions were made, as well as the motives and preferences of individual justices and judges.

Notes

[6] Other examples include the relative weight placed on categorical versus balancing analysis (Blocher 2009; Farber 2009), viewpoint neutrality (Sadurski 1997), and jurisprudence constante (Fon and Parisi 2006).
[19] Glimmerveen and Hagenbeek v. the Netherlands, 1979, p. 194; this phrasing was taken from the Court’s 1976 *Handyside* decision.
References


