



What if we didn't... have the First Amendment?

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In the months since Donald Trump was elected President of the United States, protesters have taken to the streets to march with signs and chant their frustration; Trump himself has lashed out at criticism, calling critical media the “fake news” and threatening broadcast licenses; and the nation’s most popular sport has been gripped by debate over players who “take a knee” to protest police brutality.

The limits of free speech have been tested by an increase in hate speech, as Trump’s rise has led to an outcrop of assembly of white nationalists and other far-right extremist groups. On the other side of the political spectrum, college students have sought to shut down hate speech on campuses, which in turn has drawn criticism and legal resistance from Republican lawmakers and free speech advocates.

Everywhere Americans look, the First Amendment is at the center of national conversations about the right way to live in America. Few tenets are as historically ingrained in American society as the First Amendment, but as the US struggles to find the limits and scope of its free speech, it’s worth considering: what would the country look like without the broad protections it provides? The possibilities may surprise you.

An American mainstay

The First Amendment has been the backbone of American democracy throughout the country’s history. The law is unique around the world in how broad its protections are. It contains only certain narrow exceptions about speech in the US. In addition to exceptions like lying under oath, copyright infringement and the protections afforded by libel and defamation laws, the 1942 Supreme Court case *Chaplinsky v. New Hampshire* ruled freedom of speech “is not absolute at all times and under all circumstances.”

First ratified on Dec. 15, 1791, the Bill of Rights actually came about as a political compromise to quell the criticisms of Antifederalists, who railed against the U.S. Constitution and the massive power it gave to the federal government. Since then, the protections provided by the First Amendment have enabled such historic social developments as the Civil Rights and women’s suffrage movements.

The First Amendment has also given cover to the Ku Klux Klan and other hate groups. In 1969, the Supreme Court case *Brandenburg v Ohio* upheld the First Amendment rights of KKK leader Clarence Brandenburg, who was convicted under Ohio law after speaking at a Klan rally, as his speech was offensive but did not incite violence. More recently, the Supreme Court also ruled the Westboro Baptist Church could protest military funerals.

Freedom of speech, expression and association have historically been at the heart of every successful movement for social change in the U.S.

“Fundamentally, the protection of freedom of expression is necessary to a dynamic society,” U.S. Ben Wizener, director of the ACLU’s Speech, Privacy and Technology Project said in an interview with *Mic*. “Ideas that are deeply unpopular in one generation can become conventional wisdom in the next generation, because [the First Amendment’s] protection allowed us to push for change.”

Freedom of speech around the world

Comparatively to other countries, the First Amendment’s protections are uniquely broad.

In 1948, the United Nations General Assembly laid out international rights to many of the First Amendment’s protections with its Universal Declaration of Human Rights. However, freedom of speech and expression protections vary wildly among member nations.

In Iran, which Reporters Without Borders dubbed “the world’s biggest prison for journalists,” speech is heavily restricted. China is known for heavy censorship — popular sites such as Wikipedia, YouTube and Facebook are blacked out during “periods of controversy,” and photos, videos and search terms that could be considered to be a “threat to political stability” are blocked. As of 2017, 41 journalists were imprisoned in China, according to the Committee to Protect Journalists.

In Saudi Arabia, blasphemy against Islam and the country’s monarchy can be punishable by prison or death. Activist groups have estimated that up to 30,000 dissenters may have been imprisoned for “political purposes” in the country, while others have been sentenced to death.

In Europe, the right to freedom of expression is legally governed through Article 10 of the European Convention on Human Rights. This right, however, is not absolute. Speech and expression protection varies between European countries. Germany protects freedom of speech in its constitution, but inciting hatred against or insulting a national, racial or religious group carries a punishment of up to five years in prison.

More flexible in their approach to freedom of speech are Nordic countries, which have been ranked by the World Press Freedom Index as having the world’s best freedom of the press. Laws outlawing specific kinds of expression are also not as strictly defined in such countries as the United Kingdom.

“Freedom of speech and expression in the U.K. is a right enshrined in U.K. common law and by the Human Rights Act,” Rachael Jolley, editor of the U.K.-based *Index on Censorship* magazine,

said in an interview with *Mic*. “Where freedom of expression is controversial or shocking, the courts have made it clear that freedom of expression protections still apply.”

Yet these countries still have stricter limits to freedom of speech than the U.S. Hate speech targeting specific groups is illegal in all Nordic countries, as well as in the U.K., whose Public Order Act prohibits “threatening, abusive or insulting” words or behavior that causes another person “harassment, alarm or distress.”

The U.K. has additional barriers on free speech; the country’s public order laws and the Theatres Act of 1968, which prohibits performances that “provoke a breach of the peace,” have resulted in the cancellation of multiple theatrical performances at the advice of police. Britain’s libel and defamation laws — which put the onus of defending a claim’s accuracy on the defendant — have also made it a primary destination for “libel tourism,” in which plaintiffs in libel suits bring charges in countries with laws more favorable to their case. These libel laws put barriers on unflattering speech.

What would happen if Trump repealed the First Amendment?

The U.S. has long enjoyed the broad protections of the First Amendment — but what if these rights were to suddenly disappear? Imagine if Trump and the U.S. government had repealed the Amendment on January 20, 2017 — which would be a difficult feat, requiring the passage of a new amendment approved by both Congress and the states. But if this had happened, the past 16 months likely would have played out quite differently.

Any protests against the president and his policies would likely be quelled. To give an immediate example from the first days of the Trump era, the mass demonstrations at airports across the U.S. in late January 2017 after the announcement of the administration’s embattled travel ban, which saw dozens arrested nationwide, would likely have been shut down, or not have occurred at all. And the president’s frequent complaints about his critics — gripes over Democrats who didn’t applaud during his State of the Union address, or his calls that “treasonous” and “disrespectful” athletes who kneel during the National Anthem should be fired — could go from mere online rants to carrying actual consequences for those who express an opposing point of view.

Nowhere, though, would the effects of a First Amendment repeal possibly be more harshly felt, than on the press. Journalists frequently draw Trump’s ire — the president has labeled the media “enemies of the people” and spewed rhetoric against CNN, the *New York Times* and *Washington Post*, among many other news outlets.

“It is frankly disgusting the way the press is able to write whatever they want to write,” Trump told reporters in Oct. 2017.

Trump’s criticisms about the media, however, have already gone beyond just mere complaints. The president sent a cease and desist letter to try and halt the publication of Michael Wolff’s book *Fire and Fury*; threatened to challenge the licenses of NBC and other networks offering critical coverage of the president; and asked his former chief of staff Reince Priebus to look into changing libel laws concerning the press. In May 2017, the *New York Times* reported that

Trump had even asked former FBI Director James Comey to consider jailing journalists who publish classified information.

These attacks by the president on the media have already started to erode public trust in the press. According to a study released in Nov. 2017 by the Poynter Institute, 31% of Americans agree with Trump's description of the media as an "enemy of the people" and believe the media "keep[s] political leaders from doing their job."

"We do have this very strong tradition of the First Amendment, but at the same time, we're seeing the 'fake news' trope being used to denigrate and undermine the value of the press and of journalism in democracy and in holding elected leaders and others accountable," Courtney Radsch, the advocacy director at the Committee to Protect Journalists, said in an interview. "And that's worrying."

But the effects could be worse without strong press freedom protections. If the First Amendment didn't exist, it's possible to imagine that Trump's proposed actions could become a reality. There would no be a barrier preventing stricter libel laws, the government could go after critical news outlets, and journalists who draw the administration's ire could find themselves taken to court — or to jail.

Peter Sterne, managing editor of the U.S. Press Freedom Tracker, predicted that without the First Amendment, Trump would likely ask Congress to enact laws criminalizing the reporting of fake news and lowering the standard for libel.

"If he tried to do that, and especially if Congress was willing to go along with it and pass those kinds of laws, there would be nothing stopping him," Sterne said. "Right now, the First Amendment acts as a barrier to that, because if they try to do that, courts will rule that it's unconstitutional."

Of course, journalism is not completely without risk as it is; 34 arrests of journalists took place in the U.S. in 2017, according to the U.S. Press Freedom Tracker, with 29 arrests taking place at protests. Margeaux Ewen, the North America director of Reporters Without Borders, pointed to these arrests as something else that could become more widespread without freedom of the press.

"One could hypothesize that if the First Amendment were not part of our Constitution, maybe these arrests would be commonplace — but we're already seeing an increase in these arrests while the First Amendment remains untouched," Ewen said in an interview with *Mic*.

Of course, Trump couldn't do this alone. Many laws concerning press protections, including libel regulations, are enacted at the state level, and Trump's threats to unilaterally force changes to libel laws or challenge broadcast licenses are "not within his purview as president."

"What Trump has threatened to do is hyperbolic, and it's not based in any reality about what the actual process of changing legislation actually entails," Radsch said.

While Congress could go along with Trump's attacks on the press and pass laws that would censor news organizations, or take them to task for defaming public officials, Sterne notes, they could also do nothing and keep freedom of the press intact.

“If the First Amendment were immediately repealed or didn’t exist, it doesn’t mean that anything would necessarily change,” he said. “It just depends on what laws Congress passes and what actions the government takes.”

Whatever happens in the U.S., Ewen also noted that a repeal of the First Amendment — or even just a broad disrespect for freedom of the press in America — could have a global effect.

“If the U.S. is in decline in respecting its own ideals, that can only influence further decline the world over, as usually the U.S. has held itself to be a beacon for press freedom and [tried to] influence other countries ... to release journalists and better effect press freedom,” Ewen said.

Would hate speech laws curb extremism?

Though the First Amendment’s broad protections are deeply entrenched in American values, theoretically, the U.S. could take a harder-line approach to how it regulates and qualifies the freedom of speech.

“The law is as it is because our country has a much different history, both in terms of government structure and in terms of global politics, than other countries,” said David Snyder, Executive Director of the First Amendment Coalition.

But what about an alternative history in which the Supreme Court gave a narrower reading of the amendment’s protections? A stricter interpretation may have resulted in a European-style system, in which freedoms of speech and expression are guaranteed, but not as sweeping.

If more restrictive policies were in place, speech could be qualified through prohibitions against hate speech — provisions which the Supreme Court ruled unconstitutional as recently as June.

Hate speech legislation in the U.S. would likely be met with some support. The Cato Institute 2017 Free Speech and Tolerance Survey conducted in August found that 40% of respondents believe government should “prevent people from engaging in hate speech against certain groups in public.” Further, 56% of survey participants said it’s possible to ban hate speech and still protect free speech.

Hate speech laws are particularly popular among American millennials, with 40% supporting government censorship of speech deemed offensive to minorities in a 2015 Pew Research Center study. Hate speech codes have become a flashpoint, especially on college campuses. According to a study released in March by the Knight Foundation, 64% of college students do not believe the First Amendment should protect hate speech.

PEN America Executive Director Suzanne Nossel pointed to different generational attitudes and expectations to explain why younger Americans are particularly against hate speech.

“There are demands for levels of conscientiousness in language that, you know, adults — people over 40 — can kind of scoff at. And yet to students, you know, these seem very real,” Nossel in said an interview with NPR. “Ways of characterizing people that were perfectly acceptable a couple of decades ago sound really jarring and really rankle this generation. So I think they are pushing the boundaries.”

Hate speech legislation has the potential to help curb organized extremism; in Japan, for example, far-right rallies decreased by nearly half following the country's enactment of hate speech laws in 2016.

Legislation regulating hate speech laws can sometimes backfire, though. A French court ruled in 2013 that LGBT activists could not refer to their opponents as “homophobes” under the country's hate speech laws, convictions under which typically result in fines or suspended sentences, and more infrequently jail time. In Spain, a man was fined in 2015 for calling local police “slackers” on Facebook under the country's gag law, which allows for fines of up to 600,000 Euros for “public order offenses.”

In the U.S., the University of Michigan enacted a speech code in 1988 in response to racist acts on campus that included a flier that declared “open season” on black students. The code prohibited behavior that “stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation [or] creed” or that which creates an “intimidating, hostile or demeaning environment.”

The university's ban, however, had an unintended effect. Racist incidents on campus continued at the same rate, while white students brought 20 cases of offensive speech against black students. The university's policy was later struck down by a federal district court after a psychology graduate student challenged the policy, over fears his research examining biological differences in personality traits and mental abilities could be considered in violation.

If hate speech laws were enacted in the U.S., effects similar to what was seen in the Michigan case could be even more widespread — particularly in the Trump era, Wizener warned.

“If we had laws that carved out exceptions for hate speech and said hate speech is not protected — and the attorney general of the U.S. is Jeff Sessions — do we think it's likely that it's white supremacists who are going to be prosecuted by those limitations?” Wizener said. “Or is it Black Lives Matter [activists]?”

Differences at the margins

A change in freedom of speech laws in the U.S. — especially if modeled on the European laws — could cut down on hate speech on the US while also subjecting minorities to increased prosecution, experts war.

For example, the current rash of laws imposing consequences on companies and other groups who boycott Israel — which Wizener predicts will be ruled unconstitutional — are an example of the kind of law that you would see much more routinely without a strong First Amendment.

“I think that it would very much depend on who's in power, but the kinds of speech that would receive the least protection would be the speech that's the least popular,” he said.

When it comes to even broader restrictions on the freedom of expression than what a European-style approach would entail, there may be even harsher effects. Supreme Court rulings that upheld the First Amendment right to burn American flags are one example. Without the First

Amendment, criticism of the government could land a protester in jail. Trump has already advocated for this on Twitter.

Limits on the freedom of speech and expression would also impact social justice efforts. The LGBTQ rights movement, for example, couldn't happen in a society "in which provocative discussions about those issues could be prohibited by political majorities."

"There are pretty strong freedom of expression protections in most Western democracies," Snyder said. "The differences are more at the margins. I think a world in which there wasn't strong protection for freedom of expression would be one in which important social change was much slower in coming."

So while the US may be gripped by national debates over the limits and scope of the First Amendments amid greater pushes for social change, Americans remain steadfast in their tolerance of all free speech, more so than any other nation in the world.