

Comparing Documents, Comparing Rights

Introduction:

Is there one best way to protect democratic values? In this lesson, students compare the U.S. Bill of Rights and the EU Charter of Fundamental Rights to examine the differences between positive rights—those rights that require government to act to protect citizens from harm and to provide security such as medical care and old age pensions—and negative rights, which prohibit government from interfering with individual rights. A case study in hate speech is used to illustrate how European and U.S. approaches differ.

Objectives:

- Describe the differences between positive and negative rights.
- Identify examples of positive and negative rights in the U.S. Bill of Rights and the EU Charter of Rights.
- Apply understanding of negative and positive rights to a hypothetical case involving free expression.

Materials and Preparation:

Handout 1-- EU Charter of Fundamental Rights and Bill of Rights
Handout 2—Free Speech, Hate Speech Case Study

Teaching Time: 1 class period, plus extended time for research

Procedure:

1. Begin the lesson by asking students to do a two-minute “quick write” in which they list as many of their rights as they can. Combine student ideas into a class list. Together, students should identify which rights are specifically protected by the U.S. government.
2. After providing students with brief definitions of negative rights (*restrict government from interfering with or restricting individual freedom*) and positive rights (*require government action to provide for or protect people*), have students analyze their list and determine which listed rights are positive rights and which rights are negative. Examples of positive rights are protecting people from harmful speech and the right to an education or accessible health care. The U.S. Bill of Rights mentions neither of these specifically. The Bill of Rights is considered to be primarily a statement of negative rights because it limits on the federal government from impinging on specific freedoms or individual rights, such as freedom of speech, freedom of press, the right to bear arms, and so on.

3. Distribute the handout presenting the Charter of Fundamental Rights of the European Union and the U.S. Bill of Rights. Focus first on the EU Charter of Fundamental Rights, explaining that the EU Charter does not have supremacy over the laws in member countries so the laws must be considered with laws of member nations. Provide some background information about the document, and then ask students to place a + by each statement that is positive right and a – by each statement that is negative. Ask students to complete the same task for the Bill of Rights.
4. Use the following questions to stimulate class discussion:
 - What similarities and differences do you see in the two documents related to positive and negative rights?
 - What limits are placed on the government of the EU? What are some of the expectations that Europeans have for their government (positive rights)?
 - Which of these rights are found in the Bill of Rights? Are there some positive rights that they would like to see added?
 - Are there rights that are not included in either document that should be added for the Twenty-first Century? For example, Finland recently made access to high speed internet a right.
5. To explore the costs and benefits of these two approaches to defining rights, provide students with the handout entitled Free Speech or Hate Speech. Ask students to read the arguments favoring positive and negative rights and select the strongest arguments for each.
6. Following this discussion, explain that students will take a closer look at the question of where and when government should limit the right of citizens to freedom of expression—a right that is stated and protected in both the EU and U.S. documents. Students should render a decision first using negative rights and then using positive rights. Following this analysis, which seems to be the best approach?

The hypothetical is based on a case heard in 1990 by the Supreme Court of Canada. In a 4-3 decision, the Canadian court decided that the teacher, Keegstra, was guilty and should be punished. Not only was he fired from his job, he was fined \$5,000.

6. To close the lesson, use the questions at the end of the handout to stimulate students to consider why a democracy might choose one approach over the other. Discuss the fact that Human Rights Watch has observed that “The US stands virtually alone in having no valid statutes penalizing expression that is offensive or insulting on grounds of race, religion, or ethnicity.” Ask: Are certain types of rights more difficult for people to obtain or for governments to protect? What are some of the costs and benefits of the two approaches to stating rights?

7. Assessment: Frederick Schauer, a professor at the John F. Kennedy School of Government at Harvard, observed in a recent essay called "The Exceptional First Amendment":

"In much of the developed world, one uses racial epithets at one's legal peril, one displays Nazi regalia and the other trappings of ethnic hatred at significant legal risk and one urges discrimination against religious minorities under threat of fine or imprisonment, but in the United States, all such speech remains constitutionally protected."

Ask students to write an essay in which they answer the following question:
What evidence can you provide from this lesson to support or reject Schauer's claim?

Charter of Fundamental Rights of the European Union and U.S. Bill of Rights

The EU Charter of Fundamental Rights was proclaimed in December 2000 and became binding in December 2009, when the Lisbon Treaty came into force. Rights are set out in 54 articles and six chapters, entitled dignity, freedoms, equality, solidarity, citizens' rights, and justice. The charter reflects basic Western values such as the right to freedom of speech and thought and equality before the law. The Charter recognizes the right to strike, subject to national law, and fair working conditions. It bans reproductive cloning.

Charter of Fundamental Rights (abbreviated)

TITLE I: DIGNITY

Human dignity is inviolable. It must be respected and protected.

Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Prohibition of torture and inhuman or degrading treatment or punishment

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Right to liberty and security

Respect for private and family life

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Right to marry and right to found a family

Freedom of thought, conscience and religion

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

Freedom of expression and information

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Right to asylum**Protection in the event of removal, expulsion or extradition**

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III: EQUALITY

Everyone is equal before the law.

Non-discrimination: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

The Union shall respect cultural, religious and linguistic diversity.

Equality between women and men must be ensured in all areas, including employment, work and pay.

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV: SOLIDARITY

1. Workers' right to information and consultation within the undertaking
2. Right of collective bargaining and action
3. Right of access to placement services
4. Protection in the event of unjustified dismissal
5. Fair and just working conditions

Prohibition of child labour and protection of young people at work

Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

TITLE V: CITIZENS' RIGHTS

Right of access to documents

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

TITLE VI: JUSTICE

Right to an effective remedy and to a fair trial

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. The severity of penalties must not be disproportionate to the criminal offence.

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

U.S. Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Free Speech or Hate Speech?

Review the arguments for positive rights and that for negative rights as applied to as they apply to freedom of expression when and the rights of minorities. Underline the strongest arguments for both positions.

Positive Rights Arguments – Protecting Society

- Hate propaganda is a substantial concern in a free and democratic society because it is a threat to the common good. If a government tolerates hate speech, it is implicitly endorsing a message that is contrary to fundamental democratic values.
- Governments have a compelling interest in regulating hate speech to protect the individual freedoms of historically oppressed minority groups. Symbols such as a swastika and epithets toward oppressed groups intended to spark violence should not be tolerated.
- Several international groups and courts in many democracies hold that rights are interdependent and some rights cannot be used to destroy other rights.

Negative Rights Arguments – Freedom of Individuals

- Freedom of speech should thrive in the least restrictive environment possible. Citizens must learn to tolerate many words that hurt. All ideas have a right to be heard. Justice Douglas warned that we must protect the ideas we hate, for if we do not, soon or later we will be denied the ideas that we cherish.
- The way to address racist speech is with more speech. If an African American is offended by the confederate flag, he can burn it. Harsh language is a natural part of personal exchanges and strong intellectual arguments. Free speech is important to minority rights so they can make their ideas heard.
- Free expression is fundamental. Government has a duty to stay neutral with respect to the content of speech. Government should not be in the business of setting standards for acceptable speech. How are we to separate intent to incite or humiliate from an honest but vulgar statement of views?

Case for Discussion

Decide how each set of arguments would apply to the case that follows:

A teacher in a rural town taught his pupils that Jews were “treacherous,” “subversive,” and “child killers.” In his lectures, he said that Jews were responsible for the major calamities of human history, including depressions, anarchy, wars, and revolutions. He taught that the Holocaust was manufactured by the Jews to gain sympathy. Students were expected to repeat this viewpoint in class discussions and on the tests.

Using the positive rights analysis, what should happen to this teacher?

Using the negative rights analysis, what should happen to this teacher?

Questions for Discussion Following Your Decision

1. Based on this exercise, how does stating a right as a negative compare with stating a right as a positive? What are the merits of each approach?
2. Why does the United States allow speech that is banned in much of the world? Why do you think the rest of the world has taken a different course?
3. What should be the range of speech that is protected in the United States ? Is there a middle ground between positive and negative rights? What types of speech, if any, should not be protected?