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FREEDOM OF SPEECH AND HATE SPEECH: AN AMERICAN PERSPECTIVE¹

*LIBERDADE DE EXPRESSÃO E DISCURSO DE ÓDIO:
UMA PERSPECTIVA NORTE-AMERICANA*

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ABSTRACT

Freedom of speech is a fundamental right in the United States, however, it is not unlimited. Although the Supreme Court initially supported the government in its pursuit of speech limitation, more recently the Court has positioned itself as the protector of the First Amendment rights. The purpose of this article is to identify the boundaries of freedom of speech, as defined by the US Supreme Court, to prevent hate speech. As a result, it will demonstrate how the Court prevented the government from regulating speech on the basis of content, as provided parameters to avoid the lack of protection of freedom of speech. However, in doing so, the evolution of the US jurisprudential understanding often established ambiguous categories, especially when dealing with the idea of hate speech.

Keywords: Freedom of speech. Hate speech. U.S. Courts. Democracy.

RESUMO

A liberdade de expressão é um direito fundamental nos Estados Unidos, no entanto não é ilimitado. Embora a Suprema Corte tenha inicialmente apoiado o governo na busca pela limitação do discurso, mais recentemente, o Tribunal se posicionou como o protetor dos direitos da Primeira Emenda. O propósito do presente artigo é identificar os limites da liberdade de expressão, conforme definidos pela Suprema Corte Norte-Americana, para que não seja configurado discurso de ódio. O seu resultado demonstrará como a Corte impediu que o governo regulasse o discurso com base no conteúdo, além de fornecer parâmetros que evitassem a proteção insuficiente da liberdade de expressão. Todavia, ao agir dessa maneira, a evolução da jurisprudência da Suprema Corte Norte-Americana acabou por estabelecer categorias ambíguas, especialmente em relação à ideia de discurso de ódio.

Palavras-chave: Liberdade de expressão. Discurso de ódio. Tribunais Norte-Americanos. Democracia.

INTRODUCTION

One of the most basic tenets of the American legal system is the First Amendment of the United States (hereinafter “First Amendment”) The First Amendment is often held up as the model for the extensive freedom it gives the people. Specifically, the First Amendment delineates and protects freedom of religion, speech, press, assembly, and petition. The Constitution is the supreme law of the land in the United States, as per the Supremacy Clause, with no greater code and given its status, courts are hesitant to limit the rights protected by the First Amendment in any way. In particular, the freedom of speech and freedom of religion are protected and often referred to as fundamental freedoms or liberties which are not up to a vote (U.S., 1939, 1943). Courts, specifically the United States Supreme Court, are hesitant to limit these rights in any way out of concern those limits might lead to censorship and erosion of individual freedom. And as per a more than 200-year-old precedent, the Supreme Court (hereafter “the Court”), is final interpreter of the Constitution (U.S., 1803, 1816).

In very limited and specific circumstances has the Court allowed for the restriction or regulation of speech. Proponents of freedom of speech argue any limitation on these fundamental freedoms would have the greatest impact on minorities who will be unable to voice grievances against the majority. And so, the general trend has been to protect the right of free speech, when federal government or local municipalities attempt to limit speech, even at the expense of other rights. The guarantees of “life, liberty, and the pursuit of happiness” sometimes come into direct confrontation when another individual exercises their right to speak hatefully and discriminatorily. The challenge seems to establish limits that allow balance between the sometimes-contradictory rights of individuals.

With the recent increased attention to hate speech, free speech, and discrimination within the United States, a closer look at the laws is necessary. This paper will discuss the relevant caselaw related to freedom of speech, religion, and hate speech as the U.S., specifically the Supreme Court, grapples with these difficult questions. In so doing, this paper’s specific objective was to identify boundaries established by the US Supreme Court to protect freedom of speech and, at the same time, prevent hate speech. This was accomplished by utilizing deductive method, with the study of US Supreme Court caselaw as well as doctrine related to fundamental rights.

UNITED STATES CONSTITUTION FIRST AMENDMENT RIGHTS

As mentioned above, there is no law, holding, or regulation that could trump the Constitution and the United States Supreme Court (hereafter “the Court”) has the power to interpret the Constitution (US, 1803; US, 1816). Formal Amendment is the only way to make changes or modify the Constitution (US, 2021a). The First Amendment states,

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” (U.S., 1791, online).

Although the Constitution expressly names the Congress, the Amendment has been interpreted to include the federal government, all fifty states by way of the Fourteenth Amendment and all government agencies (STONE; VOLOKH, 2016). This means that when local municipalities, states, government agencies, or the federal government try to restrict these rights in any way, any individual affected by these laws may have a cause of action. This amendment's guaranty of freedom of religion, of speech, and of the press are to be interpreted liberally, however these rights are neither absolute nor limitless (U.S., 1943).

DEFINING FREEDOM OF SPEECH

According to a liberal interpretation of the First Amendment, all people within the United States have the freedom to say or not to say what they want without censorship with a few limited exceptions, as outlined below. Courts have struggled to clearly define this right. The definition of speech under this Amendment includes both direct words and symbolic actions (2021). In the United States, speech is generally categorized as protected or unprotected speech. Protected speech is not as easily regulated, while federal and local governments have more power to regulate unprotected speech.

To provide some more clarity, courts might further classify speech as (i) political and ideological speech, (ii) commercial speech, or (iii) unprotected speech. First however, a court should consider whether the act is speech or conduct, and, if it is inherently expressive (KILLION, 2019). Regulating speech based on its content or the speaker's viewpoint is presumed unconstitutional, and the Government bears the burden of showing its constitutionality against the individual bringing this suit (U.S., 2008, 2015). If the government limits speech for reasons other than content, such as a "time, place, and manner of expression" restrictions, for example, playing loud music in public, the government only needs to show it serves a significant government interest. In addition to identifying the type of speech restriction, identifying the category of speech content is also important. Regulations of protected speech generally receive strict

or intermediate scrutiny, while the government is given more discretion to regulate unprotected speech (RUANE, 2014).

With regards to content, the general rule is speech is protected under the First Amendment, unless it falls within one of the narrow categories of unprotected. Political and ideological speech are at the core of the First Amendment, including speech concerning “politics, nationalism, religion, or other matters of opinion (U.S., 1943)”. Political speech can take other forms beyond the written or spoken word, such as financial donations (U.S., 1976), or other symbolic acts (U.S., 1989). Government regulation that regulates political or ideological speech generally receives strict scrutiny in the courts, and so, the government must show that the law is narrowly tailored to achieve a compelling interest.

More recently, the Court has also distinguished commercial speech within the context of free speech. Commercial speech, defined as speech that merely proposes a commercial transaction or relates solely to the speaker’s and the audience’s economic interests, had historically received less First Amendment protection than political speech as an effort to protect consumers from deception and fraud. However, since 1976, judicial scrutiny of laws regulating commercial speech has increased (KILLION, 2019; U.S., 1976). Commercial speech restrictions typically receive an intermediate level of scrutiny if they are directed at non-misleading speech concerning a lawful activity. The Court established a test that only if such a law directly advances a substantial government interest and is not broader than necessary to serve that interest it is constitutional (U.S., 1980).

Finally, the Supreme Court has recognized limited categories of speech that the government *may* regulate because of content, “as long as it does so evenhandedly” (U.S., 1992). Generally, speech that is considered obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography is unprotected. These categories have changed over time, and the Robert’s Court, the current Supreme Court under the leadership of Chief Justice John Roberts, seems unwilling to expand upon this list (U.S., 2010).

One category in unprotected speech to note that this paper will not focus on is, fraud and defamation (also known as libel). Fraud and

defamation (libel), often associated with false statements, are categories that the Court has struggled to properly define as unprotected speech. However, the Court declines to allow more regulation of false statements, recognizing that “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation” (U.S., 2012). The Court noted this point in the famous *New York Times v. Sullivan* case, creating a malice requirement, in addition to false statements, to prove libel (U.S., 1964). Nevertheless, the government may regulate fraudulent speech in order to prevent public or consumer deception (U.S., 2003), but not overbroad or unduly burdensome “prophylactic” rules (U.S., 1985, 1988).

DEFINING FREEDOM OF RELIGION

Like the freedom of speech, the U.S. Constitution says everyone in the United States has the right to practice his or her own religion, or no religion at all. The First Amendment contains two clauses that together describe the freedom of religion: (i) the Establishment Clause and (ii) the Free Exercise Clause. The Establishment Clause states, Congress shall make no law respecting an establishment of religion (U.S., 1791). In the strictest reading, the Establishment Clause prohibits the adoption of an official religion by the federal government (STONE; VOLOKH, 2016). Broadly, the Clause is meant to prevent the federal government or any other government agencies from the favoring of or against any religion. The Free Exercise clause states, “[...] [Congress shall make no law] prohibiting the free exercise thereof [any religion]” (U.S., 1985, 1988, online). This clause is interpreted to simply mean that the government cannot forbid the practice of any religion or any religious practice. Although these two clauses may overlap, they are meant to provide protection in every way from government suppression or coercion by way of regulating religion.

Much like speech, there is no clear-cut definition of religion and the Court often ends up redefining the term according to the case at hand. In 1890, the Supreme Court in *Davis v. Beason* defined religion traditionally, “The term ‘religion’ has reference to one’s views of his relations to his

Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will (U.S., 1890, 1996, online).” Since then, the Court has expanded its view of religion. In the 1960s and 1970s, the Court stated that the Establishment Clause prevents government from aiding “[...] those religions based on a belief in the existence of God as against those religions founded on different beliefs (U.S., 1961, online).” The Court in a 1970 decision went one step further and effectively merged religion with deeply and sincerely held moral and ethical beliefs. In another decision, the Court hinted individuals could only be denied exemption from religious protection if “[...] those beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon consideration of policy, pragmatism, or expediency (U.S., 1961, online).”

A decade later, in the *Thomas v. Review Board* decision, the Court decided to retract some of the broad protection of religious freedom with regards to philosophical values (U.S., 1981). In an opinion written by Chief Justice Warren Burger, the Court stated, “[o]nly beliefs rooted in religion are given special protection to the exercise of religion.” Although Thomas, a Jehovah’s Witness who quit his job after he was transferred to a weapons-making facility, won his case, the Court found his actions to be motivated by his religious beliefs. Hence, the definition of religion has evolved through caselaw in the united states but still remains an elusive concept, without a clear definition.

FREEDOM OF SPEECH IN U.S. COURTS

Freedom of speech has seen much development in the U.S. Courts as judges have grappled with protecting the rights of individuals and balancing the needs of the government. One of the first cases limiting free speech was in 1919. The defendant was accused of causing and attempting to cause insubordination and obstructing the recruiting and enlistment service of the United States, when the United States was at war with the Germany Empire (U.S., 1919). The Court created a test that would determine whether the words “used in such circumstances and

are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent” (U.S., 1919). In addition, the Court stated that even “[...] the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic (U.S., 1919, online)”. This is one of the clearest examples of limitation of speech the Supreme Courts provides. This 1919 Court recognized war time as a special exception to freedom of speech and limited the right noting that,

[...] when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right (U.S., 1919, online).

As mentioned above, generally political protest is categorized under protected speech with very limited exceptions, however in 1968, the Court decided that burning of draft cards to protest the war was not a form of protected speech. Chief Justice Earl Warren established a test to determine whether legislative regulation of symbolic speech was justified. The two-part test examines whether the regulation is related to content and whether it is narrowly tailored to achieve the government’s interest. In the decision, Chief Justice Warren writes,

[...] a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest”. (U.S., 1968, online).

In contrast, the Court decided other symbolic speech such as wearing black armbands to protest or even the burning of the flag are acceptable forms of symbolic speech and protected under the Constitution. The Court also held that state officials did not have the power to limit the use of symbols as to only communicate certain sets of messages, observing that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply

because society finds the idea itself offensive or disagreeable (US, 1989).” This argument is the basis of those who are proponents of protecting the freedom of speech-ideas by the minority or unpopular thoughts must be freely expressed or else we create the likelihood of greater censorship and coercion by the majority and those in power. Such danger was appointed by Alexis de Tocqueville: “[...] in a country where the dogma of people’s sovereignty ostensibly reigns, censorship is not only a threat, but a great absurd” (TOCQUEVILLE, 2019, p. 244).

That is reason why regulation of speech is usually impermissible when based on content and the burden shifts to the government to prove a compelling state interest. Freedom of speech is a fundamental right that Canotilho presents as “negative rights”, meaning instruments which “[...] directly conforms a subjective space of distancing and autonomy with the corresponding duty to abstain or prohibit the aggression to [such rights] from recipients, public and private” (CANOTILHO, 1993, p. 256).

However, the Court is sometimes forced to judge the cost and benefit of the law in question. As described above, political, and ideological speech are often given the greatest level of protection in courts but even that can be reduced under certain circumstances. One such exception is school.

Schools’ settings are one place where freedom of speech has traditionally been limited even though public schools are considered an arm of the government (U.S., 1986, 1988, 2007). Although, in *Tinker v. Des Moines*, the Supreme Court stated that students were allowed to wear their armbands to school as an anti-war protest because students do not “[...] shed their constitutional rights at the schoolhouse gate (U.S., 1969, online).” And in *West Virginia Board of Education v. Barnette*, the Court ruled in favor of children in a family of Jehovah’s Witnesses who refused to perform the salute and were sent home from school for non-compliance. Nonetheless, there seems to be a higher standard of speech in schools than in other public places (U.S., 2007). Starting in 1986, three such cases exemplify the complicated balance the Court has tried to execute. The Court has held that the First Amendment did not prohibit schools from prohibiting vulgar and lewd speech at school events (U.S., 1986). Similarly, the freedom of students to advocate illegal drug use at a school-sponsored event was not protected under the First Amendment

(U.S., 2007). Both these situations fell under the unprotected category of speech especially because the events occurred within a school setting. Justice Burger in his opinion for Bethel wrote,

The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's counter-vailing interest in teaching students the boundaries of socially appropriate behavior (U.S., 1986, online).

The Court has affirmed this view time and again.

RELIGIOUS FREEDOM IN U.S. COURTS

Religious freedom is also an evolving concept in U.S. caselaw, with the Court redefining boundaries and freedoms based on the case and time. Dating back to 1879, the Court reviewed the boundaries of the Free Exercise Clause while hearing a polygamy case. A federal law banning polygamy was challenged as unconstitutional as plural marriage is a part of some religious practices (U.S., 1878). Even though the activity had a basis in religious belief, the Court held that government had the right to punish activity judged to be criminal. Even though it could ban the religious practice as criminal, the government could not regulate belief. (§ 19:4. The Free Exercise Clause, 2 Religious Organizations and the Law § 19:4).

Since *Reynolds* (the polygamy case mentioned above), the Court has moved back and forth on the limits of the Free Exercise Clause. Another seminal case for the clause was *Employment Div., Dept. of Human Resources of Oregon v. Smith*, where the Court greatly narrowed a 35-year-old constitutional doctrine that had required a government entity to prove that it had a "compelling interest" whenever a generally applicable law was found to infringe on a claimant's religious beliefs or practices (U.S., 1990).

In response to this decision, the Federal government passed the Religious Freedom Restoration Act of 1993 (RFRA). The statute was intended to provide greater protection to religious practices and the exercise of. The Act states "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of

general applicability, except as provided in subsection (b).” The exception is applicable only if the government shows the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest” (42 U.S.C.A. § 2000bb-1 (West)). However, provisions of the RFRA that apply to the states have been struck down by the Supreme Court as an overstepping of congressional power (U.S., 1997). Another attempt was made by Congress to create more religious freedom by way of the Religious Land Use and Institutionalized Persons Act (RLUIPA) which the Court did uphold famously in *Holt v. Hobbs* (U.S., 2015).

Sometimes together, and sometimes in parallel, the Establishment Clause has also remained within the Court’s purview. Almost one hundred years after *Reynolds*, in the 1960s, the Court decided several landmark cases with regards to religious freedom emphasizing the separation of Church and State. Starting in Maryland, the United States Supreme Court overruled a state requirement that a candidate for public office declare a belief in God to be eligible for the position (U.S., 1961). The Court held that this requirement violated the Constitution by giving preferences to religions involving a belief in God over those that do not. Similarly, in New York, parents challenged the constitutionality of a daily reading of a state-composed nondenominational prayer in New York schools (U.S., 1962). The Court ruled, that the prayer was a “‘religious activity’ and use of public school system to encourage recitation”, even when there was a choice to opt out, “[...] wholly inconsistent with Establishment of Religion Clause of Constitution” (U.S., 1962, online). The Establishment Clause, unlike the Free Exercise Clause, does not depend on showing direct government coercion. Any time the government or a government agency enacts laws which establish an official religion, whether those laws coerce directly or not, it is a violation of the Clause (U.S., 1962).

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief

that a union of government and religion tends to destroy government and to degrade religion (U.S., 1962, online).

The Court has even attempted to establish a uniform test to check whether a law violates the Establishment Clause. Often referred to as the Lemon test, the Court formed this test in 1971 based on cases in Pennsylvania and Rhode Island stemming from statutes that provided for the state to pay for aspects of non-secular, non-public education. The Pennsylvania statute was passed in 1968 and provided funding for non-public elementary and secondary school teachers' salaries, textbooks, and instructional materials for secular subjects (U.S., 1971).

The Lemon test says that in order to be constitutional, a policy must: 1. Have a non-religious purpose; 2. The primary effect cannot be promoting or favoring any set of religious beliefs; and 3. Not overly involve (entangle) the government with religion (U.S., 2011). Failure to meet any of the prongs could create a violation of the Constitution. The application has been inconsistent and critical, with some Justices calling to remove the test completely, but Lemon remains the dominant test for Establishment cases (U.S., 1997; NGUYEN, 2019; VITERITTI, 1998).

Regardless of the test used, the Court seems to be more proactive limiting the government by way of the Establishment Clause, because the separation of Church and State is such an obvious American value. The Lemon test is one way for policymakers to gauge whether a law infringes on religious freedom. On the other hand, the Free Exercise Clause which would give individuals more freedom to practice their respective religions on a day-to-day basis has no established test but is subject to RFRA and RLUIPA requirements. As the court stated in Reynolds, the practice of any religion is limited by what is considered criminal activity. This seems to be the greatest restraint on religions in the United States. Essentially the United States Supreme Court gives lawmakers a significant amount of discretion to criminalize behavior notwithstanding the impact on religious practice.

HATE SPEECH AND LIMITATIONS

Freedom of speech is one of the most integral rights or basic freedoms in United States. Unprotected speech uses a type of language that incites actions that would harm others or violence, such as obscene language, or represents a message that advocates illicit activity, in addition to defamation, fraud, and child pornography (U.S., 1957, 1988, 2007). What about speech that harms people emotionally and mentally or speech that is considered hateful? Freedom of speech sometimes becomes a double-edged sword, harming the same citizens meant to protect. Although there are anti-discrimination laws and laws against hate crimes that the Court has typically upheld, hate speech does not always neatly fall under these federal statutes, geared more toward actions than words. This makes it harder for the Court to protect citizens from hate speech. In such special circumstances, the United States Supreme Court has used its power to restrict speech.

Hence, the Supreme Court has limited freedom of speech regarding content that is lewd or obscene, profane, libelous, incitement and insulting or “fighting words” (U.S., 1957). This speech is “[...] no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality (U.S., 1942, online).” The Court has remained cautious in broadening the category of unprotected speech, and even the sub-types within this category are defined narrowly. Although these categories are limited, hate speech may sometimes fall into one or more of these classifications.

One of the limits on speech as noted above is obscenity. This does not mean sexually offensive language is not protected under the Freedom of Speech, but as defined by the Court, speech “which deals with sex in a manner appealing to prurient interest,” may be limited (U.S., 1957). Obscenity, which may include, lewd and indecent speech, is not clearly defined, but the Court did eventually set up a test for this standard:

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that

the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (U.S., 1973, online).

This test appears to refer to the value of specific speech noted in *Chaplinsky* and whether that value outweighs the harm caused.

Another important sub-category to recognize that can be used to limit hate speech is, speech that incites violence or harm to others. Incitement is often closely associated with insulting or “fighting words” and “true threats”. In 1942, the Supreme Court held that the First Amendment does not protect “fighting words by which their very utterance inflict injury or tend to incite an immediate breach of the peace (U.S., 1942, p. 572). The test was “[...] what men of common intelligence would understand would be words likely to cause an average addressee to fight.” (U.S., 1942, p. 573) The Court gave an expansive definition of fighting words, including “[...] classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats (U.S., 1942, p. 573).” This was a landmark case in that the Court recognized that certain speech has no value other than to destroy peace and incite unrest.

However, the Supreme Court has not capitalized on this expanded definition of “fighting words”. Rather, the Court has since retracted, stating that “speech cannot be restricted simply because it is upsetting or arouses contempt (U.S., 2011, p. 12)”. And although the Court continues to cite “fighting words” as an example of speech that the government may regulate, it has not upheld a government action based on that doctrine, since *Chaplinsky*.

In another landmark case, the Court held that the First Amendment protects advocating the “[...] use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (U.S., 1969, p. 444)”. In this case, the Plaintiff, a member of the Ku Klux Klan, a white supremacist group, was arrested after he made a speech recommending overthrowing the government as well as derogatory remarks towards

Black and Jewish people. He was convicted under a Criminal Syndicalism statute that made illegal,

[...] advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism (U.S., 1969, p. 445).

Additionally, the First Amendment does not prevent the government from prohibiting some forms of "true" threats (U.S., 1969). True threats are different from "political hyperbole", in that, when the speaker "[...] means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals (U.S., 2003, p. 344)." The threat does not need to be carried out, but it "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur" (U.S., 2003, p. 360)." Intimidation falls within the true threats, and certain actions such as cross-burning may fall under intimidation, which is able to "create a pervasive fear in victims that they are a target of violence" (U.S., 2003, p. 360).

Although these limited categories of speech may protect individuals against hate speech, the Court has been hesitant to limit freedom of speech even when the content is hateful because that would "strike at the heart of the First Amendment". Most recently, in *Matal v. Tam*, the Court affirmed, "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate (U.S., 2017, p. 25)." The guarantee of the ability to freely express one's thoughts, regardless of how unpopular, is the basis of the First Amendment freedom of speech. Some argue that the only way to ensure and protect minorities is to vigorously protect such value. Any erosion of free speech could lead to erosion of other rights and even censorship by a majority of less popular points of views just because they are different. Even some of the most liberal sections of population fear the idea of limiting speech.

RELIGION AND SPEECH

Even though the Court has held that discrimination based in religion is not protected by the Constitution, discriminatory and racist speech may not be as easily regulated (Piggie Park; Masterpiece Cakeshop). The Court has reviewed several cases at the intersection of religion and speech, and how these two rights were used as a means to defend hate speech. In 1946, Arthur Terminello, a Catholic priest who regularly expressed his anti-Semitic views in newspapers and on the radio spoke at a Catholic organization in Chicago where he made remarks repeatedly attacking Jews, Communists, and liberals, while inciting the crowd. After fights broke out between audience members and protesters, Terminiello was arrested under a law barring “improper noise or diversion tending to a breach of the peace” (U.S., 1949, p. 2). In a 5-4 split, the Court overturned his conviction, writing,

Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *(citations omitted)* There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups (U.S., 1949, p. 4).

Although, the case was heard only a few years after Chaplinsky, the Court seemed to already be retracting the doctrine established there. Even now this argument stands as one of the primary reasons why the Court and many others hesitate to limit speech in any way.

Similarly in 1977, when the National Socialist Party of America, also known as Nazis, was declined a permit to speak in Chicago, it sought a permit for Skokie, a city where one-sixth of the town’s population was made up of families that had survived the Holocaust. County authorities attempted to block the Nazi march in court, citing a city ban on wearing Nazi uniforms and displaying swastikas. The 7th Circuit Court of Appeals

upheld a lower ruling that the Skokie ban was unconstitutional. The Supreme Court declined to hear the case, allowing the lower court's ruling to become law. After the verdict, the city of Chicago decided to grant the Nazis permits to march there rather than Skokie (U.S., 1977).

More recently, cases involving cross burning have been heard in the United States Supreme Court. Crosses stand as a religious symbol in some religions, and in the U.S. the burning of the cross is recognized as a hate symbol associated with supremacist groups such as the Ku Klux Klan (KAHN, 2009). In 1990, a St. Paul, Minn., teen burned a makeshift cross on the lawn of a Black couple. He was subsequently arrested and charged under the city's Bias-Motivated Crime Ordinance, which banned symbols that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (U.S., 1992, p. 377).

The Court unanimously held for the Plaintiff. In the majority opinion, Justice Antonin Scalia, held that the ordinance was excessively broad. citing the Terminiello case. Scalia wrote that "[...] displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics" (U.S., 1992, p. 391).

Eleven years later, the Court revisited the issue of cross-burning as a form of hate speech again after three people were arrested for violating a similar Virginia ban. In a 5-4 ruling written by Justice Sandra Day O'Connor, the Court held that while cross-burning may constitute illegal intimidation in some cases where intent is proven, a ban on the public burning of crosses would violate the First Amendment. "[A] state may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm," (U.S., 2003, p. 345).

The Court has upheld its ruling on Freedom of Speech even while recognizing that certain speech's "contribution to public discourse may be negligible" and "speech cannot be restricted simply because it is upsetting or arouses contempt" (U.S., 2011, p. 12). In 2006 members of the Kansas-based Westboro Baptist Church, demonstrated at the funeral of Lance Cpl. Matthew Snyder, who was killed in Iraq. Snyder's family sued Westboro and founder Reverent Fred Phelps for intentional infliction of emotional distress. In an 8-1 ruling, the Court upheld Westboro's right to picket. The opinion, written by Justice Roberts, states,

Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a 'special position in terms of First Amendment protection. (*Citations omitted*). [W]e have repeatedly referred to public streets as the archetype of a traditional public forum [...] If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable (U.S., 2011, p. 10).

Thus, the Court demonstrates its inclination towards self-restraining approach when opinions are expressed in public areas, clearly stating that life in society includes the possibility to have emotional distress even when discourses do not contribute to feelings such as compassion towards others, depending on the location speech was delivered.

SPEECH IN OTHER FORUMS

As noted above, speech in schools with minors may be more limited than for the public because of the setting, while Colleges and Universities across America deal with issues stemming from balancing of free speech and keeping these places safe learning environments for all students (KRISTOF, 2015). Most universities have some sort of "speech code" that limits the kind of speech happening on these campuses, nonetheless, as per *Tinker v. Des Moines*, "[...] students do not shed their constitutional rights at the schoolhouse gate (U.S., 1969, p. 506)." Public universities and colleges, much like schools must provide students with constitutional rights, however, is there some discourse that create hostile and exclusive environments? The Supreme Court has been unwilling to give an opinion on this issue yet and so, States and lower courts have addressed the issue on an ad hoc basis. Although, this paper main focus is the Supreme Court, it may be important to note a couple of district court cases that are relevant to this issue, including *DeJohn v. Temple University*, where the 3rd Circuit Court states, "[d]iscussion by adult students in a college classroom should not be restricted" (U.S., 2008, p. 28).

Similarly, the regulation of speech on the internet and more specifically, through social media has garnered much attention recently.

The rise of the internet in the 90s and early 2000s led the government to issue the Communications Decency Act to regulate harmful material on the Internet available to minors (US, 1997). However, in *Reno v. ACLU* the Court struck the anti-indecency provisions of the act, stating that:

(1) provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications device to persons under age 18, or sending patently offensive communications through use of interactive computer service to persons under age 18, were content-based blanket restrictions on speech; (2) challenged provisions were facially overbroad in violation of the First Amendment (U.S., 1997, p. 862).

Regulation of speech on private forums is difficult for the government to partake in. However, if private companies take the initiative to restrict or censor speech, the First Amendment protection is not given to citizens as it only applies to government agencies. Some argue that this protection should be given to those on private forums as well as social media becomes one of the biggest platforms of public discourse (HUDSON JUNIOR, 2019).

CONCLUSION

The U.S. Supreme Court has refused to prohibit hate speech except for in very limited circumstances (incitement to violence, true threats, fighting words, and obscenity). Many proponents of free speech believe that democracy is epitomized when freedom of speech and expression is unrestricted. When people feel comfortable enough to express themselves without fear of censorship or retribution, they are truly free and represented. However, imposing restrictions of any kind of speech has the potential of creating a precedent limiting other types of unpopular speech depending on the opinion of those in power.

On the other hand, advocates of banning hate speech argue there are some kinds of speech that is completely unnecessary in the freest of societies. Some kinds of speech are so hateful, that they bring no value to those who hear it, just harm. In the United States, the law stands to protect the freedom of people while also protecting them from harm. But looking for a perfect balance is a difficult task often left to the Court.

And the Court has dealt with it on an ad hoc basis, changing its stance, as necessary. There may never be a perfect answer to how that balance should be struck. Yet, it is imperative to continue to reflect on ways to create a peaceful society where differences are not only allowed, but respected.

U.S. caselaw seems to use imminence of a targeted threat as one of the most important thresholds to decide whether a restriction must be imposed on a given statement or act. Although, more recently the Court has moved away from this doctrine, if you threaten violence against a specific target, you might find your right to speech restricted. In the same light, religious practices and speech that have hateful content may not be regulated, however, if the victim can prove targeted intent to intimidate, the Court will not intervene in a restriction.

Repeatedly, the Court has iterated that speech that allows for unfretted hate in public places with the intent to harm holds minimum social value. Expressions of hate must be taken seriously by Legislators and should not be allowed under the veil of liberties conquered largely for the purposes of strengthening human rights. Thus, regulation of political and ideological speech should continue to be scrutinized at the highest level, while unprotected speech should be left to the people to regulate with the Court only interfering when it sees substantial censorship.

Even though political and ideological debate is essential to all democracies, allowing hate speech to hide behind these ideals, as well as religious freedom, would be detrimental to the very minorities we are trying to protect. History has demonstrated that hate speech predicts physical violence, especially to groups more exposed to this type of attacks. Minorities tend to have less political and financial leverage to protect themselves against organized groups that use social media and public gatherings to spread messages with high potential to increase intolerance. There is ²evidence demonstrating that facism and other horrific moviments started as a calling for order, respect for traditions and nation's best interest.

Repeated hate speech generates a dehumanization effect which ultimately tries to justify the harm and distress caused to other persons, which is unacceptable. Although the Legislative branch is the most appropriate place to conduct these type of discussion, if legislators fail to promptly comply to such important duty, Courts must be ready to

provide adequate protection in order to enforce fundamental liberties and rights, that includes adequate protection from hate speech.

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