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The Making and the Unmaking of Free Speech in Howard *Zinn's Declarations of Independence : Cross Examining AmericanIdeology* (1990), and David K. Shipler's *Freedom of Speech, Mightier than the Sword* (2015)

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Dedication

To my father, mother, and siblings.

Abstract

Based on David K. Shipler's *Freedom of Speech Mightier than the Sword* (2016) and Howard Zinn's *Declarations of Independence: Cross-Examining American Ideology* (1990). David K. Shipler provides a timely and comprehensive analysis of the state of free speech in America, while Howard Zinn offers a critical perspective on the evolution of American democracy, highlighting the struggles for freedom of speech and other fundamental rights. This dissertation studies some central themes including the understanding of freedom of speech in America and the space hate speech has occupied since 1914. It is concerned with the study of the 'marketplace of ideas,' which is considered one of the pillars of freedom of speech in America and how hate speech has affected and infected this 'marketplace.' Our main interest is to examine the theory of the 'marketplace of ideas' under its main founders and originators who influenced heavily Americans' exercise of their basic right, on the one hand, and the U.S Supreme Court's interpretations, on the other. For that end, we rely on John Stuart Mill's ideas on freedom of speech and free thought elaborated in his *On Liberty*. In this essay, he defends the right to hear and creates the environment for a marketplace in which all ideas are welcomed to compete in search for the truth. In addition, we refer to the ideas explored by Alexander Meiklejohn on the First Amendment and the link he draws between freedom of speech and democracy. In his *Freedom of Speech and its Relation to Self-governance* (1948), Meiklejohn explains how freedom of speech is a necessity to assure self-governance. Therefore, this dissertation deals with the heated debate on freedom of speech and its tested limits. We conclude that because of the First Amendment, the Supreme Court has no choice but to rule in favor of most cases involving hate speech. The two well-known authors who authored crucial works to uphold the freedom to free speech are David Shipler and Howard Zinn. They make the case for the significance of preserving this essential human right and maintain democratic principles.

Contents

I. Introduction

According to Van Mill, "Every society places some limits on the exercise of speech because it always takes place within a context of competing values."[1] Understanding the making and unmaking of freedom of speech in the United States is critical. In recent years, researchers and critics have become increasingly interested in this topic, with the goal of deciphering this broad idea and narrowing it down to what the true meaning of freedom of expression in the United States really is. Freedom of speech has a long history, going back to England in the 1700s; Cato's Letters are among the foundations that established a legal basis for freedom of expression. These letters had an impact in the United States of America since European ideas and intellectuals influenced the Bill of Rights.[2]

John Stuart Mill, a strong believer in freedom of speech, argues: "Speaking generally, whether completely responsible to the people or not, the government will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public"[3]. He describes the force that repudiates this right as "illegitimate" and "noxious"[4]. Freedom of expression is a basic right in the United States built around the idea of the "Marketplace of Ideas" which adopts its meaning from the free market of goods. This is an attempt to transfer the "market competition" into a theory of free speech, which Mill claims is the best way to separate falsehoods from facts.[5]

Literature Review

The concept of the "marketplace of ideas" has piqued the interest of theorists, journalists and writers alike. The study of this concept has been made easier thanks to the contributions of commentators on the subject. Some critics were more concerned with the historical context of freedom of speech, while others were more interested in the philosophical foundations that contributed to freedom of speech, as we understand it today.

Professor Rodney A. Smolla,[6] examines the decisions of Oliver Wendell Holmes and Louis Brandeis, two of the most influential justices in the United States' Supreme Court, whose opinions have shaped freedom of speech. While Holmes has introduced the marketplace theory to the court, Brandies has defended freedom of expression. One of the most essential justifications for freedom of expression is the "marketplace of ideas." This was first proposed by Mill in *On Liberty* and advanced by Justice Holmes in the Supreme Court; it has sparked the interest of a number of critics who have produced insightful analyses of the marketplace. Robert Weissberg (2008)[7] published a critical review on the marketplace of ideas. He talks about the real marketplace of ideas, which is made up of illogic and poor evidence. In addition, Ruth McGaffey, an Assistant Professor,[8] offers a critical perspective on the marketplace of ideas and evaluates the theoretical grounds that support this approach. Zoe Sherman (2019)[9]on the other hand, questions the analogy between the marketplace of ideas and the marketplaceof goods, all while interpreting the First Amendment.

Hate speech, on the other hand, has its detractors, particularly with the resurgence of the term in the media today. Many academics are attempting to comprehend this concept despite the fact that the United States of America does not recognize or refer to such speech as hate speech. Scholars such as Joseph J. Hemmer Jr. (2009)[10] evaluate both sides of the debate between egalitarians who believe hate speech is detrimental and libertarians who believe that prohibiting hate speech is unconstitutional.

Critics have analyzed the two works on which we will build and analyze our study because they both contribute to the understanding of the making and unmaking of freedom of speech in the United States. The analysis of freedom of speech has helped many scholars in discerning the fine lines of freedom of expression and has helped us to hear cases arising from the perspective of those who have been directly affected by government policies and court decisions. Mark A. Graber (1992)[11] examines Howard Zinn's book and presents a critical

evaluation of *Declarations of Independence: Cross Examining American Ideology*. It makes a point about the importance of examining American ideology in the context of foreign policy. He also criticizes the standpoint of Zinn for holding beliefs that are opposed to his own. Former Los Angeles Times critic David L. Ulin (2015)[12] commented on the book under consideration, *Freedom of Speech Mightier than the Sword*, pointing out the perspective of David K. Shilper's on free speech when he considers himself a "free speech absolutist"[13]. He also addresses the case studies offered in the book while defending Shipler's point of view.

David Shipler's *Freedoms of Speech Mightier than the Sword (2015*) and Howard Zinn's *Declarations of Independence, Cross Examining American Ideology (1990)* have attracted many critics. Yet, it seems that most criticism disregards some aspects. In fact, Mark Graber stresses the idea of freedom of speech in the realm of foreign policy, putting aside the historical aspects that constitute freedom of expression. In addition, David Ulin, in his review "Shipler's 'Freedom of Speech' Reflects Our Fractured Times" focuses on the general review of *Freedom of Speech Mightier than the Sword,* neglecting the philosophical and thematic basis that makes the issue studied in the work most intriguing. In fact, many critics have overlooked some historical, judicial and cultural dimensions of both works.

Issue and Working Hypotheses

From our review of literature, one can notice that both *Freedom of Speech Mightier than the Sword* and *Declaration of Independence: Cross Examining American Ideology* have triggered the interest of a fair share of critics. The subjects and issues both Shipler and Zinn have risen are at the center of interest of many scholars and researchers in the academic field. Yet, the critics have shed light more on the personal contributions of the respected writers to the notion of freedom of speech. In this sense, the scholars seem to have focused more on Shipler's position with regard to freedom of speech and to the case studies he presented in the book. *Declarations of Independence: Cross Examining American Ideology* also appears to

have attracted many critics who approached the work in terms of Zinn's depiction ofthe American ideologies in a critical way and his refusal to accept the counter arguments of others. Previous works have dealt with the subject of free speech from different angles. However, as far as our research goes, no study has dealt with the work of David K. Shipler's *Freedom of Speech Mightier than the Sword* and Howard Zinn's: *Declaration of Independence Cross-examining American Ideology*, in relation to the making and the unmaking of freedom of speech.

Therefore, this is an opportunity to study the concept of free speech under the perspective of the two renowned writers, to compare them and to explore how they define free speech in America. We argue that one of the prominent justifications for freedom of speech, that is the "marketplace of ideas", is still complicated and controversial in America. Justices still find difficulties in drawing the boundaries of free speech when interpreting the First Amendment, especially when dealing with hate speech cases. The latter are taking a worrying surge in America with an increased protection of this kind of speech. Thereafter, the topic needs to be treated with accuracy and precision.

Methodological Outline

Our work begins with an introduction that states our main purpose. It includes a review of some criticism on the concept of the marketplace of ideas and hate speech as well as a review of some criticism on David K. Shipler's *Freedom of Speech Mightier than the Sword*, and Howard Zinn's *Declarations of Independence: Cross Examining American Ideology*. It also contains the issue and the working hypotheses. The methods and materials section provides a short summary of the main concepts and theories of the marketplace of ideas, freedom of thought developed by Mill in *On Liberty* and Alexander Meiklejohn's ideas on freedom of speech which he originated in *Freedom of Speech and its Relation to Self-Governance.* In the results section, we will give our findings. The discussion consists of two

chapters. In the first chapter, we will delve into the U.S Supreme Court, its history with cases arising from freedom of speech, and the landmark cases that shaped freedom of expression in America. Then we will tackle the philosophical foundation of free speech with the theories developed by Mill and Meiklejohn, which include freedom of speech and the right to hear, and the importance of this natural right in self-governance according to Meiklejohn. In the second chapter, we will study Shipler's *Freedom of Speech Mightier than the Sword* and Zinn's *Declarations of Independence; Cross Examining American Ideology* to examine how they relate to the theory under scrutiny. Our dissertation ends with a general conclusion that sums up the main issue tackled in this piece of research.

Endnotes

[1] David van Mill, *Free Speech: A Philosophical Introduction* (New York: Routledge, 2017), 41.

[2] John Trenchard and Thomas Gordon, Cato's Letters: or, Essays *On Liberty*, Civil and Religious, and Other Important Subjects (London: J. Wilkie, 1755), 3.

[3] Mill, John Stuart. *On Liberty*. New York: H.M. Caldwell Co., 1880, 18.

[4] ibid.13-15.

[5] ibid. p.42

[6] Rodney A. Smolla, "Speech Overview," Freedom Forum Institute, accessed September 11, 2021, https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/speech-overview/.

[7] Weissberg, Robert. "Bringing Tolerance by Criminalizing Hate." In Criminal Justice and the Placement of Abused Children, edited by Susanna S. Epp and Richard R. Redding, 45-55. New York: Routledge, 2018. http://www.taylorfrancis.com/chapters/mono/10.4324/9781315126210-5/bringing-tolerance-criminalizing-hate-robert-weissberg.

[8] McGaffey, Timothy. "*A Critical Look at the Marketplace of Ideas*." Communication Quarterly 20, no. 4 (1972): 25-33. Accessed September 11, 2021. https://www.tandfonline.com/doi/abs/10.1080/03634527209377933.

[9] Sherman, Stuart. "*Interrogating the Analogy of the Marketplace of Ideas, Interpreting the First Amendment*." Forum for Social Economics 48, no. 2 (2019): 137-146. https://ideas.repec.org/a/taf/fosoec/v48y2019i2p137-146.html.

[10] Hemmer, Joseph Jr. " *Hate Speech, the Egalitarian/Libertarian Dilemma*" The Howard Journal of Communications 5, no. 4 (1995): 307-330.

[11] Zinn, Mark. "Graber (Review Date Spring 1992)." *In Contemporary Literary Criticism,* edited by Jeffrey W. Hunter, 199. Detroit: Gale, 2005. Accessed September 11, 2021. https://www.latimes.com/books/jacketcopy/la-ca-jc-david-shipler-20150503-story.html?_amp=true.

[12] Ulin, David L. "Review: Shipler's '*Freedom of Speech' Reflects Our Fractured Time*." Los Angeles Times, May 3, 2015. https://www.latimes.com/books/jacketcopy/la-ca-jc-david-shipler-20150503-story.html.

[13] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 17.

II. Methods and Materials

To fulfill our established goal, our approach will rely on the theory of freedom speech developed by John Stuart Mill in *On Liberty*. We also intend to make use of another philosophical canon written by Alexander Meiklejohn entitled *Free Speech and its Relation to Self-government*. It defends the necessity to protect absolute freedom of speech, especially concerning political speech. With this study, the two critical books of David K. Shipler and Howard Zinn will be analyzed to explore the American right to free speech and to examine whether hate speech is tolerated in the marketplace of ideas.

Mill makes the case that the growth of individuals and the advancement of society depends on the freedom of speech. According to Mill, the advancement of knowledge and critical thought is threatened by the suppression of viewpoints, even those that are deemed damaging or objectionable. In support of his claim, Mill points out that individuals who seek to suppress a thought may really be right and that they are not omniscient. Mill highlights the risk of repressing ideas just because people in positions of authority disagree with them. He emphasizes that there is a chance that an idea might be true even if it is unpopular or contradicts the dominant school of thought. Those in positions of power who try to silence it cannot claim to be infallible. Thus, they should not have the authority to do so:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[1]

With the chance for further learning and the pursuit of truth, Mill's argument emphasizes the value of allowing for free discussion and divergent viewpoints: "the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible."[2]

While Mill emphasizes the value of individual liberty in *On Liberty* he also notes the possible harm that it could inflict on others. He contends that as long as people do not hurt

other people, they should be allowed to act in any way they want. This freedom must be weighed against the potential to hurt other people and should not be absolute. In other words, one's freedom should not violate another person's rights. Hence, it is crucial to establish a balance between individual freedom and social responsibility, where personal freedom is constrained by the duty to defend the rights and well-being of others:

> an act injurious to others, which ought to be a subject of reprobation, and social stigma, even when it is not deemed expedient to superadd legal punishment. Yet the current ideas of liberty, which bend so easily to real infringements of the freedom of the individual in things which concern only himself, would repel the attempt to put any restraint upon his inclination.[3]

Societies during the age of enlightenment have changed shaping the rule into a democracy, which meant that the people or the mass would rule thanks to a democratic process of elections. However, even with such forms of rule, tyranny can also be present, and freedom can be restricted. Mill was concerned with the legislatively enacted restrictions of liberty,[4] through "legal penalties, or the moral coercion of public opinion".[5] Informal mechanisms of social pressure could, in mass democratic societies, be all-controlling. Mill worried that the exercise of such powers would lead to stifling conformism in thought, character and action. He originated the concept of the marketplace of ideas when arguing against censorship and in favor of the free flow of ideas, asserting that no idea by itself embodies either the truth or its antithesis. He writes:

> The object of this Essay is to assert one very simple principle […] That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is selfprotection.[6]

Meiklejohn takes a firm stance on Freedom of Speech, while rejecting any constraints that may be placed on speech. He advocates the right to political speech with his libertarian viewpoint, which is considered a foundation of a representative democracy:

> We Americans think of ourselves as politically free… And if other men, within the jurisdiction of our laws, are denied their right to

> political freedom, we will, in the same spirit, rise to their defense. Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.[7]

The notion of a marketplace of ideas derives its meaning from the real free market of goods that originated in 1776 by Adam Smith. Smith founded the free market, known as "the invisible hand of the free market", which limited the government's intervention in the economy and opened the market to competition[8]. He argues that giving freedom to people to produce and exchange goods on a free trade basis will promote natural self-interest and prosperity. Smith describes this in these words:

> All [government-created] systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man,as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his ownway.[9]

Consequently, the idea of a marketplace in which goods are in a free trade atmosphere is the origin of the marketplace of ideas. The latter addresses that ideas must be free to compete in order to find the truth. The Founding Fathers were influenced in their conceptualization of the American democracy by the Europeans, and the "Great Charter" is an example of how the American Constitution and the Bill of Rights were originated. The provision of the Magna Carta in clause "1" seems similar to the First Amendment: "The English church shall be free and shall have her rights undiminished, and her liberties unimpaired".[10]

Magna Carta was a "potent symbol of liberty, and the natural rights of man against an oppressive, or unjust government".[11] Therefore, this document has established the notion of the rule of law and was associated with British liberty and freedom. Another major document that has a substantial influence on the First Amendment is "Cato's Letters". These extraordinary 149 essays were written by John Trenchard and Thomas Gardon. This work is described by many commentators as "Synthetic genius"[11]. It considers freedom of speech a priority:

> Whigs think all liberty to depend upon freedom of speech, and freedom of writing ... there is often no other way left to be heard by their superiors, nor to apprize their countrymen of designs and conspiracies against their safety.[12]

Accordingly, Thomas Paine manifests the importance of liberty and the necessity to protect individual liberties when he wrote "The American constitutions were to liberty what a grammar is to language: they define its parts of speech and practically construct them into syntax."[13] Cato's Letters is a very valuable document that still resonates today in the most appropriate definition of liberty and its scope.

According to Trenchard and Gordon, freedom of speech is a "Sacred privilege ... so essential to free government" that it would lead to truth, and with it, all good things: peace, prosperity, the widespread ownership of property, and a government as good as its people.[14] The marketplace of ideas is a cornerstone concept that paved the way to freedom of expression. This notion evolved in the 17th century, and it is still flourishing even today. However, the scope of its application seems to create a problematic debate.

Materials

This part of our research includes a summary of the two works under study.

Summary of *Freedom of Speech, Mightier Than the Sword*

Freedom of Speech Mightier than the Sword is a five-part book which tackles different principles of Freedom of Expression.[15] Shipler presents to the reader case studies that he collected from his interviews and researches with a number of people who were at the center of the issue of freedom of speech. The first chapter of the book deals with the censorship of some books in some American schools. This happened due to the discontent of some parents with the content of the books and the ideas they convey to their children. This form of censorship is also regarded as a restriction to freedom of expression. This "Fear of reading"[16] as Shipler calls it, has raised so many concerns in the United States, as parents interfere more in the school's curriculum to keep their children from being exposed to unorthodox views or

adult content. The second chapter of the book entitled "Secrets" concerns the whistleblowers who leak information to the media concerning the U.S agencies surveillance acts. Thomas Tamm and Thomas Drake are among the stories that Shipler explored in his book. Describing their journey in the process of leaking information to the Newspaperand the aftermath of such acts in the American judicial and political system.

The fourth chapter of the book is concerned with the racist statements and bigotry. David Masters' statement about the former U.S president Barrack Obama has brought the restrictions on free speech back to the table of discussion, as Shipler puts it "the landscape of free speech is vast in America, but there are boundaries"[17]. The fourth chapter of Shipler's work highlights the amount of speech one may have in relation to the amount of money one possesses. Shipler argues that the big bosses who run big business and own many assets can buy and direct the unfolding of information because with their money they can buy "a voice". Finally, the fifth chapter of the book, he discusses the censorship that occurs in theatres. This form of restriction on Freedom of Expression is also recurrent since the censors stop the funding of the plays as a tool to prevent the plays from being performed in live theatres. However, as Shipler puts it "Wherever there are censors, there are writers who learn how to evade them".[18]

Summary of *Declarations of Independence Cross Examining American Ideology*

Howard Zinn captivates the reader's attention through a critical view on the U.S ideologies and politics. He starts by referring to the famous work *The Prince* by Machiavelli; Zinn argues that the strategies used by the U.S government are derived from Machiavelli's work, especially when it comes to its foreign policy. Then, the writer detects aspects of violence and links them to human nature and how history is "Used and Abused" by some historians by applying a selective approach to history especially in schools. Furthermore, the writer explores topics like just wars and unjust wars, law and justice and the American class

system, before expressing his "Second thoughts on the first amendment", by arguing that the First Amendment does not reflect in reality its content, and that "prior restraint" does exist, which means that free speech in America is not absolute. Next, he identifies some of the justifications used to restrict speech like: National security, police powers, and the control of information. Zinn is very critical when it comes to the government's interferencein the free speech process, through the exercise of censorship.

The Supreme Court's importance in interpreting the First Amendment is shown by the decisions that we examined in our dissertation about free speech and hate speech in the American marketplace of ideas. This is especially clear in the two books under consideration, *Freedom of Speech Mightier than the Sword* by Shipler and *Declaration of Independence: Cross-Examining American Ideology* by Howard Zinn, each of which emphasizes the crucial role the Supreme Court plays in cases involving free speech and hate speech. The cases that we are going to study serve as an appropriate illustration of how the Supreme Court's interpretation of the First Amendment has a significant influence on the development of American law and jurisprudence regarding free speech and hate speech.

To comprehend the current understanding and interpretation of the right to free speech in America, it is crucial to study the writings of Shipler and Zinn. The two publications evaluate the cases that have influenced the notion of free speech and its constraints in American culture, especially in relation to hate speech. We may understand the Supreme Court's philosophy on free speech and how it has changed over time by looking into these cases. The decisions discussed in these books highlight the Supreme Court's crucial role in defining the parameters of free expression and the fine line it must maintain when upholding people's rights while keeping the peace. In order to get a thorough grasp of how the freedom of expression is perceived and implemented in the United States, it is crucial to analyze these works.

Endnotes

[1] Mill, John Stuart. *On Liberty*. New York: H.M. Caldwell Co., 1880, 18.

[2] Mill, John Stuart. *On Liberty*. New York: H.M. Caldwell Co., 1880, 19.

[3] ibid. 15.

[4] ibid. 13.

[5] ibid. 13.

[6] ibid. 13.

[7] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Row, 1948). 3.

[8] "Adam Smith's Wisdom". https://www.mercatus.org/expert_commentary/adam-smiths-wisdom-wealth-of-nations-quotes.

[9] Hayes, *"Adam Smith and The Wealth of Nations*". Https://www.investopedia.com/updates/adam-smith-wealth-of-nations/

[10] Trenchard, Cato's Letters : *Essays On Liberty, Civil and Religious, and other importantsubjects.*

[11] Trenchard, John and Gordon, Thomas. *"Cato's Letters No. 15: The Liberty of Speaking and Writing, The Free-Born Subject's Inheritance and Privilege*" The Independent Whig (1720), edited by Robert Molesworth. London: J. Morphew, 1721. p. 69-71.

[12] ibid. p. 69-71.

[13] Paine, Thomas. "*The Rights of Man*." In The Thomas Paine Reader, edited by Michael Foot and Isaac Kramnick, 280-281. New York: Penguin Books, 1987.

[14] Trenchard, John, and Thomas Gordon. Cato's Letters: Essays *On Liberty*, Civil and Religious, and Other Important Subjects. Edited by Ronald Hamowy, Liberty Fund, 1995.

[15] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 160.

[16] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 56.

[17] ibid. 148.

[18] ibid. 253.

III. Results

In this section, we will discuss the findings we have reached, after perusing David K. Shipler's *Freedom of Speech, Mightier than the Sword* and Howard Zinn's *Declarations of Independence; Cross Examining American Ideology*. We have relied on John Stuart Mill's theory of Freedom of Speech, and the Marketplace of Ideas, as well as Alexander Meiklejohn's ideas on the First Amendment and Political Speech and its relation to Self-government. Our analysis of the two works revealed that they both depict stories in which Freedom of Expression is curtailed. They look at lesser-known forms of restriction as well as the aftermath of the restrictions imposed on the lives of those who risked all and claimed their rights to seek the truth in the Marketplace of Ideas. Some experts, however, believe that restrictions on Freedom of Speech are occasionally appropriate since Hate Speech is a threat to the democratic system and people's civil liberties.

The analysis of the two books has been preceded by an overview of how the Supreme Court of the United States deals with cases pertaining to the exercise of free speech. Indeed, the Supreme Court has played a significant role in interpreting the Constitution in matters involving Freedom of Speech. Since the turn of the century, it has had increasing ability to rule on the constitutionality of actions and decisions enacted by the other two branches of government as well as to determine what speech is protected and what speech is not. Ultimately, the Marketplace of Ideas, as envisioned in Mill's *On Liberty*, is a necessary component of a free democracy's survival since the United States of America was built on the notion of liberty. Moreover, Alexander Meiklejohn's work *Freedom of Speech and its Relation to Self-government*, provides a theoretical framework for the consideration of the cases presented in Shipler's and Zinn's works since it emphasizes the value of unrestricted discussion in a democratic society.

IV. Discussion

Chapter One: John Stuart Mill, Alexander Meiklejohn and the U.S Supreme Court's Interpretation of Cases Related to Freedom of Speech

The Supreme Court of the United States of America is the highest court in the country. Article III of the United States' Constitution established the Court, stating that its judicial competence extends to all cases arising under federal law and treaties.[1] It is responsible for interpreting freedom of expression legislation and cases, among other things. This is due to the fact that it is the highest court of the United States, with judicial authority over all disputes arising under federal law and treaties, with jurisdiction over all cases originating under federal law.

For more than a century, the Supreme Court lacked the authority to evaluate laws and determine whether they are constitutional. The executive and legislative branches heldthe reins of power. This means that the two branches of government may easily pass legislation without being called out on the constitutionality of the laws and the orders theyenacted. Nevertheless, this all changed with the appointment of Justice Marshall to the Supreme Court. His influence had a major effect on the statute of the court and the power it gained as a result of the rigorous judicial review. In Marshall's words, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[1] Shane Mountjoy refers to the power gained by the supreme court in his book *Great Supreme Court Decisions,* where he explains the way in which the court had a paucity of power especially in cases arising from freedom of speech. He also points out the importance of the case of *Marbury v. Madison* in upsetting the balance and in establishing supreme court power according to Mountjoy:

> The Court did lack stature, as even Marshall recognized, and because the political climate threatened the independence of the Judicial Branch, Marshall took care to avoid a direct confrontation with the

> Executive and Legislative branches in the Marbury case. In this decision, however, the Court also asserted the power of judicial review for the first time.[2]

The Supreme Court has had a significant impact on how the Constitution and the First Amendment are interpreted. They have developed the ability to interpret and evaluate whether a law is constitutional or not as a result of this. They also have the authority to determine what constitutes Free Speech and what does not. According to David Mountjoy, judicial review is:

> The power of the Supreme Court to examine the actions of another branch of government. Such power means that the Supreme Court can look at acts of legislation passed by the U.S. House and Senate or actions of the president or the Executive Branch and determine whether they are constitutional. If the Court decides that an act of Congress or anexecutive action is unconstitutional, the law or action is unacceptable.[3]

The First Amendment protects the right of citizens to Free Expression and bans the government from interfering. This privilege is praised as the foundation of a democratic society. In comparison to the United States, the exercise of Freedom of Expression in other developed countries is restricted. Under the First Amendment, the United States provides a broader breadth of protection. In other words, it does not limit or even acknowledge the legitimacy of limiting Hate Speech. The Supreme Court and state courts read the constitution in such a way that expression is protected to such an extent. It approaches the problem of free speech on a case-by-case basis, rather than applying a single clause to all cases.

When it comes to disputes involving Freedom of Speech in the United States, the courts do not take a uniform approach. When an 18-year-old student in Alaska held up the sign "Bong Hits 4 Jesus" in protest, the case of Morse v. Frederick[4] served as a crucial example of how the court ruled on the question of Free Expression. Frederick was expelled from school when his actions were found to be in violation of the rules of the school. The rule of the Ninth Circuit court of appeals clashed with the Supreme Court's rule in this case. While the first

court recognized Frederick's right to Free Speech, the highest court ruled that the school has the authority to limit this type of speech to protect students from the dangers of drug use.

In another landmark case, in Schenck v. United States 1919, the Supreme Court unanimously upheld a conviction under the Espionage Act for distributing flyers opposed to the draft. It is in this case that Justice Holmes argued: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic"[5]. "The shouting fire" analogy used by Justice Oliver Holmes is the illustration of harmful speech when it is intended to cause panic. General attorney Mitchell Palmer puts it this way:

> A man may say what he will, as has often been said, but if he cries fire in crowded theatre, with the intent to injure the people their assembled, certainly his right of free speech does not protect him against the punishment that is his just desert.[6]

In a 1919 opinion, Justice O.W. Holmes of the Supreme Court ruled that the pacifist leaflets of a socialist leader created a "clear and present danger"[7]to national security and affirmed his conviction under the Espionage Act.1234. Holmes argued in Schenck, that the cases interpreted by the Supreme Court does not interpret the First Amendment literally, so not all speech is protected. The "clear and present danger" test is therefore decisive when it comes to special circumstances and a general rule cannot be applied in this case. The latter involving Schenk v. United States was a groundbreaking case, wherein Justice Holmes introduced the American public to the limits of the First Amendment. Through the "Present danger test", speech became restricted to time, place and circumstances:

> The question in every case is whether the words used are 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. It is a question of proximity and degree. [8]

Child pornography is one of the types of expression that has minimal legal protection in the United States. And because the value of such speech is seen as low, it is not protected by the law. When it comes to sexual material involving children, the court considers it

unprotected speech. The court aims at safeguarding the public and social values, as a justification for such judgments. When analyzing the censoring of books that contain sexual material, using Shipler's *Freedom of Speech Mightier than the Sword*, one can deduce that parents, who object and challenge the books because of this issue, rest on the claim that it is in their best interests to protect their children and preserve their social and religious values.

In cases involving freedom of speech judges tend to weigh in on a variety of factors. The Supreme Court does not apply a single concept to interpret the Constitution; instead, it considers each case individually, weighing what is more important: one's right to express one's opinions and ideas in the marketplace of ideas, or the public interest in preventing imminent danger. The role of the courts is critical and challenging at the same time. One of the major judges who shaped the American supreme court, Justice Marshall, commented on the constitution's interpretation and expansion, stating that "we mustnever forget that it is a constitution we are expounding ... a constitution intended toendure for ages to come, and consequently, to be adapted to the various crises of human affairs."[9]

The scope of freedom of expression extends to all forms of expression. It includes all known forms of expression: books, films, and performances, written and oral expression, and expressions by action as well as by words. "A procession, a silent vigil, burning a flag and erecting a sculpture" among others all fall within the realm of expression to which the principle of free speech implies.[10] Draft burning is a form of symbolic expression, but determining whether it falls within the scope of free speech has proven to be a difficult task for the courts. David O'Brien and his case serve as a case study for how courts interpret symbolic communication that sends political vibes and communicates political beliefs opposing the Vietnam War. The Supreme Court stated that not all sorts of expression are protected, and in the instance of O'Brien, he was urging people to accept his position on the war. His actions were not protected under the First Amendment. The Supreme Court

ruled as follows:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and' non speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.[11]

As we have seen, the Supreme Court distinguished between speech and conduct and did not apply the same standard on both. Many critics believe that the Supreme Court's decision in O'Brien's case severely limits freedom of expression. Alexander Meiklejohn has long championed the right to free political speech as a means of promoting self-government in a democratic society. In his view, opposing or expressing dissatisfaction with government policy is part of what free speech is all about:

> the effect of the "clear and present danger" theory of the freedom of speech, of late adopted by the Supreme Court, has been to merge the First Amendment into the Fifth. Under that interpretation, the freedom in question has become alienable rather than unalienable, subject to restriction rather than safe from restriction, a matter of circumstances rather than a matter of principle, relative rather than absolute.[12]

The Supreme Court's "clear and present danger" doctrine of the right to free speech is being criticized by Alexander Meiklejohn. He contends that by making free speech dependent on the setting in which it is used, this argument has undermined the First Amendment's guarantee of the inalienable right to free expression: "Now, the basic error which we shall find in the "clear and present danger" principle, as it seeks to separate speech which will be endured from speech which will not be endured."[13] Meiklejohn believes that this is a risky approach since it gives the government the power to censor free expression depending on the situation rather than on principle. According to him, the right to free expression should be regarded as absolute and should only ever be curtailed under extremely specific conditions.

Meiklejohn's position underscores the conflict between the need for social order and individual freedom and poses significant queries about how the two might be balanced in a democratic society.

Prior to 1914, the Supreme Court played a minor function. During this time, cases were brought before state courts. "But challenges to the Espionage and Sedition Acts of World War I did reach the Court, putting the justices on a collision course with the First Amendment. For the first time since ratification of the Bill of Rights in 1791, the Court was asked to rule that Congress had violated the constitutional ban on laws that abridged freedom of speech, or of the press."[14]

During World War I, the Supreme Court gained greater authority to judge on disputes involving Freedom of Speech. The Supreme Court declared in Schneck v. United States, one of the most important cases in American history, that speech has limits, [15] especially where there is a "clear and present danger". This significant test, which was presented for the first time in the American Supreme Court, places clear boundaries on speech and provides the Supreme Court more ability to determine whenspeech is protected and when it is not. Justice Oliver Wendell Holmes in the case of Schenck v. United States (1919) argued that the First Amendment protects even speech that is critical of the government or the war effort: "The problem of the limits of freedom of speech in war time is no academic question. On the one side, thoughtful men and journals are asking how scores of citizens can be imprisoned under this constitution only for their disapproval of the war as irreligious, unwise, or unjust".[16]

From the landmark cases that were discussed in this, one can deduce that the interpretation of the constitution and the Bill of Rights in the United States varies from one judge to another and depends on the justices that hear the case. In addition, justices treat them in a case-by-case basis. For instance, Justice Black and Justice Douglas advocated for the absolute position.[17] They interpreted the First Amendment literally to mean that it

prohibited enacting any law that abridge freedom of speech. [18] Justice Black wrote:

> the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.[19]

In addition, Weinberger asserted that "absolute freedom of speech is the only basis upon which the Government can stand and remain free."[20] The First Amendment's interpretation is clearly not literal, as can be deduced. In this regard, judges have differing opinions. The First Amendment cannot be interpreted to mean absolute freedom of expression. Many critics argue that restrictions are necessary to ensure the democratic implementation of this right, especially where danger prevails. Justice Brandies asserts:

> Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth - of expansion and adaptation to new conditions. Growth implies changes, political, economic and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things.[21]

When courts claim that the American constitution is not fixed, it opens the door to alternative interpretations, which may have an impact on the lives of many Americans. Commentators believe that the constitution should be updated to reflect the times we live in. Others appear to take a hard stance on how the constitution is seen, claiming that the framers wrote it in such a flawless way that it must be honored and interpreted precisely. The assumption that the constitution is not a fixed set of ideas that may be construed differently gives the Supreme Court significant discretion to rule on matters involving free speech and hence to establish laws that limit this right. As a result of this notion, laws such as the Espionage Act were enacted. The abuses of speech in times of war or conflict demonstrate how fragile this right is in the American reality.

International Human Rights accords also acknowledge the limits that must be placed on Freedom of Expression. Article 10 (2) of the Human Rights Acts acknowledges the need for restrictions in order to defend higher ideals in this regard:

> 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 ina 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".[22]

Even though many commentators and researchers acknowledge that freedom of speech has limitations, it is difficult to identify them and draw the line between what should and should not be protected. Freedom of speech and of the press which are protected from abridgment by Congress are among the fundamental personal rights and liberties [23] in America. The framers of the Bill of Rights prioritized this freedom because they recognized its value and the danger of limiting it by government intervention. At a minimum, the freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity.[24]

The impact of the Supreme Court's judges on freedom of expression disputes can be felt as early as the twenty-first century, when the court extended the right to examine the constitution and holds new positions in response to changing circumstances. In this case, "The Constitution," Hughes once said, "is what the judges say it is," echoing the view of Oliver Wendell Holmes that judicial interpretation of constitutional provisions reflects "the felt necessities of the times," as the courts respond to social change.[25]

In a negative way, the First Amendment constitutes an absolute-sounding injunction against (federal) governmental interference in the process of free debate.[26] However, the Supreme Court maintained that another approach must be put in place for the interpretation of the First Amendment. In other words, it cannot be read literally, so the balancing test was adopted. It is stated:

> To allow opposition by speech seems to indicate that you think the speech impotent… believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[27]

In the above citation, Holmes refers to the truth and the "ultimate good" which could be reached through freedom of expression. This implies that even speech that could be considered wrong *On Liberty* must be allowed to compete in order to reach the truth. In this sense, hate speech is considered a legitimate exercise of the right to free speech and of free competition of ideas. Mill's *On Liberty* and the First Amendment share a common commitment to protecting freedom of expression, which they view as essential for individual liberty and social progress. Mill advances the theory of free speech and advocates this basic right:

> The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.[28]

Following the First World War, and particularly with the power it attained, the Supreme Court has demonstrated a strong interest in freedom of expression. The ability to express one's opinions in both peacetime and a time of conflict is directly tied to having the right to do so. This was not the case in America, though, as legislation like the Sedition Act was put in place during times of war to restrict this liberty and prevent people from exercising their right to active citizenship. Even advanced democracies like the United States appear to show caution when it comes to expressing political ideas.

Mill (1859) argues in defense of freedom of speech that a society should not merely tolerate but embrace speechthat is considered objectionable in order to achieve the truth and

enable people to arrive at true beliefs about the world.[29] Since silencing opinions prevents people from getting to a better and a clear understanding of the world:

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[30]

In his essay, Mill (1859) continued his arguments adding that the only place where opinions can be tested is in the realm of freedom of expression and where the ultimate truth will arise from errors. Therefore, by being censored ideas and judgments in the marketplace of ideas, we are preventing truths from being discerned from falsehoods:

> The beliefs, which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded… This is the amount of certainty attainable by a fallible being, and this is the sole way of attaining it.[31]

Mill's thought is based on the epistemological position that knowledge and truth may be attained through a free clash of differing and opposing views.[32] Consequently, Mill advocated for the protection of "Absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological".[33] Zechariah Chafee asserts the importance of protecting the right to free speech. He adheres to the view that truth can not be discovered unless there is free debate: "One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion."[34] With this being said, Chafee does not assert the absolute form of freedom of expression. He rather views with scrutiny the right to speak his thoughts and the right of the constitution to start wars. This dilemma is characterized by irresolution and indecisiveness. Thus, the importance of drawing boundaries to free speech weighs heavily. In such occasions present danger is generally the element which decides the kind of speech to be restricted and the one to be allowed. When we compare the status of freedom of

speech in today's reality in America, we find big contrasts. Hate speech is spreading more, and it becomes more difficult to discern truth from falsehood. Mill takes a firm stand on the idea of protecting free speech especially political speech. Consequently, censoring opinions is considered an abridgment to speaking one's thoughts freely. All people are fallible, and any suppression of an opinion on the ground of its alleged falsity implies an unacceptable "assumption of infallibility" on the part of the censor.[35]

The Justifications for Freedom of Speech, Freedom of Thought and the Right to Hear

In a democracy, the right to hear and receive information is crucial. This right comes before the ability to express one's ideas. They are both regarded private as a property belonging to the person who claims the right to listen and speak freely. The significance of this right is based on the premise that if one's voice is not heard, it is meaningless. There are numerous ideas colliding every minute in the marketplace of ideas, but some are heard more than others. Vincent Blasi holds : "each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance".[36] Blasi goes farther in his defense of free speech and the important role its it occupies in society by stressing:

> The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[37]

Freedom to think as one chooses is unquestionably capital because it gives birth to individuality and autonomy. Therefore, it is through it that one can make informed choices. However, freedom of thought lost its primary value if people cannot hear the private opinions of others, as stressed by Shipler in his book when referring to the paramount role of willing listeners:

> Freedom of speech implies the freedom to hear. Without willing listeners, brilliant thinkers cannot educate, brave orators cannot mobilize, daring leakers cannot reform. The unseen play, the unread book, the ignored appeal, falls silently away. The unheard lament flutters and fails.[38]

When people are divested from the opportunity to hear any opinion and compare from the ocean of ideas and opinions, they are actually divested from their intellect. Therefore, the argument for "freedom of thought and discussion"[39] is of paramount importance according to Mill. What matters ultimately is not the right to express opinions or speech but rather the right of the individuals to hear those opinions. Furthermore, people will tend to be certain of the beheld thoughts and opinions when there is no opposing view as expressed by Mill in his words:

> If an age or a people assume that any notion they entertain is certainly right, they assume their own infallibility, and arrogantly claim for themselves a prerogative which even the wisest of men never possess.[40]

It is true that freedom of thought is important, but before an individual can have the right to express his thoughts and opinions, he must be able to hear. The right to hear opposing opinions is the preliminary step that proceeds the right to think and therefore expresses those ideas in the middle of opposing opinions and voices.

John Stuart Mill and the Marketplace of Ideas

The marketplace of ideas is a political theory developed by John Stuart Mill in his book *On Liberty*. It describes the process by which competing ideas compete in the public sphere, and the best ideas eventually emerge victorious. The marketplace of ideas metaphor is inspired by the market economy, where consumers freely choose from a variety of products based on their desired quality. The results of a powerful base of rational consumers are an increase in the market share and the prevalence of the best products.This is the benefit of competition, which always pushes the market further to produce the best products.

This metaphor used by Mill is actually implying that every opinion is to be expressed

and every person is to come to the marketplace with his or her own ideas and exchange ideas with one another. And as the market economy, ideas will compete and the best ones will prevail while the "bad" ones will be eliminated just like the "bad products."[41] Jill Gordon reveals his admiration for the work produced by Mill and tries to discern the message Mill wanted to put across:

> Within the liberal democratic tradition J.S. Mill's *On Liberty* remains the most eloquent of all documents in defense of the public's right to hear as well as to speak freely. It is an optimistic, inspiring message: if only truth is left free to combat error, in an open market-place of ideas, humanity is bound to become more enlightened and better off, in the long run; for the only effective way to deal with erroneous or dangerous ideas is to refute them not to suppress them.[42]

Mill also emphasizes the dangers and drawbacks of censorship when it comes to restricting speech. Falsehood, according to Mill, is more destructive than censorship, and not permitting opposing viewpoints in the marketplace will limit people's pursuit of truth. It is worth emphasizing that the growth of totalitarian regimes, which have severely limited freedom of speech, was also constrained:

> Exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[43]

As a result, in a democratic society, freedom of speech is a cornerstone. Mill's theory is often seen as a key basis for freedom of expression, and even lies are regarded as assets in the marketplace of ideas, in search for truth.[44]

The pursuit of truth may occasionally be misleading. All ideas can compete in the marketplace of ideas, but its evaluation of ideas' quality is not possible. This makes it possible for untruths and useless ideas to penetrate the market and influence people. There are certain ideas that are considered to be dangerous for the general public because they might cause violence.

Alexander Meiklejohn and the First Amendment

Alexander Meiklejohn takes a firm stance on free speech. It is stated: "The First Amendment to the Constitution, as we all know, forbids the federal Congress to make any law which shall abridge the freedom of speech".[45] The purpose of the First Amendment according to Meiklejohn was to compel men to "endure" in a free society many things they do not like. Thus, the First Amendment plays a paramount role in a democracy such as the United States. He also emphasizes the importance of the First Amendment, which he believes should be preserved and safeguarded since it is an essential component of a democratic society. It is critical to convey political ideals since it defines how societies govern themselves: "The primary purpose of the First Amendment is" for citizens to understand the issues that "bear upon our common life."[46] Its role is to promote and facilitate the political discourse, protect the right to hear, hence, the right of listeners, and improve the systemof free expression.

Free speech ought to be protected when it pertains to self-determination. Citizens are required to be knowledgeable about all aspects of their nation's governance. When government programs appear to conflict with their interests, authorities attempt to repress people who voice their criticism. When there are general elections, many candidates strive to use every strategy to win, which puts the free speech process to the test. To guarantee that their words are heard by as many people as possible, they utilize a variety of platforms and media. If it affects their interests, they could also try to prevent individuals from expressing their thoughts.

Even though the language of the First Amendment seems absolute, some limitations are deemed essential to protect high values in a democratic society. The study of the right to free speech in America has taken a wider space in the judicial sphere as well as the political one. It is clear that judges adopt the philosophical foundation of freedom of speech to support it and protect it. Yet, it is not the sole backbone for the American courts. The Supreme Court

felt the necessity to develop new approaches and tests to back up the first amendment, when dealing with cases arising from freedom of speech.

The Dennis decision is one of the landmark cases in American history because it accepted the Smith Act as constitutional and therefore restricted the right to free speech in America.[47] It is one of the instances in which there is the Unmaking of Freedom of Speech, as it was referred to by Howard Zinn in *Declaration of Independence, Cross Examining American Ideology*. In his book, Zinn refers to such instances when speech was severely restrained like that of O'Brien. One can observe that sometimes it is dangerous to restrict the right to Freedom of expression because the impact of such decisions could be seen afterwards in similar cases like the case of *Yates v. United States,* when 15 prosecutions had been brought under the conspiracy provision of the Smith act. In Yates, however, the Supreme Court reversed the conviction.[48]

The case study that was analyzed in *Freedom of Speech Mightier than the Sword*, in which Officer Marsters made racist comments on his Facebook profile about former president Obama is a relevant example of how hate speech is still rooted in America. Similarly, in Brandenburg v. Ohio, a Ku Klux Klan leader was convicted for "advocating the duty, necessity, or propriety of crime, sabotage or violence or lawful methods of terrorism as a means of accomplishing industrial or political reform".[49] The leader of the Ku Klux Klan stated that: "if our President, our Congress, our Supreme Court continue to suppress the white, Caucasian race, it is possible that there might have to be some revenge taken"[50] Surprisingly, the Supreme Court reversed the conviction of Brandunderg, similar to Marsters who was not convicted or even followed in courts for his speech. The Secret Service made search warrants and investigated him since his comments were a clear threat. This is to say that hate speech is protected in the United States relatively.

"Clear and Present Danger Test"

The Supreme Court established the "Clear and Present Danger Test" to determine when speech is protected by the First Amendment. Justice Oliver Holmes presented the "clear and present danger" test in Schenck v. United States (1919):

> The question in every case is whether the words used are 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. It is a question of proximity and degree. 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.[51]

Congress has the right to limit dangerous speech. In this sense, the constitution does not protect hate speech when it represents clear danger. As referred to in the quotation, the limits imposed on speech as determined in the "Clear and Present Danger" test are related to many factors in order to determine the degree of harm it may cause.

The purpose of the First Amendment was to fully guarantee the protection of freedom of speech and the press. However, it was impossible to get a general opinion on the topic due to the subtleties of speech and the delicate issues the Supreme Court was dealing with. Therefore, the Supreme Court and the judges who rule in matters of this nature determine how the First Amendment should be interpreted. When the goal of speech is to generate violence and destabilize the social order rather than just communicate ideas, it is not protected speech. This makes it legitimate for the Supreme Court to impose speech limitations and to prevent any type of violence from starting. The Supreme Court is faced with this challenge and attempts to draw a distinction between the speech itself and the method of expression considering there are prohibited means that could cause harm. The Supreme Court upholds the freedom of expression of all individuals but also has a responsibility to filter out harmful speech. The examination that is being applied to speech appears appropriate because some discourse does not strive to find the truth. The main objective of this category of speech is to

cause harm to others. It is also challenging to draw a line between what is free speech and what is not because the extent of the harm cannot be measured.

The social composition of America is complicated; there are still certain subjects that spark strong disagreement. One of these topics that is handled carefully is racism. Unfortunately, there are a lot of cases in the United States that deal with racism. Freedom of expression does not grant a person the right to insult someone and treat him with inferiority based on his race. Racism might be used in hate speech, which would also harm a significant majority of Americans. Additionally, these hateful messages have been further circulated through social media that is why anti-discrimination laws are in place to try to stop it. It is challenging to outlaw hate speech without violating the First Amendment's guarantee of freedom of speech. People will defend themselves by claiming that they are using their fundamental freedom to talk without restraints. That is related to the argument made by certain commentators that hate speech is protected free speech. Thus, prohibiting hate speech is a blatant constitutional abridgement.

Political Speech

Political debate surely provides voice for equals participating in Democratic institutions. Citizens' ability to voice opinions on great and small issues of the day allows for equal participation in the institutions of Government. Only through an effective public voice can individuals and groups influence policy at the national and state levels. For the champions of the political speech theory, like Alexander Meiklejohn, "the primary purpose of the First Amendment is"[52] for citizens to understand the issues that "bear upon our common life."[53] For this reason, they must be able to access all manner of ideas and beliefs for and against issues. As part of their right to free expression, the public has the right to be informed about political issues. This means that a certain type of speech should be given more protection and less scrutiny. But in America, political discourse is closely regulated. This is a

result of the sensitive material it contains and the attention it receives. All kinds of communication, including written and spoken, are examined and may be susceptible to prior constraint under the justification of national security. One of the messages that seek to find the truth is political discourse. This search is characterized by providing citizens with information about significant matters occurring in their nation and the manner in which it is administered by the elected officials.

Free speech is important in a democracy since it allows citizens to be fully informed, and it creates a space for free debate. The opportunity for each citizen to participate in public discourse and in the formation of public opinion is vital to the legitimacy of the democratic state.[54] "What makes a culture democratic … is not democratic governance but democratic participation."[55] The first Amendment must "safeguard not only the right of the public to hear debate, but also the right of individuals to participate in that debate and to attempt to persuade others to their points of view."[56]

The right of a listener to receive information is also a key to participatory democracy. Democratic decision-making, after all, is about citizen listeners making informed and intelligent evaluations and judgments. Indeed, Alexander Meiklejohn would privilege listeners over speakers. According to Meiklejohn, what improves democratic self-rule is not the quantity of speech but its quality, so that "what is essential is not that everyone shall speak, but that everything worth saying shall be said."[57] The Supreme Court and scholars have recognized two of the three most prominent goals of free speech to create a marketplace of ideas and to facilitate democratic self-government will fail withoutthe right to hear.[58]

D.S. Bogen argues that freedom of expression and exchange of ideas are essential for representative democracies that are committed to equal liberty: "Freedom of speech is the great Bulwark of Liberty; they prosper and die together: And it is the Terror of Traitors and Oppressors, and a Barrier against them."[59] Yet not all forms of expression are protected by

the First Amendment. Frederick Schauer writes: "the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives."[60] The protection of all forms of communication, especially political speech, is crucial. The main right of the governed is to criticize their rulers. It demonstrates the differences between an authoritarian and democratic government. The first is based on the idea that citizens have a right to critique their government and to freely voice their opinions regarding the policies that have been implemented by it. The second, however, seeks to restrict fundamental freedoms and to prevent people from criticizing the authorities. This difference has a significant impact. It demonstrates the value of freedom of speech. The framers of the First Amendment gave great consideration to guaranteeing the freedom of people to express their thoughts freely, for they believed it to be fundamental to preserving a democratic foundation for a society in which individuals govern themselves.

The issue of whether to include or exclude hate speech from free speech protection is problematic. In other words, should the law protect hate speech? Hate Speech, to some commentators, is the free exercise of one's right to free speech, while others perceive it as a threat to democracy. To begin with, it is widely accepted that some forms of communication should be restricted and that freedom of speech should be limited in certain situations. Some commentators read the First Amendment literally, interpreting it to mean unlimited freedom of speech, while others dismiss this interpretation as nonsense. Restriction of speech is considered necessary to defend the freedoms of the people and in some cases, for national security matters. It was made quite plain by the Supreme Court that the government may regulate physical, verbal, or printed expression only where the expression is harmful to others.[61]

The Supreme Court, on the other hand, made it clear that some speech in America is not protected under the First Amendment and that speech that may hurt others is not protected.

The case of Chaplinsky v. Hampshire is an illustration of how the First Amendment does not protect obscene speech. According to Mill, [62] when there is a demonstrated risk of harm to others, speech must be limited. Mill distinguishes between speech that expresses just ideas and speech that demonstrates a genuine threat of harm.[63] When attempting to convey the meaning of harm, one can conclude that hate speech, such as defamation or spreading incorrect information about someone, may cause harm to people. In this regard, the United States Supreme Court contends that:

> the right of free speech is not absolute at all times and under all circumstances, and does not include the use of lewd and obscene, profane, libelous and other words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[64]

The way liberty is interpreted in America makes it difficult to get a universal consensus on what is acceptable and what is not. Many individuals define freedom of speech as the absolute right to communicate ideas, even if they may cause harm or insult others. They believe they have a constitutional right to hate speech. When the latter harm others, it is not a liberty. Consequently, the boundaries of speech should be aligned with the right to respect the liberty of others. Individuals must be given access to all available information in order to build an independent point of view, for any misinformation or disinformation might result in the loss of the truth.

The impact of limiting free speech in authoritarian societies can be evaluated through history. People lived in oppressive regimes where there was constant dread as a result of these measures. Having unrestricted speech rights and being legally protected to do so enables societies to advance and enjoy active citizenship and democratic values. Furthermore, political elites use the free speech system to maintain their position of authority and all the benefits that it provides. Nevertheless, in order to fully enjoy their freedom, citizens must learn about critical issues, including political ones. The founding fathers placed considerable significance on protecting the right to free speech because they understood that it is essential

to their growth and development.

Looking at the history of freedom of speech in America reveals many shades of the way the First Amendment is interpreted. Hence, the Supreme Court plays a major role in shaping this right. In fact, when comparing the period before the First World War and after, we can notice a change in the status of free speech and the place hate speech has occupied in American society and politics. Hate speech becomes more apparent and dominant after the world war. In this sense, Shipler reveals and showcases the instances in which Hate speech was protected by the law. He also accentuates the close relationship the court has with the right to speak freely without boundaries.

Speech was limited in times of war. In this sense, the Supreme Court has gained the supremacy to control speech and to discern times when it should be restricted. Many view that the supreme court has interpreted the First Amendment in such a way as to allow a wider protection for hate speech, as long as it does not incite immediate violence. This implies that there are certainly boundaries restricting the right to freedom of speech. Consequently, interpreting the First Amendment is not an easy task. The cases we have studied demonstrate the degree to which it is difficult to draw the line to what is protected speech and what is unprotected speech. Many commentators hold strongly the necessity to protect hate speech and to consider it as free speech, while others see the threat this type of speech may cause and the necessity to limit it. We have showcased the legal protection hate speech have benefited from in America during all these years. And even today with the age of the Internet, it is becoming more difficult to restrain or regulate hate speech.

The preceding part was a philosophical discussion of freedom of speech theories and its interpretation by the Supreme Court. The justifications used to guarantee freedom of expression are thought to be a good foundation for safeguarding this right and preventing minding. It is worth mentioning, however, that the Supreme Court, which has the right to rule

when freedom of speech may be exercised and when it cannot this has a big influence on how Freedom of Expression is interpreted. The study of the respective views of John Stuart Mill and Alexander Meiklejohn contributes to a greater understanding of the Making and Unmaking of freedom of expression as well as lawfully advocating for this right.

Endnotes

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Chapter Two: Testing the Right to Freedom of Speech in America in Shipler's and Zinn's Works

1. The Right to Hear in *Freedom of Speech Mightier Than the Sword*

In this chapter, we will look at Shipler's *Freedoms of Speech Mightier than the Sword* and Zinn's *Declaration of Independence Cross Examining American Ideology* to learn more about how free speech is made and broken in the marketplace of ideas. We will go into the main parts of the lives of people who have faced the true test of freedom of speech, some who have opposed this privilege, and even those who have gone to extremes to utilize hatred and bigotedspeech under the guise of the First Amendment and the right to free speech. We argue that while Shipler provides a more or less impartial perspective on the subject, Zinn is extremely critical and opinionated when dealing with such sensitive subjects.

David Shipler stresses the substantial role of the right to hear: "Freedom of speech implies the freedom to hear"[1]. This concept was first developed by Mill in *On Liberty*. Mill argues in favor of freedom of thought preceding the freedom of expression.[2] In the American context, Justice Brennan expressly defended the right to listen:

> [T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees meaningful. think the right to receive information is such a fundamental right. [3]

Subsequently, the right to free speech in America is within two overlays: one legal the other cultural.[4] The first overlay can be depicted in the First Amendment and the case laws surrounding it. The First Amendment imposes limitations on the government in regards to freedom of speech; the government cannot make any laws that abridge these freedoms or discriminate against individuals or groups exercising these rights.[5] This means that the government cannot censor speech, or control the press. However, private entities, such as corporations and individuals, are not bound by the First Amendment in the same way that the

government is. Private corporations have the authority to impose their own rules and limitations on the speech and expression that takes place on their premises or on their platforms, even while they are occasionally required to respect people's rights to free speech. This implies that private businesses may impose speech restrictions on their websites, prohibit particular workplace expressions, or limit access to their facilities based on speech or expression. As for the second overlay, it concerns the taboos and the understanding of where the limits of speech are drawn. Therefore, it is through the understanding of these "overlays of free speech", that people can discern the boundaries of speech in America: "We Americans, while imbued with the legal and cultural right to speak our minds, are forever choosing our words, depending on time and place and circumstance."[6] In this quote, Shipler admits the rooted boundaries that are placed on speech. Even the American society, which is historically known for its fight for its own freedom of speech and the refusal to accept any restrictions on speech, has inherited some form of boundaries on freespeech.

The Censorship of Books in the Marketplace of Ideas

The first part of the book under examination is devoted to challenging books in America. The challenge concerns two novels: *Waterland* written by the British author Graham Swift in 1983, and *Beloved*, written by Tonni Morrison, published in 1987. The two novels had been excluded from the Advanced Placement English class curriculum under the demand of parents. The written form of free speech expressed through books is considered a big issue in America. Conservative parents are always in favor of banning books that are considered unorthodox and obscene. There are towns in America where people encourage banning a book from a schools' curriculum or library. The so-called protective parents in Plymouth Canton, and Michigan, are just few examples of parents who expressed their outrage with the books given to their children.[7]

According to Shipler, the parents took such an unprecedented step because they felt the

public school system has become a bastion of liberalism and social permissiveness. The themes that the two novels deal with are: sex, profanity, and homosexuality. However, it is worth noting that few parents did actually read the two novels. The censorship of books is a means by which information is limited and includes everything from sexually explicit content, racism, homosexuality, drugs, alcohol, and suicide, among others. The overarching expression that typically includes all the other reasons is: "Unsuited for Age Group."[8] According to some observers, the censorship placed on select works is a significant danger to democratic principles. Some, on the other hand, believe that certain books should be prohibited due to their profane content.

Book censorship is another situation when determining speech restrictions is challenging. Book banning is a blatant infringement of free expression, although some see it more from a protective standpoint. Some concepts are not permitted to compete in the marketplace of ideas because the harm they may inflict is unquantifiable. In comparison, according to Mill's principle, these potentially dangerous ideas have a right to exist in the marketplace, and only the law of the market will determine whether they will remain or be excluded.

Interference with the educational curriculum is more complicated than it appears. Courts cannot simply judge on a certain book and decide to withdraw it from the library, because such an act violates the First Amendment and the concept of liberty. As a result, determining whether a book is acceptable for children places an additional strain on judges considering public libraries are closely guarded. With that being said, this case study shows the indecisive meaning of the First Amendment:

> Public libraries are the most protected by court ruling on such matters, and it is nearly impossible to get books that are already in the shelves removed entirely without violating the first amendment. Courts have decided that schools have the right to exclude books form course curricula, as in Plymouth-Canton, Michigan. But once government employed librarians in a public school or a public library order a title

> for circulation, its subsequent withdrawal tends to run afoul of the Constitution unless it is shown to be obscene.[9]

This implies that the Court may order the banning of a book from public libraries if it deems it necessary because of the content that may be inappropriate or harmful for students. And when referring to the theoretical background of this paper, one can find the Harm principle of John Stuart Mill, that he developed *On liberty*. It is through this principle that Mill places limitation on speech: "…the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others".[10]

Thereafter, does book banning fall under this principle? The answer is pretty simple yet complex, for reading books, and in this case the two novels, have not any effects on the students, but the withdrawal of the books did affect the students' psychology where they felt that their parents did not trust them enough with the novel. In addition, reading novels that may contain disturbing elements for the parents does not necessarily mean that their children agree with the ideas discussed or even practice them. Even when teachers are urged to explain to concerned parents requiring a reading, it does not necessarily mean accepting all the ideas or behaviors it contains.[11]

Political Speech in the Marketplace of Ideas

As a former justice department lawyer who uncovered evidence of the government's secret electronic surveillance of U.S. citizens, Thomas Tamm was working in a "highly sensitive unit. The Office of Intelligence Policy and Review (OIPR), which prepared secret warrant applications under the Foreign Intelligence Surveillance Act (FISA) for clandestine monitoring of people not necessarily suspected of crimes but deemed agents of foreign states or terrorist organization."[12] David Shipler points out that the FISA system "designed for privacy protection…" and that the law "restricted intelligence gathering inside the United States".[13] It is also required from intelligence agencies "to get approval from federal judges who sat as the Foreign Intelligence Surveillance Court in closed sessions in the Justice

Department".[14]

Shipler discusses further the discoveries made by Tamm about the calls that he was required to make with the "one person in the office", who was contacted by the NSA to see if the information was in program to make a warrant. The NSA gave "the program"[15], the code name "Stellar Wind"[16]. "It swept up vast amounts of digital information and voice communications, both abroad where no warrant was needed, and inside the United States, where FISA required secret warrants and made every instance where a warrant was not obtained a felony carrying a prison sentence"[17]. Tamm then took the electronic surveillance story to the New York Times reporter Eric Lichtblau, and it was indeed published in 2016, Tamm resigned "voluntarily from the job while suffering financial hardships."[18]

The story of Thomas Tamm as it has been reported by David Shipler raises an important question on the 1st Amendment's right of free speech in case of reporting wrongdoings committed by the government. This leads us to an important law case Garcetti v. Ceballos (2006),[19] the highest court's interpretation of the constitution does not provide protection for individuals who expose their elected leaders. This indicates that there is insufficient space for political expression in terms of free speech. Meiklejohn has written about the need to safeguard political speech. According to Meiklejohn, open free discussion is the foundation of democracies, and the safeguarding of this privilege is essential for engaged citizenship. Meiklejohn emphasizes the importance of absolute protection of political expression since it ensures active participation of citizens in a democracy: "Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious."[20] According to Meiklejohn, without free speech, democratic societies stagnate and are more susceptible to the forces of authoritarianism and censorship. Dissenting voices are silenced and people's ability to confront those in positions of authority is severely constrained in the absence of free speech.

As a result, there may be limited room for advancement or change and a concentration of power in the hands of a select few.

2.Bigotry: Between Freedom of Speech and Hate Speech in theMarketplace of Ideas

The proponents of unlimited freedom of expression defend their position by claiming that even harmful speech covers the pursuit of truth. According to researchers who reject speech restrictions, the marketplace of ideas must be accessible to all kinds of ideas in order to compete for truth, and this form of speech must be allowed in it. According to Mill, the pursuit of truth is impossible without freedom of speech[21], so it is of paramount importance. Mill connects these two principles because he claims that without free expression of ideas and open discussion, people would not get the truth they seek: "Letting truth and falsehood grapple... whoever knew truth put to the worse, in a free and open encounter".[22] He asserts that all viewpoints and ideas must be welcome in the marketplace of ideas. This concept was implemented in the Supreme Court, with Justice Holmes agreeing with Mill's idea of seeking truth in the marketplace of ideas. They both asserted that freedom of speech is the touchstone of societal goals.

Racism takes a paramount space in the American political and social sphere, especially when it concerns the American understanding of the limits of their Freedom of Speech. In this sense, Shipler shareshis views on the subject stating that:

> The landscape of free speech is vast in America, but there are boundaries, often invisible to the unwitting, who trip over the unseen taboos and then fallbewildered into desrepute[23]

There is a difference between the way in which the United States deals with constitutional hate speech issues and the other Western countries deal with them. Rosenfield adds that "contemporary hate speech cannot be confined" since "not all …instances of hate speech are alike".[24] Rosenfeld points out that it is difficult to define hate speech in a way that is both clear and comprehensive. Any definition would need to be flexible enough to

encompass the full range of speech that is considered hate speech, but also specific enough to distinguish it from other types of speech. Similarly, Shipler argues that "the United states stands out for its expansive permissiveness, enshrined in a first amendment whose value lies not in protecting the broad consensus, which does not need protection, but insulating the unpopular, the extreme and the hateful from government censorship and prosecution".[25] Accordingly, Catlin (1993) proposes that hate speech can be defined as speechthat advocates or incites "acts of discrimination or violence towards a group of people or an individual based on hatred for their nationality, race, or any immutable characteristic". Catlin also evokes the consequences of hate speech, which silences "the target individual or group, minimizing their contribution to public discourse and effectively destroying the free trade of ideas in the supposedly equally accessible marketplace".[26]

The case of David Marsters, a retired officer, is an excellent test of the boundaries of free speech in America. Here again, an important question must be raised on whether racist statements are considered as free speech in America and whether they are protected under the First Amendment. Marsters made racist comments about the former President Obama, when he wrote on his Facebook page "shoot the nigger".[27] His statement was to communicate his opposition to the new policies put in place by President Obama. Marsters said:

> It's getting disgusting, the whole country, he's given away the country food stamps, all that. Nobody wants to work anymore. He always blames everybody else." And Obama "was blowing smoke from marijuana" during the first presidential debate in 2012, Marsters imagined. He was high as a kite.[28]

In this regard, Shipler defends the right of Marsters to his speech "which he exercised in a galvanizing way in late August 2013"[29]. Marsters' words are qualified by Shipler as "principles words, of legitimate criticism."[30] On the other hand, the town manager called the Facebook remark "deplorably hateful, dangerous and exactly opposite of all this country and the town of Sabattus stands for."[31] Furthermore, the literal meaning of the sentence seems to

present the biggest worry for the secret service. Marsters defended his position by claiming that he did not mean to threaten to kill the president of the United States in a literal meaning, rather to impeach him, he also claimed that his typed sentence "was a slip of the finger".[32] The American judicial law takes these kinds of threats seriously; it deploys an entire body to test the validity of the statements and the threat:

> Whoever knowingly and willfully [makes] any threat to take the life of,to kidnap, or to inflict bodily harm upon the President of the United States…shall be fined under this title or imprisoned not more than five years or both. [33]

David Shipler does not use the word hate speech to distinguish the words of Marsters; he rather uses words like "pure speech" or "ugly speech". It is protected by the First Amendment as long as it is only speech and not accompanied by concrete action. The "clear and present danger test" is as it was first presented by Justice Oliver Holmes that speech could be dangerous if it imposes a threat and that the threat is real and imminent. Justice Holmes noted the reason behind the controversy of freedom of speech and free thought: "it is … not the free thought for those who agree with us, but freedom of thought that we hate"[34]

The comments of Marsters seem to present a "clear and present danger" as it was taken by the secret service. Threatening the president, even if it is not intentional, is not considered free speech in America. The boundaries on freedom of expression in America are often very difficult to establish. Even judges find it difficult to distinguish free speech and dangerous speech which could lead into concrete action. The justifications Marsters presented in defense of his speech were not very convincing for a number of bodies.

Conversely, the marketplace of ideas theory is arguably the most prominent of the free speech theories. Shipler defends the right of Marsters in presenting his case and stating his thought: "he… has a right to his speech, which he exercised in a galvanizing way".[35] The marketplace of ideas theory allows all ideas to compete in search for the truth or the right information as it was discussed in the previous chapter. John Stuart Mill argues in favor of

free speech: "the only freedom which "deserves the name is that of perusing our own good in our own way"[36]. Mill also objects the act of silencing speech and describes it as an act of evil.[37] Mill continues by adding that the exercise of freedom of speech must not be at the expense of others: "So long as we do not attempt to deprive others of theirs."[38] Marsters' use of his right of criticizing the president according to Shipler is a part of a liberal democracy like the United States. However, his bitter comments on the president did present a threat according to the government and to the law: "Under federal law, it takes less to activate an investigation into threatening words against the president than it does, say, against your boss oryour neighbor".[39]

Accordingly, Shipler explores one of the highly debated issues in America that is racism. In this case, Marsters admitted that his words were not directed towards the race of Obama but rather on his policies and his discontent with the latter as it has been developed by Shipler in *Freedom of Speech Mightier than the Sword.* When there is a case like Marsters, it is often difficult to make a clear conclusion about the issue of freedom of speech in the marketplace of ideas. Hate speech or "extreme criticism" as Shipler calls it, is not welcomed in the marketplace of ideas because it denotes hatred and could even become a serious threat. Shipler defends the right of Marsters to make his case and typing his thoughts, but he also admits the lines that are drawn to free speech and the limits which are imposed on speech in the United States. That is to say that the First Amendment does not guarantee absolute freedom of expression.

Shipler explores one of the highly debated topics in the American legal and social arena, freedom of expression and its boundaries: "Without the liberty of complaint and association, democracy fails."[40] In his work, *Freedom of Speech: Mightier than the Sword,* the celebrated commentator brings forward real stories to shed light on "the cultural limits of both freedom of expression and the willingness to listen."[41]

1. Limitations on Speech in Declarations of Independence: Cross Examining American Ideology

Freedom of speech is considered one of the most important American founding principle that contributed to the building of American democracy. Zinn in his book contributes to the wide debate about freedom of speech and the First Amendment. He is very critical of the absolute language of the First Amendment and therefore shares real stories and case studies in which the free speech was not protected under the First Amendment but rather prosecuted with the Smith's act in war time and its extension, the espionage act. The "Trotskyists" and David O'Brien are just two cases among others, which clearly demonstrate the issue under examination, where special circumstances arise in the First Amendment not to protect the speech of the ordinary citizens.

To begin with, the Trotskyists and members of the socialist party were "persecuted" in 1943 when they criticized the war under the Smith Act that was passed in 1940. The law criminalized advocacy of the violent overthrow of the government and membership in groups that promoted such ideas, but it was broadly interpreted and used to prosecute individuals for their political beliefs, even if they did not engage in any violent or disruptive activities, Formally "Alien Registration Act of U.S. federal law passed in 1940 that made it a criminal offense to advocate the violent overthrow of the government or to organize or be a member of any group or society devoted to such advocacy."[42] In the context of U.S. history, the Alien Registration Act of 1940 is an example of the government's tendency to restrict civil liberties in times of perceived national security threats, while raising important questions about the balance between national security and individual freedoms. Then, David O'Brien was convicted because he set his draft registration card on fire. It was an expression of opposition towards the war of Vietnam. The Supreme Court held that O'Brien was engaged in civil disobedience and went to prison. Zinn refers to the issue of obedience and disobedience in his

work claiming that there might be times when the pressure to uphold the law is so great that it even defies a person's inclination for survival:

> "Obey the law." That is a powerful teaching, often powerful enough to overcome deep feelings of right and wrong, even to override the fundamental instinct for personal survival.[43]

Zinn emphasizes the pressure that society frequently places on people to abide by laws and regulations even though they may stand in contrast to that person's own sense of morality or fairness. Zinn also poses significant queries about how justice and the law interact. Although the law is intended to advance justice and safeguard society as a whole, it is not perfect and occasionally serves to uphold repressive power systems or prolong injustice. Under such circumstances, it is crucial to contest the legality of the rule of law and to pursue peaceful change. Furthermore, Zinn draws attention to the conflict between the legal restrictions on free speech and a person's ability to express their own thoughts and opinions in the framework of freedom of speech. Laws and regulations can protect people and communities from destructive speech and hate speech, but they can also be used to silence dissent and suppress the voices of minorities.

According to Zinn, social demands to uphold the law can occasionally take priority over an individual's sense of good and wrong, even to the point of limiting that person's ability to express themselves freely. This can be observed in situations when people may feel obliged to self-censor or refrain from speaking out on contentious matters out of concern for negative social or legal consequences. In order to defend and advance the right to free speech, Zinn emphasizes the intricacy of the link between the law and free expression as well as the significance of critical thought and interaction with legal institutions.[44]

"Prior Restraint" in the Marketplace of Ideas

Zinn scrutinized the subject of freedom of speech and the press while referring to the First Amendment, which used an "absolute language" concerning freedom of expression. The

phrase “no prior restraint”, as argued by Zinn, means that Congress will not attempt to uphold or restrain any voice or opinion. But as Zinn continued in his argument, “Congress did exactly that; it passed laws abridging the freedom of speech the Alien and Sedition Acts”.[45] According to Henry Cohen, “prior restraint” may take place in one of two ways: first, a statute may demand that a person submit the speech they wish to distribute to a governmental agency for a license to do so; or second, a court may impose a temporary restraining order or an injunction prohibiting the speech in question.[46]

With respect to both these types of prior restraint, the Supreme Court has written that “any System of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.”[47]

> Are the most serious and the least tolerable infringement on First Amendment rights.... A prior restraint ... by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. [48]

It has been held that prior restraints are difficult to overlook, as the Supreme Court determines how the Constitution is to be interpreted in various contexts. The First Amendment guarantees Americans’ freedom to communicate their opinions without restraints, but it is the highest court that ultimately determines how free speech should be expressed and under what conditions. It is obvious that prior restraint contradicts the first’s position, which is to eliminate all forms of censorship. But once more, the Supreme Court can determine whether to publish or suppress a written form of communication based on “prior restraint.” Howard Zinn emphasizes a crucial idea on the right to free speech and the function of the state in enforcing it. According to Zinn, a key component of free speech is the concept of “no prior restraint,” which states that the government cannot censor or forbid people from expressing their opinions. But, Zinn also emphasizes that after it has been expressed or published, the

government can still punish people for their speech. Some statements may be deemed by the government to be impermissible or unlawful, and those who make them may be imprisoned. This demonstrates the constant conflict between the right to free speech and the duty of the state to safeguard the populace from damaging discourse:

> Every freeman has an undoubted right to lay what sentiments he pleases before the public… This is the ingenious doctrine of "no prior restraint." You can say whatever you want, print whatever you want. The government cannot stop you in advance. But once you speak or write it, if the government decides to make certain statements "illegal," or to define them as "mischievous" or even just "improper," you can be put in prison.[49]

Ultimately, Zinn emphasizes how crucial it is to defend free speech as a fundamental right while simultaneously emphasizing the necessity for responsible speech that does not inspire injury or violence. It serves as a reminder of the need to preserve a careful balance between people's individual freedoms and the common good. The above quotation from Zinn serves as a reminder of the possibility for the government to abuse its authority by limiting free expression. History has demonstrated that censorship and punishment have been employed by governments to quell opposition and manage public opinion. Checks and balances are necessary to stop the government from overstepping its bounds and infringing on citizens' rights to free expression. In order to defend their right to free speech and to hold those in authority responsible for any attempts to silence or punish dissenting voices, people must also continue to be watchful and vocal. The battle for a truly free and open society where the exchange of ideas can take place without fear of retaliation is ultimately highlighted by Zinn.

In America, freedom of expression is fiercely defended since it is thought to be essential to defending the rights of the powerless and common people. Politicians and other influential figures will attempt to stifle free speech in order to prevent people from expressing ideas that might jeopardize their interests. The right to free expression and the ideologies Mill has defended his entire life will be at risk in this case. The truth will be obscured and disappear

amid all the falsehoods when the marketplace of ideas is manipulated by the powerful people.

Political Speech in Zinn's Second Thoughts on the First Amendment

Zinn criticizes the real application of the First Amendment by the U.S government, when it imposed limitations on speech. The language of the First Amendment is absolute according to Zinn: "The Language of the first amendment looks absolute."[50] He then evokes the Sedition Act of 1798, which was "one of the first tests of freedom of speech."[51] This act has permitted the "deportation, fine or imprisonment of anyone deemed a threat or publishing "false, scandalous, or malicious writing" against the government of the United States."[52] Zinn considers that the Sedition Act abridged freedom to speak ones' thoughts and opinions: "the Sedition Act was a direct violation of the first amendment."[53] In this sense, Zinn argues that a simple act, which was passed by the congress, was enough to underweight the value of First Amendment.

Furthermore, the limitations on freedom of expression had been considered by many scholars, theorists and commentators alike as a necessity to preserve the values of a liberal democracy. Shaneek Sen views it as "a limitation in order on one's human rights in order to uphold community's human rights."[54] Sen points out the consequences and damages of hate speech on the community and the necessity to restrain such harmful speech for the general good of the community: "The bread social purpose of censorship can be laid down as to ensure that ordinary member of the community are not affronted by the display of material to which majority of reasonable adults would object, to maintain a basic level of public decency, and to avoid the undesirable social effects."[55]

National Security and the Limitation of Speech

In *Declarations of Independence: Cross Examining American Ideology*, Zinn tackles the issue of freedom of speech from another angle, and under another circumstance, namely wartime. National security is used as a premise for restricting free speech rights and banning

publications. Zinn harshly criticizes the government's handling of these matters. He takes a staunchly pro-free speech stance and believes that this is simply an attempt by the government to suppress free speech: "the powerful words of the first amendment seem to fade away within the sounds of war."[56] Here, Zinn refers to the act that was tightly passed by the congress in 1917, namely the Espionage Act. This act convicted any person for causing, or attempting to cause, insubordination in the armed forces and interfering with or obstructing recruitment and enlistment, in time of war.[57] The acts by which the offense was committed were the publication and dissemination of various articleswhich the defendant had written.

The case of Dennis v. United States represents another illustration in which the government may restrain speech in special circumstances. National security is used as a justification for restricting speech. The case sustained the conviction of eleven leaders of the communist party for conspiracy to violate the Smith Act, which makes it unlawful for any person:

> to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government...with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of over-throwing or destroying any government in the United States by force or violence.[58]

In Dennis v. United States (1951), the Court ruled that the act was constitutional, and, according to Chief Justice Frederick Moore Vinson, the law "may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent."[59] The "clear and present danger" rule as thus established was accepted as the standard and was followed in all subsequent decisions involving the Espionage Act. Zinn criticizes the basis of the "clear and present danger" rule, and the analogy of "shouting fire in a crowded theatre" writing:

> It was a clever analogy. Who would think that the right of free speech extended to someone causing panic in a theater? Any reasonable person must concede that free speech is not the only important value. If one has to make a choice between someone's right to speak, and another person's right to live, that choice is certainly clear. No, there was no right to falsely shout fire in a theater and endanger human life.[60]

Zinn then wonders who was creating a "clear and present danger" to the lives of Americans, Schenck, by protesting the war, or Wilson, by bringing the nation into it.[61] Zinn also refers to the balancing test "where the right of free expression was continually being weighed against the government's claims about national security. Most of the time, the government's claim prevailed."[62] Zinn argues for the necessity to use ones' right in time of crisis and war, where the citizens must be able to criticize their rulers and scrutinize their practices. For this end, freedom of expression should not be subject to restrictions in these times:

> In crisis situations, the right of citizens to freely criticize foreign policy is absolutely essential, indeed a matter of life and death. National security is safer in the hands of a debating, challenging citizenry than with a secretive, untrustworthy government. Still, the courts have continued to limit free debate on foreign policy issues, claiming that national security overrides the First Amendment. [63]

Here Zinn highlights the importance of the right to free speech, particularly in the context of criticizing foreign policy. He suggests that a citizenry that is able to openly and freely debate and challenge the government is essential to national security, as it helps to ensure that the government is held accountable and remains trustworthy. At the same time, he acknowledges that the courts have often limited free speech on foreign policy issues by invoking national security concerns. This reflects the ongoing tension between the right to free speech and the need to protect national security, which has been the subject of much debate and discussion in the legal and policy realms.

The Supreme Court's Contradictory Decisions on Free Speech

The American writer refers to freedom of expression in the U.S Courts and its interpretation; he views them with a lens of contradictions. This is to say that the American judges can make different decisions on cases that look similar by finding all differences. This goes against what is called "Precedent", which means that if a decision has been made in a case, it will not be overturned in similar cases. Accordingly, Zinn argues that the decisions made in Courts more influenced by the ideological leanings of the judges and less to do with Constitutional Law: "Judges can always find a way of making the decision they want to make, for reasons that have little to do with constitutional law and much to do with the ideological leanings of the judges."[64]

To prove his point of view, Zinn discusses a number of U.S. cases that fall under the realm of free speech, especially in the streets and among high school students. In addition to the restrictions that could be imposed on speech in times of war, under the national security justification, distributing leaflets or assembling peaceably can also be limited if it is deemed to pose a direct and immediate threat to national security. According to Zinn, there is still a discrepancy in how free speech law is interpreted. For instance, when the Supreme Court struck down the detention of 178 black students who peacefully gathered in South Carolina's streets to protest racial injustice. On the other hand, a conviction was upheld when a group of civil activists demonstrated peaceably on Tallahassee Jail.[65] In this particular case, it is clear that the court interprets the law in a contradictory manner, as it uses "time and place restrictions" to prevent people from expressing their thoughts and from manifesting their discontent with government policies.

Alexander Meiklejohn has stressed the importance of freedom of speech, especially when it comes to political speech since it is the sole factor that contributes to the active participation of citizens in self-governance and the enrichment of the public debate. Expressing one's thoughts and opinions is part of it according to Meiklejohn, and if someone

tries to silence those voices from speaking their minds, the democracy as a whole will be in jeopardy. This is to say that political speech must be protected and guaranteed by the first amendment according to Meiklejohn:

> Political speech must be protected, not because it is truthful or untruthful, wise or unwise, but because it is speech about the governance of the country and the allocation of power within it.[66]

Meiklejohn argued that political speech is the cornerstone of self-government and is essential for a healthy and functioning democracy. Without the ability to freely express opinions about the government and its policies, citizens would be unable to hold their leaders accountable and participate in the democratic process.

Based on our findings, we can boldly proclaim that the limitations of free expression have not yet been fully established. Zinn was openly contemptuous of the United States' founding principles. He believes that speech should be free in its entirety. As a result, he criticizes any circumstance in which speech was halted. When freedom of speech is restricted during times of conflict, it is a significant concern because it demonstrates the loopholes in which political leaders may manipulate free speech. Zinn believes that freedom of expression must be unlimited in order to retain the importance of the First Amendment and allow for unfettered debate in the social and political spheres. Americans regard their ability to make choices as part of their liberties, such as their power to select and offer their influence in politics. Zinn discusses his second thoughts on the First Amendment and argues that it does not guarantee people's freedom of expression. The American historian elucidates the limits established in the First Amendment and the situations under which these infringements on free expression are justifiable. It is difficult to get the intended truth when the political debate is restated. The notion of unlimited freedom of expression, as described in the First Amendment, appears to be exceedingly idealistic and utopian, especially in a world when hate speech is becoming more prevalent and dangerous.

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[2] Mill, John Stuart. *On Liberty*. New York: H.M. Caldwell Co., 1880, 13.

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https://www.mtsu.edu/first- amendment/article/848/lamont-v-postmaster-general

[4] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 12.

[5] ibid. 12.

[6] ibid, 19.

[7] ibid, 33.

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[9] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 61-62.

[10] Mill, John Stuart. *On Liberty*. New York: H.M. Caldwell Co., 1880, 13.

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[12] ibid. 76.

[13] ibid.

[14] ibid.p.12

[15] ibid. 80.

[16] ibid.

[17] ibid.

[18] ibid.

[19] "Garcetti v. Ceballos."
https://www.mtsu.edu/first-amendment/article/596/garcetti-v-ceballos.

[20] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Row, 1948). 52.

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[22] ibid. 15.

[23] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 148.

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[27] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 148.

[28] ibid.147.

[29] ibid.147.

[30] ibid. 148.

[31] ibid. 148.

[32] ibid. 150.

[33] ibid. 150.

[34] Lauterpacht, H., ed. *"United States v. Schwimmer*." In International Law Reports, 226–28.

[35] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015),

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[37] ibid.

[38] ibid.

[39] David K. Shipler, *Freedom of Speech: Mightier than the Sword* (New York: Alfred A. Knopf, 2015), 150.

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[59] ibid, 155.

[60] Chief Justice Frederick Moore Vinson, "*Dennis et al. v. United States*," 341 U.S. 494, 509 (1951).

[61] ibid, 157.

[62] ibid, 157.

[63] First Amendment Encyclopedia. "Smith Act of 1940." Middle Tennessee State University. https://www.mtsu.edu/first-amendment/article/1048/smith-act-of-1940.

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V. Conclusion

The main aim of this thesis was to analyze the making and the unmaking of freedom of speech in the United States of America. We relied in our study on two primary sources, the first is Shipler's *Freedoms of Speech Mightier than the Sword* and the second is Zinn's *Declarations of independence, Cross Examining American Ideology*. We managed to study these two works by relying on theoretical foundation of John Stuart Mill in his essay *On Liberty* and Alexander Meiklejohn, with his outstanding work *Freedom of Speech and it Relation to Self-Governance*. The research indicates that there are certainly limitations on freedom of speech in the United States as the Supreme Court, the highest court in America, interprets it. This court is considered a backbone, which preserves this right but also tries to draw the line between what is protected speech and what is unprotected speech.

This paper contends that in America freedom of speech has progressed from times when there was minimal protection for it, particularly during wartime, to present times when the right of people to free speech has expanded significantly. On the other hand, it has aided the spread of hate speech in the United States. Extreme ideas have been permitted to compete in the marketplace of ideas. This study argues that freedom of speech has evolved in America from cases in which there was little protection of freedom of speech especially in wartimes as referred to by Zinn, to modern times during which the right of people to free speech has taken a wider level. This, however, has encouraged hate speech to become more ingrained in America.

Consequently, our study demonstrates the influence the Supreme Court has on freedom of speech when interpreting such cases and the protection it provides to hate speech today because of the First Amendment. In fact, the scope of this dissertation did not allow us to explore all the aspects of freedom of speech and its respective limitations in the United States, in the selected works of Shipler and Zinn. The two works deal with interesting issues

thatcould be suggested for full researches. Thereafter, coming students can tackle the issue of freedom of speech in *Freedom of Speech Mightier than the Sword* and *Declaration of Independence: Cross Examining American Ideology,* from the social approach that with thinkers of the field like Emile Durkheim.

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