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Self-Determination in American Discourse: The Supreme Court's Historical Indoctrination of Free Speech and Expression

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Self-Determination in American Discourse: The Supreme Court's Historical Indoctrination of Free Speech and Expression

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Abstract

Within the American criminal legal system, it is a well-established practice to presume the innocence of those charged with criminal offenses unless proven guilty beyond a reasonable doubt. Such a judicial framework-like approach, called a *legal maxim*, is utilized in order to ensure that the law is applied and interpreted in ways that legislative bodies intended.

The central aim of this piece in relation to the First Amendment of the United States Constitution is to investigate whether the Supreme Court of the United States has utilized a specific legal maxim within cases that dispute government speech or expression regulation. Specifically, this research addresses the following central question: Has the Supreme Court of the United States, within certain notable cases that dispute the regulation of speech or expression, employed a legal maxim which grants initial preference or leverage to the First Amendment's interest in protecting and preserving it over the State's interest in regulating it?

To answer this question, I will first briefly overview the tests and reasoning employed by the Court's majority within certain landmark cases under six major subcategories of speech or expression. Then, if applicable, I will identify the existence of such a legal maxim within. Lastly, I will address the implications of employing such a judicial framework to these disputes.

My findings confirm the Court's general utilization of this legal maxim. My analyses show that within the simple majority of the highlighted cases below, the Court has, in practice, employed a technical approach which gives an initial preference of interest to the Constitution's protection of speech and expression over the State's interest in regulation.

Key terms: Speech, Expression, First Amendment, Precedent, Doctrine, Legal Maxim, Supreme Court, Constitution, Political Science, Democracy.

Dedication and Appreciation

I dedicate this piece to the general field of constitutional study and inquiry. This vital category of research has incessantly sought to produce deeper understandings of how the Founding Fathers of the United States Constitution and its Bill of Rights, which contains some of the most salient philosophical and political concepts in the history of our world, would both interpret and apply their political experiment to evolving future disputes between citizens and government.

An immense amount of gratitude goes to both Dr. Donald Beahm and Dr. Ross Miller. Not only as co-advisors of this project but also as past professors and personal academic mentors, the two have been irreplaceable in their dedication towards guiding my studies as well as their tireless work in developing further inquiry and research within their focused disciplines of Political Science.

Lastly, this piece reflects my appreciation for my immediate family as well as my academic and personal advisors that have continued to extend endless support and encouragement in my direction throughout my undergraduate and pre-law journey. This network of support has allowed me to pursue my academic interests over many years on a more meaningful and fulfilling path that wouldn't have been attainable without such guidance.

Table of Contents

1. *Speech Category Index/Table of Cases*

2. *Introduction*

   2.1. *Context* 1

   2.2. *Methodology* 4

   2.3. *Related Research* 5

3. *The Search For a Legal Maxim*

   3.1. *Freedom of the Press* 6

   3.2. *Freedom of Religion and Associative Speech* 7

   3.3. *Symbolic and Demonstrative Speech* 9

   3.4. *Situational Expression: School and Work Settings* 11

   3.5. *Seditious and Revolutionary Speech* 12

   3.6. *Threatening, Violent, and Intimidating Speech* 14

4. *Summary of Findings* 18

5. *Implications* 20

6. *Future Research* 22

7. *Works Cited* 23

8. *Referenced Cases* 25

Speech Category Index

I. Freedom of the Press

   A. *Near v. Minnesota* (1931)

   B. *New York Times v. United States* (1971)

II. Freedom of Religion and Associative Speech

   A. *Wisconsin v. Yoder* (1972)

   B. *Masterpiece CakeShop v. Colorado Civil Rights Commission* (2018)

III. Symbolic and Demonstrative Speech

   A. *Texas v. Johnson* (1989)

   B. *Adderley v. Florida* (1966)

IV. Situational Expression: School and Work Settings

   A. *Tinker v. Des Moines Independent Community School District* (1969)

   B. *Pickering v. Board of Education* (1968)

V. Seditious and Revolutionary Speech

   A. *Dennis v. United States* (1951)

   B. *Schenck v. United States* (1919)

VI. Threatening, Violent, and Intimidating Speech

   A. *Brandenburg v. Ohio* (1969)

   B. *Virginia v. Black* (2003)

Self-Determination in American Discourse: The Supreme Court's Historical Indoctrination of Free Speech and Expression

Introduction

I. Context

A. The First Amendment of the United States Constitution.

The First Amendment of the United States Constitution, firmly established at the forefront of the Bill of Rights, is written as follows:

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

This clause, along with its intrinsic shielding of free speech and expression, has arguably been the most salient out of all twenty-seven Amendments. The importance of its holistic role in preserving the democratic liberties that American citizens enjoy on a widespread basis each day is nearly impossible to overstate (Zhang 3).

B. Issues of Ambiguity.

The First Amendment's generally unclear meaning and application is unsurprisingly highly contested to this day. This lack of understanding is a shared quality held by most clauses within the Bill of Rights. Because of this lack of clarity, the aggregate of legal cases that challenge or dispute its interpretation takes the number one position on the list of the largest categories of disputes heard by the Supreme Court in both the 20th and 21st century (Zhang).

The First Amendment's ambiguity and its unclear method of application is the driving reason for why this inquiry is necessary.

"The ideas in the First Amendment are perennial. As long as speech, religion, and the press exist, they will continue to evolve. As time passes, new disputes involving them that have never been encountered before will appear and be challenged in the courts." - Benjamin Zhang, Duke University

While it holds true that the Bill of Rights was first established as an undissolvable layer of protection between the civil liberties of American citizens and government encroachment, the actual method of applying of this concept through the Court's process of judicial review holds no promises and is not defined in clear-cut or directive terms. Therefore, though we would hope to find a legal maxim within all of these cases that gives an initial preference of interest to speech and expression liberties over government regulation of such, the Supreme Court's indoctrination of such a legal maxim is discretionary in nature and is therefore not guaranteed.

C. Significance.

Though nearly all aspects of the Constitution have played their own individual roles in ensuring the survival of our great American experiment, freedom of thought and the guaranteed right to express and exchange ideas with others is its primary backbone. Many of the most prominent social and political philosophers in history that have had direct influence upon the underpinnings of the Constitution - such as Aristotle, Mill, Locke, and Milton, to name a few - emphasize the irreplaceable role of this liberty. And, as predicted, nearly all of the features of our constitutional representative republic - including our legislative, judicial, and

electoral affairs - hinge on the ability to express ideas in order to continue the process of productive evolution within our social and governmental interactive systems. These political systems are filled with rational actors; they are "not indeterminate, chaotic, or arbitrary; (they are) connected to human nature, to the grand question raised by human nature, and to the choice we make in the exercise of our natural capacity for choice. That capacity depends on the speech with which we form and state a choice" (Mansfield). As time goes on, changes are necessary, but these changes would likely not occur sans the First Amendment.

Because of 1) the enormously important role that free speech and expression play in the effective functioning of all democratic-esque governments, 2) the inherent ambiguity of the First Amendment, and 3) the Supreme Court's unique power of judicial review in overseeing these disputes established in *Marbury*, the Court has seen a massive number of related cases appealed to their jurisdiction.

D. Speech and Expression.

Free speech and expression, loosely defined, is the groupings of ideas or thoughts that individuals can outwardly and physically convey to others that fall under protections extended by the First Amendment and are immune from State regulation. On the contrary, speech or expression that is not considered free are the ideas and thoughts in which the protection status of their outward physical communication has been actively struck down by the Supreme Court in the past and are therefore subject to State regulation. Examples include the "distribution of obscene materials" (*Roth v. United States*, 1957) and "the incitement of actions that would harm others" (*Schenck v. United States*, 1919).

Neither speech nor expression is limited to only verbal forms. They can vary greatly from simple verbatim, such as flag desecration (*Texas v. Johnson*, 1989) or the destruction of draft cards (*United States v. O'Brien*, 1968).

E. *Legal Maxims* In the Context of Constitutional Disputes

Maxims, put simply, are commonly accepted frameworks of reasoning and consideration that are utilized in order to introduce some aspect of predictability or uniformity under certain circumstances. This broadly used Latin term is not only applicable to legal philosophy but also to matters of social and public interactive behavior. In the eyes of Immanuel Kant, prominent 18th century German social and political philosopher, a maxim is "a subjective principle of action". It can be considered, in the modern sense, to be synonymous with the term "norm". In the term's application to the United States Constitution within this research, maxims will be considered "statements of rules that establish the baseline for legal justification…(they are a) foundation of legal authority...(that sets) a baseline for legitimate restraints and powers" (Tsesis 1614).

II. Methodology

In order to answer the central question above, my unit of analysis is the aggregate of reasonings and tests that are employed within the written majority decisions of certain landmark Supreme Court cases that together as a whole make up the six major subcategories of speech and expression that will be investigated. The existence of a preferential pattern within

these cases and subsequent doctrines will allow me to determine if such a legal maxim has often been utilized by Justices within speech or expression regulation disputes as a whole.

My hypothesis is that, within the majority of the analyzed cases, the Supreme Court of the United States has in fact chosen to employ a legal maxim which grants initial preference or sponsorship to the protection of the speech or expression in question and also initially places the State's attempted regulation into a disadvantageous offensive position in which it holds the burden of meeting a specific (though varying) standard of interest.

III. Related Research

There exist numerous studies of broader constitutional maxims, similar to that of Alexander Tsesis' cited above. Such studies highlight evidence of general maxims that encompass the entirety of the Constitution. However, there exists very little research on more narrow maxims that have been utilized by the Supreme Court, specifically within disputes of speech or expression regulation.

This research also differs from most other studies on the First Amendment, which are often anecdotal and tend to focus upon a narrow range of speech or expression. This study does not utilize all applicable cases, but instead focuses on a select number of key suits within each category in order to give a more holistic and generally informative viewpoint on a central aspect of how the Court has approached cases of State speech or expression regulation.

The Search For a Legal Maxim

I. Freedom of the Press

In the case of *Near v. Minnesota* (1931), the Court determined that Minnesota's Public Nuisance Law, which provided permanent injunction against those involved with the publishing or selling of "malicious, scandalous and defamatory newspaper(s)", was in violation of the First Amendment's freedom of the press clause in a narrow 5-4 decision (Oyez). The reasoning within the majority decision by Chief Justice Hughes shows that, under this specific circumstance of prior restraint, Minnesota's restriction of these publications did not pass strict scrutiny. Minnesota's interest in restriction also did not fall under any categories of prior restraint that did manage previously to meet this bar, such as cases of obscene material or publications that advocate for the violent overthrow of the government (Feldman 444).

A second groundbreaking case on matters of the press, *New York Times v. United States* (1971), took place during the heat of the Nixon administration and the Vietnam War. This case, which also dealt with prior restraint by the State, demanded that the Court assess the constitutionality of President Nixon's citing of the Espionage Act in his attempts to stop the publication of what was known as the "Pentagon Papers" by the New York Times Company. President Nixon argued that these documents contained classified information that could compromise national security. Ultimately, on a 6-3 decision, the Court ruled that the restraint was unconstitutional. More specifically, the Per Curiam opinion stated "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its

constitutional validity...the Government thus carries a heavy burden of showing justification for the enforcement of such a restraint" (Feldman 447).

Within each of these cases, both playing a large role in creating the foundational precedent for future limits on restrictions of speech or expression of the press, the Court can clearly be seen utilizing a legal maxim in which the government's interests in restriction were immediately placed up against a large burdening hurdle, forcing it to meet a certain standard under strict scrutiny. Meanwhile, the speech in question in both cases clearly entered each dispute in preferential positions, underscored by the written opinion in *New York Times* (1971).

II. Freedom of Religion and Associative Speech

In *Wisconsin v. Yoder* (1972), the Court was asked to determine the constitutional validity of a Wisconsin law that mandated that all children under the age of sixteen be sent through universal education programs. Ultimately, three Amish parents were prosecuted under this law after refraining from sending their children to such schools for "religious reasons". In a 7-2 decision in favor of the defendants, Chief Justice Burger reasoned that "a State's interest in universal education must be strictly scrutinized when it impinges on fundamental rights and interests". In other words, Burger held that a "compelling government interest" must be identified in order for the State to rightfully suppress speech or expression. Furthermore, the Court held that "(the State could not prevail unless it showed that its requirement) served a State interest of sufficient magnitude to override the free exercise claim" (Feldman 656).

Masterpiece Cake Shop v. Colorado Civil Rights Commission (2018), a very recent and very highly debated case, also dealt with a State's restriction of an individual's religious

expression. This case asked the Court to determine the legality of a Colorado anti-discrimination law under which a private business owner was prosecuted for refusing his services due to a conflict of interest between his religious views and the sexual orientation of the two customers who were recently granted government permission to be married to one another through the Court's decision in the earlier case of *Obergefell v. Hodges* (2015). In a difficult-to-interpret barrage of concurring and dissenting opinions that ultimately heeded to a 7-2 holding in favor of the business owner's right to religious expression, the Court ultimately struck down Colorado's law by outweighing the individual's right to such a freedom over Colorado's interest in suppressing the expression to ensure equal access to goods and services for the protected class of homosexual individuals. The reasoning employed by Justice Kennedy in the majority decision, which is a bit more difficult to parse through in comparison to the reasoning of *Yoder* (1972), focused on his viewpoint that the CCRC gave unfair "hostile treatment" to the business owner rather than vice versa against the "protected" class of customers (Feldman 646).

In the case of *Yoder* (1972), the majority of the Court, in clear and direct terms, reasoned that the State's interest in the regulation of religious expression often enters the courtroom immediately carrying a burden of proof, and that the religious expression shown by *Yoder* was a "fundamental right" that could hardly ever be suppressed by the State in a valid way. This reasoning most certainly conforms to the hypothesized "preferential" legal maxim that we are aiming to identify. However, in the case of *Masterpiece Cake Shop* (2018), the weighing of interests appears much narrower and more muddled in that no two Justices used the same weighing basis. Each Justice that wrote a concurring or dissenting opinion focused on

different contextual considerations or facts of the dispute. Because of this, the reasoning employed by the Justices was far from uniform in comparison to cases in which a greater proportion of the Court concurs in full with the written majority opinion. Though the decision ultimately upheld the religious expression over the State's restriction of it, the varying independent reasonings within clearly lacked the usage of a legal maxim which initially weighed the religious expression over the State's interests.

III. Symbolic and Demonstrative Speech

Five years after Gregory Lee Johnson burned an American flag in front of the Dallas City Hall to protest the Reagan administration, the case of *Texas v. Johnson* (1989) was presented. This case, an example of nonverbal expression, asked the Court to determine the constitutionality of a Texas law that, at the time, made such desecration of the American flag a punishable crime. In a narrow 5-4 decision, the Court struck down the Texas law and Johnson's conviction. Justice Brennan's written majority decision reasoned that Johnson's actions fell under a category of expression called "expressive conduct", and that while some may be offended by Johnson's actions, that alone does not deem the expressive conduct as subject to government regulation. On the contrary, Brennan held that Texas, in order for its law to be upheld, must prove that its interest in regulation, which was to "preserve the flag as a symbol of nationhood and national unity", justified Johnson's conviction (Feldman 256). Ultimately, the Court found that Texas lacked this justification, and that its remaining allegation of "offensiveness" was lacking, as the State did not have the right to regulate or restrict speech or expression based on its level of disagreeability. The Court, in this case, clearly employed a legal

maxim which set a burdening standard of interest that the State of Texas had to prove that it met in order for its restrictions to be upheld. Meanwhile, Johnson's "expressive conduct" was not faced with any burden of proof or standard that it had to meet.

A second case within this category of expression, *Adderley v. Florida* (1966), was presented to the Court after a large group of Florida A&M students peacefully demonstrated against "racist motives" that led to the previous jailing of fellow A&M students. This demonstration, which resulted in the Sheriff's department arresting thirty-two of the individuals for trespassing, took place on the physical property of the jail that they were protesting. This case asked the Court to determine the legitimacy of the arrests and charges. In a 5-4 decision, it held that they were justified. Justice Black, writing for the majority, made two key considerations. First, Black reasoned that the Sheriffs' arrests of the students were made in order to preserve the integrity of the jail property, and that "the Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose". Secondly, Black contended that the actions of the Sheriff and his deputies came as a result of a legitimate concern for the security of the jail, and that there was "not a shred" of evidence that the arrests were made because of the content of the expression (Feldman 319). The Court's approach to this case, which ultimately upheld the State's interest in regulating the expression in question, appears to not have granted such an initial preference to the petitioning civilian party, as Black and the majority did not exert a burden of proof upon the State, but rather clearly identified its right of controlling its own property and extended that right to support certain cases of expression restriction.

IV. Situational Expression: School and Work Settings

Tinker v. Des Moines Independent Community School District (1969) is considered to be one of the most groundbreaking cases to have ever been argued in front of the Supreme Court of the United States. This case addressed a situation in which a group of students were threatened with suspension and then sent home for an extended period of time after refusing to remove their black armbands that were being worn as a form of protest against the continuation of the Vietnam War. In a 7-2 decision, the Court deemed the school's actions unconstitutional. Justice Fortas' majority opinion reasoned that students do not lose their right to free speech upon entering school properties; subsequently, in order for the school's (the State actor in this case) suppression to be upheld, it must "prove that the conduct in question would materially and substantially interfere" with the learning environment that it has vested interest in maintaining (Feldman 360). However, because the school's actions came as a result of it wanting to stop the mere *potential* for disruption or distraction, it did not meet this standard. Student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others", however, is subject to restriction (Feldman 360).

Pickering v. Board of Education (1968), a case of disputed speech in the workplace, asked the Court to determine the constitutional basis of a schoolteacher's firing after he wrote a letter to the editor of a local newspaper criticizing the school district's (his employer) handling of funds and his perception of it prioritizing athletic interests over academic interests. In an 8-1 decision, the Court determined that Pickering's letter was a protected form of speech, and that his firing was unconstitutional. Justice Marshall, writing for the majority, established two bases

of reasoning for cases of workplace speech suppression. First, Marshall struck down the notion that public employees give up constitutional liberties when entering employment. Second, and more importantly, Marshall also established the “Pickering Review” (Feldman 372), which as itself is a type of legal maxim, holding that topics of public interest generally fall under the category of protected speech or expression unless a compelling government interest proves otherwise. Because the subject matter of Pickering’s letter was of public interest and because employees do not shed their civil liberties when entering employment, the speech was protected and the firing was unconstitutional.

There is clear evidence that the Court used “free speech preferring” legal maxims within both *Tinker* (1969) and *Pickering* (1968). The Court’s initial approach in *Tinker* almost immediately struck down the State’s interest in regulating student speech by A) holding that students do not automatically shed their rights to free expression when entering school and by B) placing the State in a burdensome position in which it must prove that the expression will materially interfere with the school’s learning environment. Marshall’s Pickering Review in the latter case shows even stronger evidence of the Court’s usage of this type of maxim as this approach effectively established conditions in which nearly any matter of public concern within any context could be automatically protected from any form of restriction, giving the State a nearly insurmountable standard to meet without a compelling interest.

V. Seditious and Revolutionary Speech

The Court’s reasoning in *Schenck v. United States* (1919) established a new case approach called the “clear and present danger test”. This approach, also known as the Holmes-

Brandeis Doctrine, established a weighing mechanism in which the State's interest in restricting speech or expression would be upheld if such material posed a "clear and present danger", which included protecting against vulnerabilities of national interests. In this case, which took place in the heat of WWI, two American scientists distributed leaflets that urged for the disobedience of the wartime draft by those who were called to serve, arguing that the wartime draft violated the Thirteenth Amendment's protections against involuntary servitude. One of the scientists was charged with the conspiracy to violate the Espionage Act of 1917. In a striking unanimous vote, the Court reasoned that the Espionage Act and Schenck's conviction did not violate the First Amendment. Justice Holmes, writing for the majority, found that due to the gravity of special interests of national security and integrity in times of war, courts must hold a higher defense standard of the government in such cases, even when civil liberties are at stake within the opposition. This effectively created the "clear and present danger test" highlighted above. Under these circumstances, Justice Holmes found that the leaflets posed a "clear and present danger brought upon by a significant evil" that was "reasonably likely" to cause disruption (Feldman 17). Therefore, the speech was outweighed by the State's wartime interests and was not granted protection under the First Amendment.

In *Dennis v. United States* (1951), the Court was tasked with determining the constitutionality of the Smith Act. The Smith Act, which made it a punishable crime to advocate for the "violent overthrow" of the government, allowed eleven individuals that held public positions within the Communist Party of the United States to be criminally charged. The petitioners argued that the Smith Act violated their right to free speech by "stifling open discussion about the merits of Marxism and Leninism". In a 6-2 decision, the Court upheld the

Smith Act and the charges against the eleven individuals. The reasoning within the Court's plurality opinion, delivered by Justice Vinson and joined by Justices Reed, Burton and Minton, found that the Smith Act was not in violation of the First Amendment because the Act and the subsequent criminal charges were in place to halt the possibility of a violent government overthrow, which posed a "clear and probable danger" at the time. The Court found that the Smith Act and the charges in question were not in any way used to stifle open discussion about political ideas, but rather to target the potential dangers that could come as a result of the speech made by the eleven Communist Party members (Feldman 40).

The multitude of cases in which the Court repeatedly uses the clear and present (or "probable") danger test first established in *Schenck* (1919) highlights a recurrent maxim in which the speech in question is not given a preferential standing over the State's reasoning to regulate it. Conversely, these cases show a turning of the tide in which the special interests of the State are given initial preference. As Justice Holmes writes in *Schenck*, "the character of every act depends on the circumstances in which it is done...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" (Feldman 18). To be granted protection under this test, the speech in question is burdened with proving that it does not pose such a danger.

VI. Threatening, Violent, and Intimidating Speech

In the case of *Brandenburg v. Ohio* (1969), the Court was in charge of assessing the constitutionality of Ohio's Criminal Syndicalism law after a local Klu Klux Klan leader was

criminally charged for making a speech at a Klan rally. This Ohio law deemed all actions that advocated "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" as punishable offenses as well as abolishing group gatherings “with any society or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism”. In a Per Curiam decision, the Court ruled that Ohio’s Criminal Syndicalism law was in violation of the First Amendment under a newly developed “imminent lawless action” test, a two-pronged weighing mechanism in which the State’s interest must pass two considerations in order for its regulation to be upheld. First, the speech it aims to restrict must be “directed at inciting or producing imminent lawless action” and it must also be “likely to produce such action”. Conversely, speech that does not immediately incite such action is protected from regulation (Feldman 48). After applying the test, the Court reasoned that because Ohio’s Criminal Syndicalism law did not take into consideration whether or not speech would actually incite any violent acts and instead restricted all forms of applicable speech, it did not pass the test and was therefore unconstitutional.

Virginia v. Black (2003), a more modern case, dealt with State regulation of intimidating speech after three individuals were found guilty under a Virginia statute that outlawed any cross-burning done “with intent to intimidate”. The Court’s primary point of focus within this statute was a specific clause, which stated “any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons”. In a 7-2 decision, the Court found that the Virginia statute was in violation of the First Amendment. The reasoning within Justice O’Connor’s majority decision saw the law as being overly broad due to the wording of the statute, as any and all cross-burning would act as “prima facie evidence” of intent to

intimidate. The law would, in practice, make any cross-burning under any circumstance a class six felony. The statute effectively placed the burden of proof upon the alleged to prove that they did not have an intent to intimidate, creating a fundamental conflict from a judicial standpoint. Because of its overly broad nature, the Court also concluded that it could have the tendency to chill constitutionally-protected speech for fear of one's actions automatically becoming evidence of their intent, regardless of their actual motives (Feldman 119). Ultimately, this case indoctrinated the idea that the State could not make the expression of unpopular views automatically illegal, and that speech could not be banned merely because it expresses ideas that offend.

Brandenburg's (1969) imminent lawless action test is one of the most clear-cut examples of the Court utilizing a case approach similar to what this research sets out to identify. By placing the State's interest in regulation through a stringent two-pronged test, it effectively placed the party representing the expression itself in a very advantageous and preferential legal position. In order to pass this test under strict scrutiny, the State would have to prove that the law in question was created to restrict speech under very narrow and specific circumstances.

On the contrary, Justice O'Connor's approach in *Virginia* (2003) does not appear to utilize a maxim that would have given initial preference to the constitutional interests of protecting the expression in question over Virginia's interest in regulating it. However, by striking down the statute's "prima facie" clause, it does show the Court revering the legal maxim of "innocent until proven guilty" and using it as a standard principle that all State laws

must adhere to. As one of the most firmly established and deeply rooted judicial approaches in democratized legal systems, the Court's homage comes without surprise.

Summary of Findings

My findings indicate that, within the simple majority of the speech and expression categories analyzed in this research, when approaching a case that pertains to the First Amendment, the Supreme Court has taken the initial stance that the speech and/or expression in question is automatically protected unless it A) falls within a category that has already been deemed unprotected through precedent or B) the government can provide a "compelling interest" in regulating it. In most cases of the State placing restrictions upon ideological or political speech, the Court nearly always applies strict scrutiny to the regulation, which uniformly leads to the dispute being assessed through the lense of the legal maxim identified in this research. In order to pass these tests of scrutiny, the regulation must be shown to have been narrowly tailored in order to achieve a compelling government interest.

In broad systematic terms, the Court's tedious process of weighing the interests of civil liberties and the State's interest in regulation against one another, a process that is highlighted within every case above, has shown to be done most often by first determining the proper level of scrutiny to apply to the State's regulation and then assigning the correlating tests and reasoning processes that have been utilized in past cases that deal with similar contexts or subject material. As a whole, the Court's approaches that are highlighted within this study generally convey the message that State regulation most often has the burden of proof for a compelling reason to regulate. This well-known practice can be easily identified through the use of the now commonplace term "*compelling government interest*", which was initiated in the Court and sets the standard that the State must prove, under strict scrutiny, that its interest in

regulating speech (such as preventing violent uprisings, protecting vulnerable groups, restricting obscenity, preventing a clear and present danger, etc.) is a matter of necessity rather than a matter of choice or discretion (Steiner). This practice was utilized within numerous cases above. Meanwhile, my findings also show that only a small number of the speech or expression varieties in question within these cases are given such a burden of proof, and they are very rarely placed under the tests of stringent scrutiny that we see State regulation placed under on a regular basis.

Ultimately, the majority of these widely varying initial case approaches, though not all, act as evidence of the Court sponsoring the use of a type of legal maxim within First Amendment disputes that initially favors the position and value of free speech or expression over the State's attempted regulation of it. This evidence directly supports my hypothesis.

Implications: The Court's Endorsement of a Free Speech Preferring Legal Maxim

The cases above that don't act as support for my hypothesis, in which the identified legal maxim was not utilized by the Court, show us that it is not always a guarantee that the Court will initially prefer the interests of civil liberties over the interests of the State. Cases like these have the possibility of setting a dangerous standard in which a "slippery slope" precedent, per se, could be created. This would make it much easier for the State to regulate speech or expression moving forward.

As an example, some scholars contend that prior to *Schenck* (1919), many Americans viewed the right to free speech and expression as absolute and nearly limitless in nature. However, the Court's ruling and Justice Holmes' written decision in this case, which set forth the notion that all speech must be evaluated in its context, also caused the possibility of situations where once Congress would declare war, there would be no further right to debate the legitimacy or the merits of such a conflict (Daly). The dangers of such a scenario are obvious: this would not only suppress wartime speech but would also begin the process of deteriorating the entire constitutional defense system that protects the free exchange of ideas.

Ultimately, cases like *Schenck*, in which free speech preferring legal maxims were not utilized, highlight the dangers of its absence. The Supreme Court, by choosing to place the given speech or expression in a preferred and advantageous position of legal defense, and by placing the government in a highly scrutinized offensive position in which it must meet certain standards of its interest of regulation, does two key things. First, it fosters an environment that endorses and furthers the notion that the Bill of Rights was created and continues to exist in

order to protect Americans from excessive government rule or regulation. Second, it cultivates conditions where legitimately dangerous speech can still be struck down as unprotected under the First Amendment so long as a certain standard of interest is met. Finding and maintaining this tedious balance point has been and will continue to be no easy feat, and the Court's future will likely be defined in part by its shifting methods of pursuing such a position.

Future Research

Though the above case analyses offer strong evidence that the Court has, more often than not, chosen to employ a legal maxim which provides preferential consideration to the Constitution's interest in protecting disputed speech or expression, my findings also show that such a maxim has not been put to use in all applicable cases. Inquiry into why, exactly, the Court has chosen to use it for certain cases and not for others would be the next logical step in conclusively mapping the Court's methodology of how it approaches cases within the domain of the First Amendment.

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