

March 2018

The Understanding of Absolute Right to Freedom of Expression in the Case of Hate Speech

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The Understanding of Absolute Right to Freedom of Expression
in the Case of Hate Speech

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Arts
Zimmerman School of Advertising and Mass Communications
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Date of Approval:
March 15, 2018

Keywords: freedom of expression, hate speech, First Amendment, boundaries,
Charlottesville incident

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Dedication

This thesis is dedicated to my mom and my girlfriend who have always been a constant source of support and encouragement during the challenges of my whole college life.

Acknowledgments

I would like to sincerely thank my thesis advisor, Roxanne Watson, Ph.D. for her guidance and support through out this study and specifically for her confidence in me.

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Abstract

The purpose of this paper is to explore whether there is an absolute right to freedom of expression with regard to hate speech, and more specifically, whether tolerance should be exercised toward speech even in circumstances where this speech presents a clear and present danger to the public. The author will use legal research methods to analyze this question. The paper will delve into four major Supreme Court cases in the case of hate speech, as well as the decision by the Virginia Court that allowed the rally in Charlottesville which ended with the death of 32-year old woman. The aim is to determine how the Supreme Court has looked at hateful expression over the years and the status of hate speech in America today. The four major cases are *Brandenburg v. Ohio* (1969), *National Socialist Party of America v. Village of Skokie* (1977), *R.A.V v. City of St. Paul* (1992), and *Virginia v. Black* (2003). Although the case of *Kessler v. Charlottesville* (2017) is not a Supreme Court case, its significance in relation to the right to freedom of expression is no less than those precedent four cases. This incident and related legal cases bring the concerns about hate speech and the constitutional right to freedom of expression directly into the public discourse.

Introduction

On August 12th, 2017, a violent tragic event occurred in Charlottesville, Virginia. A hater, who allegedly is a neo-Nazi, drove a car into the crowd while one group of counter-protesters moved from the demonstrations. The driver killed a young woman and injured dozens of others. Meanwhile, two state troopers were also killed when their helicopter crashed while assisting with the police response to the white-nationalist rally. In total, three people died and at least 33 were injured after a series of violent clashes caused by the demonstrations between supporters of a white-nationalist rally and counter-protesters in Charlottesville, Virginia, on the same day. This could have been avoided if the demonstration by the white-nationalist rally had not been aimed at promoting hatred (Heim, 2017).

The whole tragic event started with a provocative march by several hundred white nationalists and white supremacists on the night of August 11th. The marchers who were part of a Unite the Right rally at the University of Virginia, held their torches and yelled slogans: “Blood and soil!” “You will not replace us!” “Jews will not replace us!” (Heim, 2017). The next day the rally was scheduled for another march in Emancipation Park at noon. But the counter-protesters gathered early to protest. Some members of anti-fascist groups yelled at the rallygoers in retaliation. In the next few hours, the two sides confronted each other with a few small skirmishes, in their words and body. Then everything escalated. One of the rallygoers, James Alex Fields Jr.,

allegedly roared his Dodge Challenger at a crowd of pedestrians (Correll, 2017). In the weeks preceding the tragic events occurred, the city, because of public safety concerns, had tried to move the rally to McIntire Park, a mile from downtown. But rally organizer Jason Kessler, a Charlottesville resident and well-known racist, sued the city, and his lawyers who worked with the ACLU and Rutherford Institute argued that moving the rally would violate Kessler's First Amendment right. A federal judge ruled in Kessler's favor on Friday, August 11th, a day before the events (Heim, 2017).

Afterward, two months later, on October 19th, Richard Spencer, who is a leader of the far-right white nationalists that had scheduled the rally march in Charlottesville, made a speech at the campus of University of Florida. He also said, during the speech, that he was not responsible for the violence in Charlottesville (Levenson, 2017).

Scholar Raphael Cohen-Almagor (2006) wrote that the United States is the freest land for hate groups. There are hundreds of hate groups that are active and influential. He also argued that the hate groups use the First (and Second) Amendments as an umbrella and have little respect for the law and governmental agencies. They will never stop venting hatred in all types of speeches, expressions or activities. According Cohen-Almagor's (2006) book, the Southern Poverty Law Center's Intelligence Project counted 751 active hate groups by 2003 in the United States. There were 7,462 hate crimes in the United States in 2002, proportionally including bias-motivated offenses, vandalism, assault, and hate-motivated murders (Cohen-Almagor, 2006, p. 261).

Hate expression is never far away from the real world no matter how severe and

powerful law enforcement attempts are to control it. From Skokie's (1977) march to Charlottesville (2017) car attack, hatred has never stopped escalating. This violent tragedy brings the debate regarding the relationship between hate speech and the rights under the First Amendment back to the forefront of public concerns. Whether hate speech should be protected under the First Amendment, or we should tolerate those intolerant expressions, is not a new issue but still problematic. Hatred is a natural emotion that is inevitable and unpredictable. There is no satisfying way to reconcile the interests of all parties concerned in the real world. Nevertheless, the fundamental meaning of human rights, the necessity of justice in society, the core value of democracy, and the dignity of law should be clarified and asserted as often as possible, in that this is a primary duty driven by the progress of civilization.

However, the issues that concern us should not only be around how the First Amendment scholars cope with the right to freedom of expression claimed by haters, or how the Supreme Court should balance all sides' interests under the First Amendment. It is worthy to rethink what the expression of hateful ideas implies in the discourse of free expression. What makes haters believe that they enjoy the right to free expression which entitles them to disregard others' right and even to infringe them, at the same time? Or is what is called "the free speech right" by haters a wrong interpretation of the meaning of an "absolute" right to free speech and the First Amendment. People who hate may think they can express themselves in any way, due to the "right to free speech". Also, they may not fully understand the constitutional right as an umbrella to protect their "free right". There is no clear answer.

Nonetheless, the researcher believes it is imperative to pay attention to how the core meaning of the right to free expression should be understood and how the Constitution is interpreted not only based on the value of democracy and tolerance but also more based on the implication and the essence of the right itself.

This paper focuses on the understanding of the right to freedom of expression in the case of hate speech under the Constitution. More specifically, what implications about this right are involved in the discussion of hate speech. Moreover, the paper also aims to begin a discussion about the necessity for defining the boundary between the right to freedom of expression and tolerance. The author queries whether there is an absolute right to freedom of expression regarding hate speech. To answer this question, the researcher will analyze the academic discussion and legal decisions that have focused on fighting words, cross burning, and hate speech.

Consequently, this paper will explore the justification for the absolute right to freedom of expression in relation to hate speech issues underlying the constitutional discourse. Part I will define the meaning of hate speech and present the theoretical basis of the paper. It mainly consists of three sections. The first is represented by John Stuart Mill. The author mainly discusses how Mill's theory elaborates the scope and boundaries of liberty. The second is about the critical perspective on the marketplace of ideas from Jerome A. Barron and Derek E. Bambauer. The third focuses on the scope of tolerance. The researcher will explore the interpretation of the tolerance theory as expressed by terms of John Rawls. In part II, the author will trace the history and the facts involved in four major cases that relate to hate speech and its protection

in the U.S. The cases *Brandenburg v. Ohio* (1969), *National Socialist Party of America v. Village of Skokie* (1977), *R.A.V v. City of St. Paul* (1992), and *Virginia v. Black* (2003) will be analyzed by looking at the Court's decisions, the reasoning behind these decisions and the dissents and concurrences. In the third part of the paper, the researcher will look at the recent decision in *Kessler v. Charlottesville* (2017) in which the court granted *Kessler* the right to protest. In the final part of the paper, the author will explore whether, based on the precedent and understanding, the right under the First Amendment the court in *Kessler* got it right. The conclusion will also explore whether there is a constitutional right to freedom of expression which is absolute, in the area of hate speech, and whether hate expression of the type that occurred in Charlottesville is protected under this right.

Literature Review

Defining Hate Speech

For a long time, based on relevant social events and legal cases in the area of hate speech, scholars have tried to establish a general concept and common sense about how hate speech should be defined. Nonetheless, an accurate definition about hate speech still remains controversial, especially in academia. Walker (1994) points out that there is no “universally agreed-on definition” on hate speech (p. 8). Also, legal definitions are more precise and are specific to certain jurisdictions so that the definition of hate speech from law often does not capture all forms of offensive or hateful speech (Ross et al., 2017). Moreover, different media services may have their own definitions in terms of their different contexts and features. For example, in practice, a general definition of hate speech in the traditional media may not be perfectly applied to social media services. Thus, it is even more difficult to obtain a consensus on a universal definition of hate speech.

From the academic perspective, many scholars are inspired by critical race theorists Matsuda, Lawrence, Delgado, and Crenshaw. In the arena of critical race theory, the term hate speech is interchangeable with the term assaultive speech: “words that are used as weapons to ambush, terrorize, wound, humiliate, and degrade” (Matsuda et al., 1993, p. 1). Starting from the base of Matsuda et al.’s (1993)

definition, Hylton (1996) provides his own understanding through the lens of individuals. He defines hate speech as speech that “aims to arouse anger, resentment, or fear in an individual because of the individual’s race, ethnic group, religion, or political affiliation” (Hylton, 1996, p. 35).

Later, Warner and Hirschberg (2012) further develop the critical race theorists’ definition by building a classifier. They define hate speech as “abusive speech targeting specific group characteristics, such as ethnic origin, religion, gender, or sexual orientation” (Warner & Hirschberg, 2012, p. 20).

First Amendment scholar Rodney Smolla (1992) regards “hate speech” as a “generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion and sexual orientation or preference” (p. 152). Also, Rosenfeld (2003) defines hate speech as speech designed to “promote hatred on the basis of race, religion, ethnicity or national origin-poses vexing and complex problems for contemporary constitutional rights to freedom of expression” (p. 1523). He also argues that constitutional principle has treated these problems not in a uniformed manner but as separately particular cases, because the boundaries between impermissible propagation of hatred and protected speech are changeable and contextual (Rosenfeld, 2003). Nevertheless, there is a big difference between the way in which the United States deals with constitutional hate speech issues and the other Western countries deal with them. Rosenfeld (2003) points out that the United States Constitution gives hate speech much wider protection compared to other Western democracies, such as Canada, Germany, and the United Kingdom, where hate speech

may be largely prohibited and subjected to criminal sanctions.

Nonetheless, comparing the general definition of hate speech by the United States Supreme Court with the definition of speech by the United Nations International Covenant on Civil and Political Rights (ICCPR), Catlin (1993) concludes that the definitions are similar in the use of some critical words. Accordingly, Catlin (1993) proposes that hate speech can be defined as speech that 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” (p. 772).

The most recent U.S. Supreme Court rationalization for restrictions on hate speech was in *Matal v. Tam* (2017). In this case Justice Samuel Alito suggests that government can be justified in restricting speech expressing ideas that offend, as long as the government has legitimate reasons for interest. He clarifies that “speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful” (*Matal v. Tam*, 2017, p. 22).

Theoretical Foundations

Boundaries on Liberty

The theory of liberty and free thought by John Stuart Mill (1869) enlightened many great liberals and laid the influential foundation for the values of modern democracy and social justice. The classic philosophy of the marketplace of ideas, which has continued to have a great impact on the First Amendment as doctrine, also originally derived from Mill's concept. Apart from inspiring liberal philosophy, Mill (1869) also contributed many views to nourish different philosophies, such as justice, equality, truth, tolerance, and utilitarianism. Although his theory has been in doubt to some degree for many years, the value and spirit of his thought always plays a significant role in liberal studies. Some research in relation to contemporary liberty and social justice issues still relies on Mill's philosophy for support and rationale.

This paper focuses on discussing two core ideas of his theory in *On Liberty*. One is to advocate to fight against the tyranny of the majority and seek the truth, through guaranteeing individual's right to liberty and equality. The second is that Mill (1869) emphasizes the significance of boundaries among individuals, society and government. Basically, Mill (1869) clarifies his main point: any person shall be entitled to an absolute right to freedom of thought, expression and conduct as long as he/she uses this right in a manner that will not harm other people. And exercising this

principle relies on limiting the power of government and society, and also relies on providing the clear boundaries for rights and duties, between man and man, individuals and government, individuals and society.

In the past, liberty usually meant protection against the tyranny of the political rulers. However, Mill (1869) suggested the imperative of fighting against the tyranny of the majority. Mill (1869) argued that it is not enough to protect against the tyranny of all levels of government. There should be more attention to the protection against the tyranny of prevailing opinions and feelings. People initially thought, and may still think, that the main reason why the tyranny of the majority is dreadful is that it is operated through the acts of public authorities. However, this expression is just one case of tyranny of the majority. Mill (1869) assumed that if the society itself is a tyrant, which means the society is collectively above each individual who consists of the society, then the operation of tyranny is not only limited to the hands of political authorities, but society can and does execute its own commands. If the execution is operated in a wrong way, or society intervenes in other affairs that should not be meddled with, then there is the potential for a more formidable social tyranny than other kinds of political oppression. Although the social tyranny does not rely on a severe punishment, it deeply infiltrates into the details of life even generating an inner strain so that people can hardly get outside of its control.

Therefore, Mill (1869) emphasized that the tyranny of the majority to the human's inside world such as thoughts, opinions, and feelings is more dangerous. He suggested the importance of protecting against the tendency that even without using the methods

of punishment available to government bodies, the society has its own way of imposing its own ideas and conducts as rules to dissenters, and against the tendency that the society hinders the development of personality, even inhibiting the formation of individuality, so that individuals must follow the society's modes to shape themselves (Mill, 1869, p. 15).

Furthermore, Mill (1869) argues that it is just as harmful to force individuals to comply with public opinion as it is to prevent them from dissent from public opinion, and the former may be even worse. It is unacceptable to deprive any individual's right to expression even when he/she may be the only one with a dissenting opinion.

According to Mill's (1869) primary point, even if all mankind held one opinion and only one person has a different view, there is no reason to prevent that dissenter's expression. In the same way, that this one person with supreme power, should not be allowed to prevent the expression of public opinion.

The other crucial view by Mill (1869) refers to boundaries. Through an analysis of boundaries of liberty, individuals, society and government, he clarifies the scope of freedom, the limitation of power and the essence of duty and right.

In the first place, Mill (1869) advocates a principle referring to how the society should cope with an individual's affairs. He emphasizes that if the society forcibly meddles in people's private business, whether through imposing legal penalties or moral public pressure, it must follow the principle: if the collective's intent is to intervene on the liberty of individuals, whether individually or collectively, there is only one legitimate and acceptable reason for such meddling which is self-protection.

In other words, the only acceptable purpose for rightly exercising any power toward a person, which may be against the person's will, is to prevent harm to others. The person's own interest, either physical or moral, should not be forced or controlled. He cannot be forced to do something or be forbidden from doing something only because the thing is good for him, makes him happy, or is wiser by others' advice (Mill, 1869, p. 23). There is no reason to impose oneself as legitimacy or truth in order to compel another person to do something. Not only is the coercion not allowed, but also any punishment imposed on something, because of that person's rejection of mainstream ideas, is unacceptable. Instead, advice, persuasion or warning can be a reasonable way to influence other persons. The only justification for the enforcement is to recognize that the banned conduct will be harmful to others. Individuals must be responsible for the society only when their conduct affects others'. If the behavior only refers to oneself, then the other's independence of right is absolute so that he/she is sovereign for his/her own body and mind. In other words, individuals should only be autonomous and responsible for themselves in cases where their conduct does not affect others (Mill, 1869, p. 23).

Nevertheless, Mill (1869) also admits that almost anything that only affects oneself may have the potential to affect others. Thus, he suggests that the effect that he refers to on others only relates to a direct and original influence. As a result, Mill (1869) proposes an appropriate region for human's liberty. First, individuals have liberty in the domain of consciousness. It requires the most comprehensive freedom in liberty of conscience, sense, thought and feeling, and the absolute freedom of all subjects,

practices, sciences, morals and religions. The freedom to express and publish opinions may belong to other principles because it is individual conduct that may concern others. But, in fact, expression and publishing is as significant as liberty of thought, and they all rest on the same reason for being important. Hence, they are actually inseparable. Second, it requires the liberty of taste and pursuit. Individuals can freely build their own life and act as they like and take responsibility for any consequence of these behaviors. As long as individuals' conduct does not harm others, their behavior should not be interfered with, even though the conduct may be regarded as foolish, perverse, or wrong. Third, individuals can freely unite with any other person in certain contexts. It means that individuals can associate with each other as long as other people will not be harmed by this association. Also, the participants are supposed to be consenting adults who have not been forced or deceived into that association (Mill, 1869, p. 28).

Nonetheless, Mill (1869) did not believe that humans had an unlimited liberty. He pointed out that no one can say that a human's actions should be as free as his/her opinions. Even for opinions, if expressing these opinions will positively instigate some harmful acts, then opinions should lose the immunity of absolute freedom. Any type of acts that are performed without justifiable reason and are harmful to other people should be restrained. If the situation is severe it may be necessary to make a serious interference or enforcement through practical actions. Therefore, an individual's liberty may be limited to ensure that he/she does not through his/her actions hinder other people (Mill, 1869, p. 100).

In addition, Mill (1869) acknowledges the relationship between the power of society and individuals' interests, through duty and right. He argues that, although our society is not founded on a contract and there still is little benefit even when we invent a contract for rules of social duty, in fact everyone receives the protection by society. People, thus, should return this benefit to society. Since everyone actually lives in the society, everyone must follow the rules and boundaries in dealing with matters which involves others. First, individual's conduct cannot damage others' interests. Specifically, interests refer to the legal provision or the legitimate rights gained by the approval of the public. Second, individuals should all share the labors and sacrifices necessary to defend members of society from inside injuries and outside disturbance. If a member of society refuses to fulfill the obligation, then society can righteously force the person to do so. More than this, even if an individual's conduct is not yet carried to the extent that violates others' legal rights, it will still cause harms or be bad for others, because of though their behavior. If so, the person deserves to be punished by public opinion, though not by law (Mill, 1869, p. 133). In a word, as long as any individual's conduct mischievously affects others' interests, then society is entitled to have a justifiable power to intervene.

Meanwhile, Mill (1869) points out that we cannot take for granted this interference and always justify it merely because the justification of the interference can only be reasonable in the context of the violation of others' interests. In many cases, individual may inevitably and legitimately cause loss or pain to others, or hamper some interests that others expect to obtain, when the person pursues a legitimate goal.

The conflict of interest among individuals is often a result of bad social institutions, and the conflict will never be avoidable if the bad impact continues. But there also are some conflicts that are unavoidable at any rate in any social institution. Mill takes the acts of fair competition as an example, such as job competition or exams. He conditionally accepts this type of obstacle to other's interests: "society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering; and feels called on to interfere, only when means of success have been employed which it is contrary to the general interest to permit—namely, fraud or treachery and force" (Mill, 1869, p. 167). Although Mill (1869) also uses other examples to justify this type conflict of interest, he does not mention whether there an unavoidable or legitimate conflict of interest in freedom of expression, which provides obstacles to another person's interest, would this speech also be exempted from society's interference or sanction.

Finally, the last point concerns the connections between Mill's (1869) thought and the "marketplace of ideas". Justice Holmes (1919) was inspired by Mill's (1869) ideas and proposed the "marketplace of ideas" theory in his dissent in *Abrams v. United States* (1919): "But when men have realized that time has upset many fighting faiths, they may come to 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 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. That at any rate is the theory of our Constitution" (p. 630).

Nevertheless, Mill's (1869) thoughts on liberty may differ from Justice Holmes's (1919) expression of the marketplace of ideas. Admittedly, they all agree that truth should eventually prevail. The marketplace of ideas implies that truth will naturally emerge from water by the competitive mechanism and finally defeat the falsehood. But Mill (1869) does not believe that truth will autonomically stand out from the competition and then defeat the evils. He argues that the position that truth will always obtain final victory where speech is allowed is only a beautiful lie. No one can assert that the truth is naturally able to triumph over the falsehood only because the truth is known as truth. To think truth can rely on itself to defeat the evils is only a fluke without credibility. People are not always more zealous for truth than falsehood. The legal or social penalties can not only prevent the spread of falsehood but can also stop the propagation of truth. In fact, the real advantage of truth is that it will never die. If an opinion is truth, it may be extinguished many times. But it will be generally found or rediscovered by someone in the course of ages. Also, truth will ultimately escape from the persecution until a favorable circumstance occurs, then it will withstand all attempts at later persecutions and head to triumph (Mill, 1869, p. 55).

Additionally, Mill (1869) indeed strongly advocates that full and free discussion and expression must be guaranteed for the good and happiness of all humans and society. However, unlike Justice Holmes's (1919) suggestion in the theory of marketplace of ideas that free expression in the competitive market of opinions will eventually help us recognize fallacies and lead us to the final truth, Mill (1869) reveals that any opinion is likely to have a tendency to be incurable. He suggests that

any opinion could possibly fall into the trap of sectarian extremity and not be clarified and cured even by the most unlimited use of expression and the freest discussion, and the situation could become worse thereby. The truth, which ought to have been recognized but failed only because the truth teller is regarded as an opponent, may suffer from worse rejection (Mill, 1869, p. 94).

Consequently, Mill's (1869) libertarian theory falls squarely into the camp of providing full freedom and is based on the pursuit of human beings' ultimate well-being. Yet, he never forgot to emphasize the importance of boundaries: "before quitting the subject of freedom of opinion, it is fit to take some expression of all opinions should be permitted, on condition that manner be temperate, and do not pass the bounds of fair discussion" (Mill, 1869, p. 96).

Criticisms of Marketplace of Ideas

The marketplace of ideas has been challenged from different perspectives. One critic, Jerome A. Barron (1967), reveals that the conventional constitution theory falls into a romantic concept that the fundamental and primary value of the First Amendment is to protect full and free discussion without considering the difference and unevenness of access to media. Barron (1967) argues that the marketplace of ideas rests on the assumption that the permission and competence of free expression is freely and equally accessible.

He asserts a new First Amendment right which guarantees the access to media discriminatorily, through emphasizing the necessity of access and proposing the implements. Barron's discussion of rethinking of the new constitutional right starts

from reviewing the romantic convention of the First Amendment. According to Justice Holmes's (1919) view of the marketplace of ideas, the truth would eventually emerge from water by itself in a free market, by full competition of ideas. This rationale is actually based on an analogy to the economic concept of a free market. Barron (1967) points out, however, that Justice Holmes might present an interesting self-contradiction in reminding his brethren in *Lochner v. New York* (1905) "that the Constitution was not 'intend[ed] to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state of laissez faire', nevertheless rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas" (Barron, 1967, p. 1643). Also, he has already implied an embodiment of economic free market concept while he elaborates marketplace of ideas in *Abrams v. United States* (1919): "...that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, ..."

Similarly, Justice Douglas was in the same camp with Justice Holmes. He believed that the free market of ideas would work mechanically if government kept away from intervention. As long as the full and free discussion can be guaranteed for competence, the self-operating and self-correcting mechanism could work to lead us to the eventual truth.

Nevertheless, both Holmes and Douglas failed to recognize that the "marketplace of ideas" does not take into consideration whether the "full and free discussion" can

obtain the full and free chance to access media for expression. Barron (1967) argues that the romantic view of the constitution has not taken into account the legal interest of various interest groups and their effect on access the means of communication. Thus, First Amendment case law might only favor groups who can access channels to express themselves. But for those ideas which might be too unpopular or unacceptable to obtain access, there may be less protection within the First Amendment discussion of the marketplace. These groups might not have the opportunity to exercise the right to express their opinion because they have no access to the mainstream media to do so.

As David S. Allen (1995) introduced in the book, *Freeing the First Amendment*, we need to understand that the interpretation of the equal protection under the First Amendment in equal protection gives little attention to the equality of speakers, especially when it involves the use of resources.

Similarly, Cass R. Sunstein (1994) points out that Justice Holmes's marketplace of ideas works under an ideal condition that there is not only no monopoly but also the competitive system functions well to guarantee a property rights regime. Even where possible, other constitutional issues still remain. Holmes assumes that the allocation of speech rights depends on a pricing system on the free market, then the majority may keep some people from talking only because little people would like to pay. Admittedly, it seems to be unreasonable as a democratic aspiration that dissident speech would be foreclosed as long as people are not willing to pay. Ironically, it is plausible if we think about the truth of what the competition is. As a result, the

allocation of broadcasting licenses and the opportunities to speak is subject to the private people's willingness to pay. Apart from the shaping exerted by the particular consumer's demands, expressive content, even more markedly yields to advertisers. The constitutional concerns must pay attention to such particular issues.

In addition, Barron (1967) also explains the source of interference with access and why unorthodox, unpopular or novel ideas are hard to convey in the development of new media. Seemingly, the communication industry itself, during the new media shifting, would be responsible for impeding to access to some extent. According to Marshall McLuhan (1964), new communication modes has led to an indifferent attitude to content from both the older media and the newer media. People have been attracted by the new forms of communication rather than the content. However, there is another explanation of indifference to the content, by Dan Lacy (1961). The new communication industry has actually been catering to its very large audience in order to increase the industry's efficiency and profit. Therefore, because all mass media has been subjected to the accepted appeal by the majority, it leaves little room for the expression of the novel or unpopular views. The predominant fact draws the interest, while some views or subjects that should have been carried are lost from the public attention.

Beyond this, Barron (1967) believes that beneath the surface the right to free speech and free press are used to escape opinions rather than to play the role of the sounding disseminator. The new media industry itself does not manipulate the access to ideas. Instead, the contemporary mass media has formed a structure to avoid

expressing opinions.

Furthermore, Barron (1967) suggests that the romantic view of the First Amendment does not function to address the new circumstance's issues in reality. He also proposes the way to make the First Amendment work in order to guarantee an equal power to communicate ideas.

Firstly, Barron (1967) criticizes the marketplace of ideas for its romantic assumption that people are provided equal protection. The truth is that the real changes in the communication industry has led to a disproportionate allocation of the right to expression so that the protection might be ignored somewhere, especially as it relates to the unpopular and unorthodox. He points out that a realistic view of the First Amendment ought to recognize that a right to expression is limited by the predominant power of managers of mass communications. Moreover, Justice Brandeis in *Whitney v. California* (1927) and Justice Murphy in *Thornhill v. Alabama* (1940) both realized the importance of presenting the widest variety of competing ideas to citizens. Specifically, they emphasized that it is necessary to prevent the tyrannical power of authorities from repressing opportunities for discussion. According to this, Barron (1967) highlights the significance if the contemporary constitution takes the same approach to the reality that private minorities who occupy power over the machinery of communication are supposed to be inhibited to ensure channels for unorthodox ideas are available.

Secondly, Barron (1967) indicates that the romantic convention of the First Amendment does not take the differences among various media into consideration

when it mentions equality of protection. It is simplistic and unrealistic to regard the impact of various media to be on the same level and to have the same free range. The romantic view confuses freedom to publish media content and freedom of access to media. Based on the no difference assumption, the romantic view neglects a contextual discussion of people's different backgrounds, situations and means of communication. Barron (1967) stressed that the constitutional principles ought to fit the dimensions of the particular medium, which conforms with the concurrent opinion of Justice Robert Jackson in *Kovacs v. Cooper* (1949). The consideration of access and impact of each medium and situation comes with so much problems that the constitution needs to pay particular attention to the specific medium in each case's circumstance while dealing with the different natures, values, abuses and dangers. Although Barron (1967) commended this view as enlightenment to the romantic convention of the First Amendment, the majority of Justices in *Kovacs* (1949) did not appreciate that. Justice Hugo Black, in his dissent, joined by Justice William Douglas and Wiley Rutledge, was inclined to give all instrumentalities of communication enough free room so that the competitive mechanism of free ideas could be processed. They believed that problems are capable of working themselves out if governmental regulations do not intervene.

However, Barron (1967) reveals that Justice Hugo Black (1949), one of the dissenters, appeared in his opinion to obscure the variety among media and ignore the differences in their impacts, even though he recognized that there is an unequal issue in applying legal principles and operating the mass media. Therefore, Barron (1967)

suggested that the legal principles must fit within their context. Television has a wider range and greater efficiency in reaching audiences, yet the print media has a longer lasting impact on critical ideas. The legal principles adopted should proportionately control the peculiarity of each medium on the basis of its impact, as appropriate. This contextual approach provides the potential to guarantee accessible opportunities for expression in the media with the largest impact.

Thirdly, Barron (1967) stresses that the “hearer” of mediated messages should understand the same significance as the “speaker”. He agrees with Alexander Meiklejohn (1961) that the minds of hearers, rather than the words of the speakers, have the most significant interest. Thus, he inquires whether the minds of hearers can be reached effectively if the media are not equally accessible to them. The challenge of securing access to media is not limited to incursions from governmental restrictions but also from private hands. Antitrust law, as a solution, seems to deal with the difficulties of access to the monopolies. Justice Black suggested in *Associated Press v. United States* (1945) that there is no exception from legal sanction if any institution, especially the nongovernmental combinations, impedes the right to free expression. Although antitrust law in this case functions ineffectively because of its indirect relationship to the access problem, Barron (1967) argues that the case at least acknowledges that a public interest in expressing divergent ideas should be given attention when securing access to media engagement. The new perspective for the romantic view of the First Amendment reminds that the conventional theory has not been properly applied to the access difficulties resulting from nongoverning

minorities. The interpretation of the First Amendment should direct the focus away from restraining the governmental hands toward those private groups who really control the means of communication. It is necessary to seek a balance between the interests of those private hands and the interests of speakers and hearers.

Additionally, Barron (1967) is particularly concerned with the right to demonstrate. Initially, he believes that demonstrations occur actually as a result of scarcity of access to proper channels for expressing one's opinion. The minority voices are eager to obtain public attention to convey their message. But the mass media channels are usually not available for those extreme opinions. Even where the medium is accessible, the nature of new media age diverts the public attention too quickly. As a result, the minority voice may turn to some aggressive solutions to maintain the impact. In addition, Barron (1967) argues that some unwelcome ideas are foreclosed for public safety and considerations of social order when the minority voices try to access the communication media. However, that repression for safety's sake may lead to unrest and violence in an attempt to capture public attention.

Above all, Barron (1967) asserts that the constitutional imperative is to guarantee the public interest to effectively use various media for the expression of diverse opinions. He objects to the arbitrary application to the problems of access in legal cases. Nevertheless, he also left an open question. What is the scope of diverse expression that should be available to the public? Does it include hateful or harmful expression? If it does, won't the public interest be jeopardized? Even worse, the right of access may face a similar query, as in the position of romantic theory, whether the

general application of all kinds of heretic opinions, including hateful and the harmful expression, will debunk different falsehoods leading to the truth.

Another scholar, Derek E. Bambauer (2006), also points out a fallacy of marketplace of ideas from a different perspective. His theoretical view focuses on the process of information gathering and decision-making. Specifically, the truth will not emerge by itself due to the competitive mechanism in the free market, because humans always have cognitive biases and inbuilt stereotypes when processing information. Thus, the information will be processed by humans and either falsehood or truth will emerge as a result of sifting by humans through their own personal biases. The distortion of thinking from persistent perceptual biases hinder humans from finding truth.

While, the main point of the marketplace of ideas is that where governmental regulations and repression of communication are removed, an ideal environment for ideas to be freely traded and freely compete emerges, leading to full and free discussion, the effect will be that truth is found. In other words, the marketplace of ideas presumes that humans are always rational and are able to perfectly correct themselves and make an unbiased decision. Bambauer (2006) argues that it is arbitrary and unrealistic to adopt the marketplace of ideas as a guide to regulate the communication market. He, therefore, suggests that the constitutional view should discard the marketplace of ideas as a principle to affect legal decisions in the regulation of communications. According to Bambauer's (2006) study in cognitive behavior, there are three main biases that can affect humans in interpreting

information. The biases occur during stages of information selection, processing and use. The cognitive bias research, thus, disproves marketplace model for the following reasons.

Firstly, Bambauer (2006) objects to the injection of mass of information into our environment. The information flood in the Internet age has already begun to overwhelm audience. It brings inevitable difficulties for us in selecting relevant and useful data. The more choices we have in information, the more confusion we have in decision-making. According to Barron (1967), we face the scarcities in equal availability of communications media and attention to the access issues. There is no inadequacy of information itself. The current information is already trapped in overabundance so that the efficiency of processing and using this information has been impaired. Additional information can only make the situation worse.

In addition, more information makes people more capricious while making decisions. Bambauer (2006) gives an example. If mock jurors are provided with more potential verdicts, they may shift their decision between the decisive one and the irrelevant one. They are inclined to reach a mediated consequence. The unnecessarily extra information may perplex the rational judgement. Moreover, Bambauer (2006) takes issue with Barron (1967) regarding how to solve the problem that private businesses dominate and control the communication channels. Although Bambauer (2006) agrees that the communication channels are indeed inadequate, he disagrees with Barron's proposal that suggests the legal solutions to limit private power and mandate access. He argues that increasing access is equivalent to the mechanics of

marketplace of ideas, wherein the more information flows in market, the more effective is the atmosphere for self-correcting. Bambauer (2006) points out, however that improving access merely by expanding or adding opportunities without consideration of information selection and processing, may lead to more harm than good. Simply adding information into the market may lead to greater scarcity of attention and cause an inconsistency in the analysis of information. People may become irresolute about any decision. Thus, the belief in the marketplace theory that information is more beneficial in condition of full and free discussion, would be ill-considered and unsound.

Secondly, Bambauer (2006) believes the way in which the information is framed will significantly affect decisions. People are vulnerable in dealing with strategic behavior and wrought information. According to his example, people easily fall into sales promotional traps. Sales information is framed by a car dealer or clothes seller in ways that provide add-on options only after the price has been negotiated, or first recommend expensive clothes, before showing the cheaper deals, in order to make you buy at least one item in the end. Our choice or awareness is always spontaneously shaped by various framed information every single day. Inevitably, framing easily leads us to cognitive biases. Bambauer (2006) also provides a political example. Taxpayers would be willing to accept a tax reduction proposal if the objective were framed as relieving tax burdens, even if the result of the proposal has nothing to do with personal benefit. Humans' preferences vary dependent on the different frames used for information so that our own choices, decisions and ideas may be a result of

framing rather than based on reason and objectivity. The marketplace of ideas model ignores that we are all surrounded by “second-hand information” and limited in distinguishing the final truth through rational and reliable means. The truth rarely exists in biases and subjectivities.

Thirdly, history causes people to easily form inherent biases and to be unwilling to accept the new findings or truth. Bambauer (2006) uses the incident in Iraq as an example to show that even though the final investigations showed that there were no weapons of mass destruction in 2003, some Americans still believed that Iraq, indeed, had weapons. For people, it is difficult to discard the ingrained behaviors and ideas which are formed by history or experience. Another key point of the marketplace of ideas theory is that good information will finally defeat bad information and lead us to the victory of truth. In fact, humans are less likely to autonomously correct themselves and to rethink their strongly held predispositions, at least in the short term. Although we may realize the falsehood and try to correct it, it always takes time, more often long term, and always is subject to personal and environmental limitations. But it is noteworthy that cognitive biases often have a short-term impact on analysis and decisions. The impact may be incompatible with the major purpose of the marketplace of ideas, which “helps to choose enlightened public policies” (Bambauer, 2006, p. 701). Bambauer (2006) also reminds that information can be deliberately manipulated by politicians to make people believe something. This manipulation matters even more than individuals’ stubborn predispositions.

Finally, Bambauer (2006) indicates that the marketplace of ideas model cannot

function in political communication as well, even though the core value of the model, which is seeking truth, is always presented in political terms, such as arousing autonomy, fighting against tyranny, or remembering America's founders. Also, we take our role of supervising the government, in order to ensure they make reasonable decisions for granted. We believe as citizens that we are wisely skeptical enough to help correct falsehood in political communication. As a matter of fact, the cognitive biases also greatly affect political situations. Bambauer (2006) explains that "loss aversion" plays a significant part when we approach policies. For example, self-serving bias would help us justify continuing to damage the environment so that we prefer the preservation measures rather than slow down steps for economic development, even though we care about environmental degradation. We are unconsciously shaped by loss aversion in political communication. Additionally, facts are sometimes manipulated to obscure public perception by the preference of political campaigns or media effects. Bambauer (2006) uses Al Gore (2000) as an example. Gore stated that he would take the initiative in creating the Internet during his service in the United States Congress. What he really wanted to do was to introduce legislation to support the development of networks and to create more opportunities for commercial purposes. However, the statement was immediately shaped by his political opponents and the press, in a distorted way to suggest that Gore stated he "invented" the Internet. Moreover, the factual version received the least press coverage, and the distorted version not only was reported most but also produced a greatly negative reaction to his campaign. Although his campaign team managed to

clarify the information and save the situation, the accurate version still did not gain attention from the public and the press. This incident had a harmful impact on the campaign which he ultimately lost.

Bambauer (2006) points out that, even though we habitually regard the marketplace of ideas as a guarantee for political communication, the Iraq and Gore events illustrate that the self-correcting mechanism does not always work. It seems Mill (1869) might be wrong about flawed ideas. They may not always make the truth clearer but may sometimes make truth more blurred.

Admittedly, the marketplace of ideas model provides an appealing prospect that flawed ideas will eventually be driven out by truth as long as there is an atmosphere that offers free enough room for the expression of ideas and allows them to compete with others. The model also proposes an ideal enlightenment principle that people will act as rational and deliberate persons to make reliable decisions, and learn from these lessons to discard falsehoods. Nevertheless, this is not a true vision. Bambauer (2006) concludes that humans' cognitive biases are rooted and inevitable. People often are trapped in the frame of stereotypes, instead of seeking for objective and accurate information. We would rather reinforce existing views, even flawed ones, than accept informed opinions. Furthermore, cognitive biases are present even in the legal system, where problems are limited to appeal to the concept of the marketplace of ideas, rather than treating issues more thoroughly and thoughtfully. Since the model fails to improve communication and bring truth to us, Bambauer (2006) suggests discarding it as a tool for policy-making and court decisions. He also proposes that what we really

should be concerned about while judging is the interaction between the masses and information, and the reason why we protect or deal with communication in that context. The regulation of communication issues should be realistically and contextually assessed.

Particularly, he mentioned harmful content. Bambauer (2006) is not in favor of full tolerance and freedom for all communications. He argues that if the information may have a harmful influence, such as leading to racial and violent reactions, it is reasonable to limit this information: “If we believe certain types of content are demonstrably harmful—for example, racial epithets or violent pornography—that is a more honest, effective, and defensible rationale for limits than simply declaring this content of ‘slight social value as a step to truth’” (Bambauer, 2006, p. 709).

Rawlsian Tolerance Theory

The relationship between liberty and tolerance has been intricately connected for many decades by liberal philosophers. The boundary issues have always been the subject of debates because of its vagueness and generality. John Rawls’s (1973) perspective on liberty has been seen as having a prominent place in the twentieth century, he still cannot get rid of that limitations. Raphael Cohen-Almagor (2006) criticizes Rawls’s concept, in regards to its prescription of the boundaries of tolerance, that is “so vague, so general”. Nevertheless, Rawls’s (1973) theory of tolerance associated with the principle of justice inspired liberal thinking. In spite of criticism, he provides a valuable perspective on tolerance, stating that the line of tolerance should be based on the cost of common interests and public order. As long as the

public order and common interests can afford the risks and threats that result from the intolerant, we should tolerate those intolerants. Rawls's (1973) theory on toleration refers to two aspects. One focuses on toleration and the common interest. He suggests that liberty should be compatible with the common interest and public order. He specifically explains the relationship by a discussion on the limitations of liberty of conscience.

Firstly, Rawls (1973) argues that there is no doubt that liberty of conscience is limited by the common interest in public order and security. The contract point of view naturally generates the limitation. He believes that an ideal polity should enable individuals to reach an agreement about their shared institutions and basic social arrangements rather than allowing someone to believe that they have a right to force others or minority groups to abide by their personal concept of goodness. Meanwhile, the justification for the limitation is based on some premises and conditions that exist because of the principle of justice. In the first place, there is no implication and appeal that public interests are superior to moral and religious interests. The public interests do not refer to the privilege. Also, the limitation does not give government a legitimate right to suppress philosophical beliefs whenever they are not compatible with affairs of state. The government shall not be entitled to decide what beliefs or associations are either legitimate or illegitimate. Rawls argues, based on the principles of justice, instead of regarding the state as a powerful authority, it should be understood as being comprised of citizens of equal status. However, government is entitled to regulate the norms of moral and spiritual interests underlying the context

that the public would agree to in an initially equal situation. This power should be exercised in order to meet needs of citizens' public conception of justice, rather than to make the authority itself become a philosophical and religious doctrine.

Therefore, the government neither has despotic power to control the interests of morals and religion, nor should these cases be determined through a fully free market. According to the principle of justice, the duty of the state should be primarily related to the guarantee of equal moral and religious liberty. Granted all these conditions exist, government can play an important role. The original position lies in the social role of justice that is accompanied by an agreement on ways in which the government appropriately applies the claims of justice. It seems evident that the disruption of these conditions may jeopardize liberty. The liberty makes sense only in cases where the public order functions well and the common interests perform effectively. It is necessary to maintain the public order in that individuals' common interests, such as social needs, achievements, beliefs and personal interpretation of moral and religious obligations, must work under the stable public order. Therefore, the government shall be entitled to restrain liberty of conscience only where the common interests may be threatened.

Furthermore, Rawls (1973) also mentioned the security concern. He argued that liberty of conscience should not be limited unless there is a reasonable expectation for the security consideration. If it is unlimited, the public order will be damaged. Similarly, the "reasonable expectation" must lie on an agreement that everyone accepts the evidence and the ways of reasoning in processing, and must be supported

by the rational scientific methods. In addition, the expectation is based on the general recognition of justice. Rawls (1973) actually implies a common criterion to justify the limitation of liberty of conscience. The criterion represents a general doctrine of social justice, which is that applying the common standard will not infringe anyone's equal freedom and will not cause issues related to privilege. Rawls (1973) emphasizes that there is no implication of the particular philosophical theory and no single authority should be entitled to settle special metaphysical doctrine. Above all, Rawls (1973) illustrates the justification of limitations on liberty of conscience so that presents the indispensability that tolerance and liberty are based on the concept of justice. The concession of equal liberty only occurs to avoid a greater injustice or a greater loss of liberty. He concludes: "the limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse" (John, 1973, p. 215).

The other main point of Rawls's view on tolerance is to explore whether and how justice requires the toleration of the intolerant. Rawls (1973) argues that, given the needs of human beings in the original position, everyone would agree to the basic right of self-preservation. Thus, it is readily agreed that the tolerant sects have a right not to tolerate the intolerant in at least one context when they reasonably feel threatened. Since it stands to reason that human beings will never forgo the right of self-protection, the question should turn to "whether the tolerant have [the] right to curb the intolerant when they are of no immediate danger to the equal liberties of others" (Rawls, 1973, p. 220). Rawls (1973) explains the question by providing an

example. He argues that we should notice the inherent stability of just institutions if the intolerant sect appears in a well-ordered society. The intolerant also needs the liberties so that it may cause the intolerant to be persuaded to a belief in freedom. Rawls presents a psychological principle that “those whose liberties are protected by and who benefit from a just constitution will, other things being equal, acquire an allegiance to it over a period of time” (Rawls, 1973, p. 219).

Therefore, even if the intolerant sect appears under the circumstances not to be so strong initially, or it does not grow so rapidly, it may tend to lose that intolerance and accept liberty of conscience. This is one consequence of the stability of a just institution. The inherent stability means that “when tendencies to injustice arise other forces will be called into play that work to preserve the justice of the whole arrangement” (Rawls, 1973, p. 219). Rawls (1973) concedes, however, that there is a practical dilemma that the philosophical theory of justice alone cannot resolve, which is that the intolerant sect may be so strong initially or may grow so rapidly that they cannot be converted to liberty. Still, Rawls (1973) argues that the tolerant should curb the intolerant only when the tolerant reasonably believe that their own security and that their institutions of liberty are in danger. Instead of occurring in all events, tolerance only takes place in the safe place where threats cannot affect others’ rights and infringe justice.

Admittedly, Rawls’s theory also has limitations. The application of his theory is based on an ideal condition that the society is well-ordered to just liberal democracies and is in accordance with his principle of justice in the original position. He does not

explain how to deal with the issue of tolerance in societies where liberal democracy is not well developed. Moreover, he does not go deeper to discuss the details of how we define and recognize the imminent threats. Although he makes the specific reasoning to elucidate why the freedoms of the intolerant people should be restricted only when the tolerant believe that their actions endanger themselves and the institutions of liberty, he does not explain how to exercise the restriction in the real world, and what criteria the process relies on.

Cohen-Almagor (2006) comments of the theory: “the Rawlsian conceptualization is so vague, so general, that we are left with limited tools for thinking when coming to prescribe the boundaries of tolerance” (Cohen-Almagor, 2006, p. 20). Nevertheless, at least Rawls provides a basic principle for the relationship between liberty and tolerance, and suggests the bottom line to liberty and tolerance. The public order and common interest should be a primary foundation to secure everyone’s human rights so that they cannot make any concession to dangerous behaviors in exercising the right to liberty.

Precedent Cases

National Socialist Party of America v. Village of Skokie (1977)

Skokie involved a proposed demonstration by National Socialist Party of America (NSPA), a Nazi Group, in Skokie, Chicago, in 1977. Skokie was a village which had of 57% Jewish population and most of its citizens were Holocaust survivors. The NSPA was described as being a “Nazi organization” by its leader, Frank Collin. He proposed to hold a peaceable and public demonstration to protest against Skokie Park District's ordinance about the use of the village’s public parks for political assemblies. The proposed demonstration would involve 30-50 demonstrators marching in front of the village hall and they were all to wear uniforms similar to the Nazi traditional uniform, including swastika armbands. They also intended to hold banners including the swastika and variations on the statement “Free Speech for the White Man”.

The district court of Cook County entered an injunction enjoining the NSPA from marching, walking or parading or otherwise displaying the swastika on or off their persons on May 1, 1977. The NSPA then applied to the Illinois appellate court for a suspension of the district court’s injunction. But the appellate court denied the application. On appeal, the Illinois Supreme Court upheld the denial of the temporary suspension. Finally, the NSPA filed an application to U.S. Supreme Court.

The Court found that the Illinois Supreme Court had improperly denied the

NSPA's request for a suspension of the district court's injunction. Therefore, the Court reversed the denial of temporary suspension, and remanded the case for review.

According to the Court, for purposes of jurisdiction, the order by the Illinois Supreme Court was a final judgment because it involved a right "separable from, and collateral to" the merits (*Westlaw, National Socialist Party of America v. Village of Skokie*, 1977, p. 44). The Court held that the merits of NSPA's claim that "the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete" was finally determined (*Westlaw, National Socialist Party of America v. Village of Skokie*, 1977, p. 44). In addition, the Court held that the order was not in accordance with the formal procedure before moving the Court: "if a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review" (*Westlaw, National Socialist Party of America v. Village of Skokie*, 1977, p. 44). The order of the Illinois Supreme Court was not upheld by the Court, since such review was absent. The Supreme Court held that the State had to allow the application for a stay pending appeal.

Consequently, the Court reversed and remanded for further proceedings. As a result, on remand from the U.S. Supreme Court, the Illinois appellate court held that the marching would be allowed but the display of the swastika during the march would be enjoined because the symbol constituted fighting words.

The Illinois appellate court proposed the issue in this appeal referred to two dimensions. One is, from the general perspective, "whether plaintiff met its burden of

proof for the issuance of a prior restraint on defendants' first amendment rights" (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 282). The other was, from a specific perspective, "whether the swastika is protected speech under the circumstances of this case" (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 282).

More specifically, the reasoning of the court's decision concerns the issue in terms of the scope of the injunction order. The court, for ease of discussion, divided the content of the injunction order into three parts: "Part A of the order enjoins defendants from marching, walking, or parading in the uniform of the National Socialist Party of America; Part B enjoins them from marching, walking, parading, or otherwise displaying the swastika on or off their persons; Part C enjoins defendants from distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry, or hatred against persons of any faith or ancestry, race or religion" (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 286).

Firstly, the court indicated a vagueness in Part A about which acts of the defendants were prohibited. There is clear language that suggested that the injunction did not enjoin the NSPA from demonstrating in Skokie while dressed in civilian clothes, but only in the uniform of the National Socialist Party of America. Thus, the unclear content gave the NSPA the impression that the injunction enjoined any demonstrations, whether in uniform or in civilian clothes. The court found that the issue was neglected because of the rush to judgment in this hastily briefed case. The

legal issue in Part A thereby, consisted of two portions: “first, whether any demonstration in Skokie by the defendants is enjoined, and second, whether the wearing of the uniform of the National Socialist Party of America is enjoined at any such demonstration” (LexisNexis, *Village of Skokie v. Nat'l Socialist Party*, 51 Ill. App.3d 279, 1977, p. 286). According to the court, the evidence presented to the trial court showed that there was no unlawful conduct by the NSPA. The evidence, the court noted, only showed that the NSPA would hold a peaceful assembly of 30-50 persons demonstrating for 20-30 minutes against what they believed was an unfair Park District Ordinance.

Meanwhile, there was other evidence presented to the trial court regarding the consideration of public safety. It showed that there would be chaos or conflict between the NSPA and the majority of Jewish citizens if the NSPA appeared in Skokie to demonstrate with Nazi elements. The demonstration might irritate Jewish citizens to produce some physically aggressive acts to defendants. The trial court, thus, entered the order enjoining the demonstration, and also believed that the NSPA would by marching intentionally incite riot by the demonstration to cause harmful effect, such that the constitutional right did not provide protection.

However, the court stated, based on the earlier precedent cases, the law was clear that the presence of hostile spectators or bystanders may not justify restraints on legal first amendment activities. The public expression of ideas may not be prohibited only because the ideas themselves are offensive to the hearers. The court stated that “the threat of a hostile audience cannot be considered in determining whether a permit

shall be granted or in ruling on a request for an injunction against a demonstration.

Thus, our laws bespeak what should be; for were it otherwise, enjoyment of constitutional rights by the peaceable and law-abiding would depend on the dictates of those willing to resort to violence” (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 287). As a result, the court reversed the injunction order since the Village had failed to meet its burden of proof.

Furthermore, the court also indicated that wearing the distinctive clothing to express a thought or idea is included within the types of a symbolic act which are considered protected speech under the First Amendment. Particularly, in the context of this instant case, the Village had argued that the Nazi uniform constituted a symbolic representation of a public call to kill all Jews, and the uniform may imply a direct incitation to immediate mass murder, so that it should not be protected by the First Amendment. However, the court did not agree with this assessment because the record failed to support the City’s conclusion. There was no evidence that the uniform without the swastika would have that inflammatory effect. Also, there was no sign that people would be directly and immediately incited to commit mass murder only because they saw the defendants’ uniforms.

Additionally, the court explained, according to the rule in *Chaplinsky v. New Hampshire* (1942), “fighting words are those personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, are inherently likely to provoke violent reaction” (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 289). The court found that there was no evidence to

support that the uniform without the Swastika constituted fighting words and no testimony presented that anyone in Skokie would consider the uniform, itself, as an abusive epithet that might provoke him/her to violent reaction. In the court's opinion, "any shock effect caused by such a uniform must be attributed to the content of the ideas expressed or to the onlookers' dislike of demonstrations by defendants" (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 289).

Therefore, in the context of the case, wearing the uniform must be considered symbolic speech protected by the First Amendment because the First Amendment, based on the court's interpretation, means "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 290). The portion of the injunction order, which is the content of Part A enjoining defendants from wearing the uniform of the National Socialist Party of America without other symbols such as the swastika, while marching, walking or parading in the village of Skokie, is reversed as constituting an unconstitutional prior restraint on NSPA's First Amendment right.

Secondly, the legal question, concerning Part B of the injunction order which enjoined "marching, walking or parading or otherwise displaying the swastika on or off their person", is whether the display of the Swastika in the village of Skokie, in the context of this case, would constitute "fighting words".

The court found that the evidence conclusively showed that "at least one resident

of Skokie considered the Swastika to be a personally abusive epithet which was, in light of his personal history, inherently likely to provoke a violent reaction in him if the Swastika were intentionally displayed by defendants in the village of Skokie” (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 292).

Moreover, other evidence implied that thousands of other residents of Skokie may share similar or even identical feelings. In this instant case, the evidence indicates that a substantial number of citizens would stand up and defend themselves from assaulting their sensibilities with the display of the Swastika. Furthermore, it had been proved by the record and common language that the Swastika was an inherent incitation to provoke violent reaction among Jewish people when it was displayed or intentionally brought to their places. The wearing of the swastika symbol would not only challenge Jewish residents but also cause them to recall the brutal memories of genocide. It would especially have great impact on the thousands of Skokie residents who personally survived the Holocaust.

The court accepted that “the tens of thousands of Skokie's Jewish residents must feel gross revulsion for the Swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendants' chosen symbol, the swastika” (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 293).

Therefore, the court believed that the display of the Swastika subjectively and objectively constituted fighting words which is not protected speech under the First

Amendment. As a result, the court found that the village of Skokie had met its heavy burden of justifying the prior restraint on the defendants' planned wearing and display of the swastika. Thus, Illinois appellate court found, there should be no confusion among the parts of the injunction order. Part B of the injunction order regarding the display of the Swastika, was modified by the court which held that, while the NSPA could march, participants could not “intentionally displaying the Swastika on or off their persons, in the course of a demonstration, march, or parade within the Village of Skokie”. (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 293). As thus modified, the court affirmed the order.

Thirdly, the legal issue, dealing with Part C of the injunction order which enjoined NSPA from “distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion,” is whether the prior restraint imposed in Part C could be justified by valid evidence (LexisNexis, Village of Skokie v. Nat'l Socialist Party, 51 Ill. App.3d 279, 1977, p. 294). In fact, the court found that no evidence had been provided that NSPA intended to engage in any such communications. In addition, the court did not think that such messages as described in Part C should be included within the scope of the intended demonstration. Therefore, Part C of the order was reversed since the court found that plaintiff has not shown the necessity for Part C of the injunction.

Thus, the court affirmed the injunction order in part and reversed it in part reversing the injunction against the applicants from marching, walking or parading in

the uniform or but affirming the injunction against displaying the Swastika on or off their persons within the village of Skokie, and remanded the question for further proceedings.

Brandenburg v. Ohio (1969)

Four of the cases under review are Supreme Court decisions. The second of these is *Brandenburg* which involved the conviction of Clarence Brandenburg, the leader of a Ku Klux Klan group under a criminal syndicalism statute, both for advocating the duty, necessity, or propriety of crime, sabotage and assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism due to making aggressive insulting and threatening statements toward African Americans Jews and the government. Brandenburg was fined 1,000 and sentenced to one to 10 years' imprisonment.

In the summer of 1964, Clarence Brandenburg contacted a local news station in Cincinnati to propagandize his rally. The news station filmed the events of the Ku Klux Klan meeting and then broadcasted the filming. The filming content included hateful demonstrations, hate speech and racist actions. Apart from this, Brandenburg's speech also included remarks accusing the United States government of suppressing the "Caucasian race". He was convicted of advocating violence under the Ohio Criminal Syndicalism Statute.

On appeal, the Supreme Court found that Ohio's Criminal Syndicalism Statute did not draw a distinction between teaching the need for force or violence and preparing a group for violent action. As a result, the Court held that the Ohio law violated

Brandenburg's right to free speech.

The Court found that the Ohio Criminal Syndicalism Act violated First and Fourteenth Amendments because the Statute failed to distinguish between the advocacy of violence and incitement to imminent lawless action. The Court found that not only had the intermediate appellate court of Ohio affirmed Brandenburg's conviction without issuing an opinion, but the Supreme Court of Ohio had also dismissed Brandenburg's appeal without filing an opinion or explaining its conclusions. The Ohio Supreme Court merely reasoned that "no substantial constitutional question exists herein" (Westlaw, *Brandenburg v. Ohio*, 1969, p. 445). In addition, the Court indicated that a new principle was fashioned after the decision of *Dennis v. United States* (1951), when the Court decided a State is not permitted to forbid or proscribe advocacy of the use of force or legal violation, by the constitutional guarantees of free speech and free press, unless such advocacy can be proved to be directed at inciting or producing imminent lawless actions and the advocacy has the potential to incite or produce such action. The Court said the abstract advocacy or teaching of the necessity to resort to force or violence is not the same as preparing a group for violent action and steering the advocacy to such action. It is necessary to clarify the differences between inciting speech and a substantial imminent action leading to harm or danger. The Ohio Statute not only failed to draw this distinction, but was also vague in defining lawless action. The Court found that there is no indication of attempts to refine the statute's definition of the crime. Therefore, the statute intruded on the freedoms guaranteed by the First and Fourteenth

Amendments.

Similarly, in his concurring opinion joined by Justice Hugo Black, Justice William Douglas, emphasized the distinction between speech and action: “the line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and over acts” (Westlaw, *Brandenburg v. Ohio*, 1969, p. 456). Indeed, Justice Douglas admitted that there are few classic cases in which speech is accompanied by action, such as *Speiser v. Randall* (1958). Speech and action can be inseparable, and “a prosecution can be launched for the overt acts actually caused” (Westlaw, *Brandenburg v. Ohio*, 1969, p. 457). However, he said that, except for the rare instances of that kind of speech, any other speech ought to be immune from prosecution. “The government has no power to invade that sanctuary of belief and conscience” (Westlaw, *Brandenburg v. Ohio*, 1969, p. 457).

While *Brandenburg* is the case recognized for the genesis of the true threat doctrine under the First Amendment, the test laid out in the case specifically provides strong protection for inflammatory speech absent of true threat.

In a 2015 case involving a man who made public posts on Facebook that appeared to contemplate the possibility of killing his wife, the U.S. Supreme Court overturned his conviction, holding that without mens rea, or the requisite intent, such a writing did not amount to a true threat. (*Elonis v. U.S.*, 2015). This decision means that it would take a significant amount of provocation to ground a finding of true threat such that speech would be prohibited (*Elonis v. U.S.*, 2015). Notably, in his concurrence in

Elonis, Justice Samuel Alito suggested that the issue of recklessness should be considered by the lower court and while lyrics in songs would not be a real threat, “statements on social media that are pointedly directed at their victims, by contrast are much more likely to be taken seriously” (*Elonis v. U.S.*, 2015, p. 2016). Justice Clarence Thomas, in his dissent, suggested that “general intent” should be sufficient to ground a finding of true threats (*Elonis v. U.S.*, 2015).

R.A.V. v. City of St. Paul (1992)

In the third case, *R.A.V. v. City of St. Paul* (1992), R.A.V. and several other teenagers made a cross and burned it inside the yard of a black family. The city of St. Paul charged R.A.V. under a local bias-motivated criminal ordinance which prohibited harmful conduct on the basis of race. The trial court dismissed this charge, but the state supreme court reversed. Finally, R.A.V. brought an appeal to the U.S. Supreme Court.

The Court found that the ordinance was overly broad and impermissibly content-based in violation of the First Amendment free speech clause. The judgment of the Minnesota Supreme Court was reversed. The Court held that the ordinance was invalid because “it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses” (*R.A.V. v. City of St. Paul*, 1992, p. 381).

Initially, the ordinance was regarded too broad to be aimed at “fighting words” and its prohibition on expression was found to be based on an unconstitutional ground: “this Court is bound by the state court’s construction of the ordinance as reaching only expression constituting ‘fighting words’. However, R.A.V.’s request that the

scope of the Chaplinsky formulation be modified, thereby invalidating the ordinance as substantially overbroad, need not be reached, since the ordinance subjects the speech addresses” (Westlaw, *R.A.V v. City of St. Paul*, 1992, p. 377).

Moreover, the Court stated that there are a few limited categories of speech, such as obscenity, defamation, and fighting words, which the Court had recognized needed to be regulated because they contain constitutionally proscribable content.

Nevertheless, the Court said, the government should not regulate those categories of speech on the basis of hostility or favoritism toward the nonproscribable content that the categories include. Thus, the regulation of “fighting words” should be based on the proscribable content rather than those nonproscribable messages.

Furthermore, the Court said that the ordinance operates in practice as content-based discrimination. It prohibits expressions on the disfavored subjects of “race, color, creed, religion or gender” (Westlaw, *R.A.V v. City of St. Paul*, 1992, p. 378). But, at the same time, it permits displays containing abusive or invective content as long as they are not addressed to those disfavored subjects. Then, although displays containing fighting words that do not invoke the disfavored subjects would not hurt those who argue in favor of race, color, tolerance and equality, the displays may incite the opponents to violence. The Court held that St. Paul’s legislative unequally treated two groups in the ordinance’s operation. According to the Court, “St. Paul’s desire to communicate to minority groups that it does not condone the ‘group hatred’ of bias-motivated speech does not justify selectively silencing speech on the basis of its content” (Westlaw, *R.A.V v. City of St. Paul*, 1992, p. 378).

In addition, the Court found, the ordinance's discrimination on the basis of content was also unjustifiable because it was not "narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against" (Westlaw, *R.A.V v. City of St. Paul*, 1992, p. 378). Any topic in a discussion has the potential to generate the same beneficial effect. But the ordinance is limited to only the favored topics.

As a result, the Court held that the ordinance was facially invalid under the First Amendment.

Virginia v. Black (2003)

Just over ten years after the *R.A.V.* decision, the Supreme Court got the opportunity to look at the issue of cross burning a second time. In *Virginia v. Black* (2003), while the Court held that Black's conviction for cross burning was unconstitutional, the Court acknowledged that a restriction on this type of speech where aimed at intimidating another could be constitutional. Barry Black was convicted of violating a Virginia statute by burning a cross.

The Virginia statute provided "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place", and emphasizes that "any such burning...shall be prima facie evidence of an intent to intimidate a person or group" (*Virginia v. Black*, 2003, p. 348). The Virginia Supreme Court upheld Black's conviction. Therefore, Black appealed to the U.S. Supreme Court.

The Court found that Virginia's cross-burning statute, which prohibits the burning

of a cross with the intention to intimidate any person or group of persons, violated the First Amendment. Therefore, the Court held that the Virginia statute was unconstitutional, and Black's conviction, invalid.

The U.S. Supreme Court affirmed the decision in part, vacated in part, and remanded. Specifically, the Court held that: "(1) Virginia's ban on cross burning with intent to intimidate did not violate First Amendment; (2) as interpreted by jury instruction given at [Black's] trial, provision of Virginia cross burning statute, which stated that burning of a cross in public view 'shall be prima facie evidence of an intent to intimidate,' was facially unconstitutional under the First Amendment; and (3) construction of [the] prima facie provision of [the] Virginia statute [as provided in the] jury instruction was ruling on question of state law that was as binding on Supreme Court as though precise words had been written into statute" (Westlaw, *Virginia v. Black*, 2003, printed page 1).

The Court pointed out that the beginnings of burning a cross in the United States is related to the Ku Klux Klan in history, and the Klan has usually used cross burning as a tool of intimidation and a threat of impending violence. To this day, burning a cross continues to be regarded as a symbol of hate, regardless of its political meaning or purpose of intimidation. Although conveying a message of intimidation can be avoidable in cross burning, the cross burner often intends to intimidate and expects a fearful effect from the recipients of the message. And the intimidating message is usually more powerful than we thought.

Moreover, the Court emphasized that the First Amendment does not afford

absolute protection to speech and expressive conduct. The regulation by government of certain categories of expression should be consistent with the Constitution. For instance, a State is permitted by the First Amendment to ban “true threats”, which contain expressions with seriously intended intimidation or expressive conduct of an intent to commit unlawful and violent acts against a particular individual or a group. The government may prohibit this type of true threat to protect individuals from the fear of violence, and from the possibility that the danger will occur. According to the Court, intimidation has been recognized as a type of true threat in the constitutionally proscribable sense, in which “a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death” (Westlaw, *Virginia v. Black*, 2003, p. 344).

Furthermore, the Court found that Black had not argued against the proposition that “some cross burnings fit within this meaning of intimidating speech” (Westlaw, *Virginia v. Black*, 2003, p. 344). Because of this, the First Amendment permitted Virginia to ban cross burnings, since the conduct particularly indicates an intended intimidation. Yet, the prohibition may not be applied to all intimidating messages. The Court suggested that Virginia should regulate cross burning as a subset of the intimidating messages within the scope of “cross burning’s long and pernicious history as a signal of impending violence” (Westlaw, *Virginia v. Black*, 2003, p. 344).

In addition, the Court indicated that the cross burning in this case did not involve content-based discrimination, although a ban on cross burning operated with the intent to intimidate was consistent with the Court’s holding in *R.A.V.* Also, in *R.A.V.*, there

was no finding that the First Amendment would prohibit all forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that if the basis for an expression entirely consists of constitutionally proscribable content or the entire class of the expression is proscribable, then the particular type of expression, even within the content discrimination, did not violate the First Amendment.

At any rate, the Court said, it was permissible to prohibit the kind of expression that has the most potential to lead to an act of violence in a constitutionally proscribable area. There is no conflict between the Virginia's statute and the First Amendment insofar as the statute bans cross burning with the intent to intimidate. In interpreting the Virginia Statute, the Court did not need to weigh whether speech was directed toward one of the specifically disfavored topics. Unlike the statute at issue in *R.A.V.*, under the Virginia Statute it did not matter "whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality'" (Westlaw, *Virginia v. Black*, 2003, p. 345). It only provided that the State could prohibit only those forms of intimidation which are most likely to cause fear of bodily harm.

Nevertheless, the Court also concluded that prima facie evidence provision of the Virginia statute, as interpreted by the jury instruction given at respondents' trial, was unconstitutional on its face. Firstly, as interpreted by the instructions, the prima facie provision did not explain why a State could ban cross burning with the intent to

intimidate. And it does not determine an appropriate scope for cross burning. The provision allows a jury to convict in every case of cross-burning where “defendants exercise their constitutional right not to put on a defense” (Westlaw, *Virginia v. Black*, 2003, p. 345). Moreover, even where a defendant, like Black, presents a defense, the provision may lead to an unjust effect, by leading the jury to presume that the act of cross burning is always conducted with an intent to intimidate regardless of the particular facts of the case. And the provision permitted the conviction based solely on the fact of cross burning itself. As so interpreted, there would be an unacceptable risk of the suppression of ideas.

The conduct of burning a cross may refer to a constitutionally proscribable intimidation, or it may only refer to political speech. The Court, however, pointed out that the prima facie evidence provided may be too vague and broad to interpret the rationale behind the act of cross burning. Instead of clarifying the true meaning of the act of cross-burning, the provision blurred the line between these meanings. It also treats the case without considering the various contextual factors, which means ignoring the necessity to decide whether a particular act of cross burning is intended to intimidate. As a result, the Court held that Black’s conviction could not stand, and provision of Virginia cross burning statute was facially unconstitutional under the First Amendment.

Thus, while finding the statute itself to be unconstitutional for overbreadth, and overturning Black’s conviction, the Court for the first time upheld the possibility of regulating the act of cross burning where the intent was to intimidate. Such a

regulation, the Court held, would be upheld as long as it furthered an important governmental interest which was not intended to suppress speech and any burden on speech caused by the restriction was no greater than necessary.

The Related Case of Charlottesville Incident

Although *Kessler v. Charlottesville* (2017) is not a Supreme Court case, its significance in relation to the right to freedom of expression is no less than the four precedent cases that preceded it. The severity of the consequence of the Charlottesville incident makes the issue of freedom of expression a problem that cannot be ignored. This incident and related legal cases bring the concerns about hate speech and the constitutional right to freedom of expression directly into the public discourse. The Charlottesville case provokes a necessary rethinking about the implication of the right to freedom of expression in contemporary society and how the First Amendment should interpret it. The Charlottesville car attack is one of the latest, seriously violent incidents involving hateful expression in the United States.

Kessler v. Charlottesville (2017)

In *Kessler*, the activist Jason Kessler applied to the City for a permit to conduct a demonstration in Emancipation Park in the City of Charlottesville on May 30, 2017. According to Kessler, about four hundred people would be in attendance, and the intention of the demonstration was to protest the City's decision to rename the Park formerly known as "Lee Park" and to remove a statue of Robert E. Lee, the commander of the Federal Confederate State Army. On June 13, 2017, the City of Charlottesville allowed Kessler's application to hold a demonstration in that park on

August 12, 2017. After a few weeks, the City also granted a permit to other demonstrations which were counter-protesting Kessler's demonstration, in another park a few blocks away from Emancipation Park.

However, on August 7, 2017, the City notified Kessler that he would be allowed to hold the rally only if he agreed to move the demonstration from Emancipation Park to McIntire Park, more than a mile from Emancipation Park. However, the City did not modify the permit for the counter-protest at the same time. The City explained that the people attending the proposed march would be many thousands, including supporters and opponents of the demonstration. Thus, the change of venue of Kessler's rally to McIntire Park was to ensure safety. But Kessler argued that if the demonstration were moved from Emancipation Park it would be meaningless. The message of the demonstration was directly related to Emancipation Park and could only be effectively disseminated in that location.

Therefore, he refused to change location and claimed that the City's decision to revoke the permit abridged his First and Fourteenth Amendment rights. On August 11, 2017, Kessler filed an Expedited Motion for preliminary injunctive relief in order to force the City to permit his demonstration in the Emancipation Park. The district court heard oral arguments on August 11, 2017, and a federal judge ruled in Kessler's favor on the same day.

Argument for Kessler

On August 10th, 2017 the American Civil Liberties Union of Virginia and Rutherford Institute filed a lawsuit in the Western District Court on behalf of Jason

Kessler. The complaint mainly included four arguments.

Firstly, Kessler called into question the reason why the City revoked and modified the permit for the demonstration. According to the City, many thousands of individuals would be attending the demonstration, including supporters and opponents. Thus, its reason for revoking and modifying the permit was not only that Emancipation Park was incapable of accommodating that large amount of people, but also the peace and safety of public order could hardly be maintained due to the size of crowd. The City suggested that the Police Department might not be able to handle the huge crowd peacefully and even might not have the resources to deploy police. However, Kessler contended that the source of the estimate of the crowd size was unclear and unreliable. The City did not indicate how they had worked out that there would be “many thousands of individuals” (Kessler’s Complaint, p. 7).

Although the City had cited the Facebook event as a type of estimate, this mechanism failed in persuasiveness. The event showed that 700 plus people were “going” and another 1,300 people were merely “interested”, all of which was filled with uncertainty. Even if they were all going, the Emancipation Park could accommodate much more people than 2,000. Kessler presents the fact of the park’s capacity: “an acre is 4,840 square yards, or 43,560 square feet and average adults (50-50 male-female) take up a cross-sectional area of about 1.5 to 2.0 square feet at chest or hip level. Taking those facts and applying basic math (dividing the number of square feet in an acre by the area taken up by average adults) an estimate of the number of people that could be accommodated standing on an acre of land would be

between 29,040 and 21,780 people per acre” (Kessler’s Complaint, p. 8).

In addition, Kessler indicated that exercising the First Amendment rights in this Park had been a tradition for many years. There were many other demonstrations and events. Also, the City had granted the permits for demonstrations by the people who opposed Kessler’s viewpoint. The counter-protest demonstrations would occur on August 12th, 2017 in Justice and McGuffey Parks which was located a few blocks away from Emancipation Park in the same downtown area. Kessler believed that the attendance of these counter-protest demonstrations would also be more than 1,000 individuals, but the City has taken no action to revoke or modify their demonstrations due to the numbers and safety consideration.

Furthermore, some demonstrations had even occurred without the City’s permit and the number of potential participants were not estimated. On May 14th, 2017, there was a candlelight vigil in Emancipation Park to oppose the previous torch lit demonstration that protested the renaming of Emancipation Park and the proposal to remove the Lee Statue. On January 31st, 2017, a demonstration relating to the “Capital of the Resistance” after the inauguration of Donald Trump had occurred in front of Charlottesville City Hall and the attendees were in the seven hundreds. Neither of these demonstrations had obtained a permit from the City (Kessler’s Complaint, p. 10).

Kessler also argued that the statement that the City could not manage the public order was an untenable argument. In past festivals, with many thousands of people in Emancipation Park, the police department had never suggested that they were unable

to handle the crowds. Kessler pointed out that the City actually had acknowledged that even modifying the rally to McIntire Park would require a large deployment of the law enforcement resources for safety considerations. And the City Police Department prepared plans for the two parks in case people gathered at both. Kessler argued that there was no benefit in changing the location for safety and traffic considerations, because the City had announced that the deployment would be in the downtown area at and around Emancipation Park. Kessler also provided evidence to question the traffic congestion consideration. Although the City said in a letter dated August 7th, 2017, that the demonstration in Emancipation Park would “lead to massive traffic congestion” because of road closures, they would still have to manage the traffic through road closures even if the rally was moved to McIntire Park (Kessler’s Complaint, p. 6). Kessler revealed that even though at an August 7th press conference, the Police Chief stated that his department felt that holding the demonstration in McIntire Park might be safer, he had not said that his department would not be able to provide the protection for the public order at Emancipation Park.

Moreover, on August 9th, 2017, the City announced that the police department had been working with other local, state and federal forces to maintain the public order during the rally if necessary. The Ku Klux Klan rally on the July 8th, 2017 proved that not only would the Charlottesville Police Department be able to protect the public order and the exercise of First Amendment rights, but also the other local law enforcement resources would engage for protection (Kessler’s Complaint, p. 7).

Additionally, Kessler queried how the City had previously managed crowds of up to

3,500 people at the Sprint Pavilion on the Downtown Mall and estimated minimum 2,000 people for the Cville Pride Festival in Emancipation Park in 2013, 2014 and 2015, but could not safely manage Kessler's demonstration involving possibly thousands of attendees (Kessler's Complaint, p. 9).

Kessler claimed that relocating would undermine the demonstration because the message would lose significance and the rally would be meaningless. According to Kessler, the purpose of this demonstration was to protest the renaming of the "Lee Park" to "Emancipation Park" and the proposal for removing the Lee statue from the park. In order to convey Kessler's political message, the demonstration had then to be organized in this relevant park. Kessler argued that location was the key point for communicating the message, otherwise the message would lose its original meaning.

Thirdly, Kessler emphasized that City's revocation and modification of the permit was based not on numbers and safety considerations but was because of the content of demonstration. Kessler insisted that the City was evidently discriminating against the content so that his rights to exercise the First Amendment had been denied. Kessler argued that the First Amendment prohibits the government from blocking a protest based on its content or viewpoint, or based on how the government anticipates others will respond to the protest, even though the government may impose and regulate the time, place, and manners restrictions on permit requirements. Kessler cited the fact that the City had not only expressed opposition to his message and political view but also expressed a preference for the counter-protesters. For example, on August 9, 2017, a spokeswoman for the City was showing publicly encouraging people to attend

the counter-protest events, but the City had never shown an encouraging attitude toward Kessler's rally. In addition, Kessler provided a document in which Mayor Michael Signer had on June 21, 2017, described the rally scheduled for August 12 and its speakers as "racist and bigoted" (Kessler's Complaint, p. 10). And on August 2nd, 2017, the Vice Mayor also showed a partial attitude on Twitter. According to Kessler's document, "Vice Mayor Wes Bellamy responded to a tweet from the Twitter handle 'Solidarity Cville', which described the 'Unite the Right' rally as 'fascism' and called Twitter followers to confront the event, with words 'this is dope! #Resist'" (Kessler's Complaint, p. 10).

Furthermore, Kessler argued that the City had concealed the real reason for the decision to modify the permit which was in order to assert political pressure on its organizers. On August 7th, at the morning meeting, Kessler asked the City's manager Maurice Jones about the limited occupancy for Emancipation Park and whether he would be allowed to hold his rally in this park if he could make sure the number of attendees fell within that limit. Kessler states, however, that he did not get a response to the question. Next, later on August 7th, Kessler asked the Chief of Police whether the police department would still provide security and protection for the demonstration as the previous agreement had indicated, whether or not the rally was permitted. He also asked whether the police would still keep "counter-demonstrators out of the park prior to the Unite the Right demonstration" on that day, and whether the police would help Unite the Right to manage access to the park. All the questions were answered in the affirmative (Kessler's Complaint, p. 12).

However, on the next day, August 8th, Kessler was told by police officials that the Chief had changed his mind and the police would not provide protection and coordination for Kessler's demonstration in Emancipation Park as promised before. Then Kessler enquired how the police would cope with the counter-demonstrators. He was told by the police representatives that "there was no plan for them to do," so Kessler said theoretically they were unlimited to provide protection for the other two parks and Emancipation Park (Kessler's Complaint, p. 13). Kessler also argued that all these changes had been made due to political pressure and he realized this from the facial expression and body language which accompanied Criminal Investigation Division Commander Captain Wendy Lewis's response to his questions (Kessler's Complaint, p. 13).

Therefore, Kessler argued that his constitutional rights had been violated and the right of public members to peacefully gather and express their views would be irreparably harmed. Kessler appealed to the court for immediate relief to enjoin the City from impeding his demonstration and to guarantee Kessler's constitutional right to free speech, petition, and assembly.

Argument for City

The City had four arguments. In the first place, the City argued that Kessler's appeal for granting of preliminary injunctive relief did not meet the legal standard. Since a statement about the standard was affirmed in *International Refugee Assistance Project v. Trump* (2017) by United States Court of Appeals for the Fourth Circuit, the standard for the grant of preliminary of injunctive relief had been well established.

The City cited: “A preliminary injunction is an ‘extraordinary remed[y] involving the exercise of very far-reaching power’ and is ‘to be granted only sparingly and in limited circumstances.’ (MicroStrategy, Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) quoting Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 816 (4th Cir. 1991)). For a district court to grant a preliminary injunction, “a plaintiff must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” (WV Association of Club Owners & Fraternal Services, Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009), quoting Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

These were the four requirements that must be satisfied for granting a preliminary injunction, but the City contended that Kessler’s appeal was not grounded on these four requirements. Firstly, the City pointed out, based on *Pashby v. Delia* (2013), the movant must make a “clear showing” that he or she is likely to succeed at trial. In this case, however, the Court found that Kessler failed to provide the “clear showing” of a likelihood of success concerning an alleged violation of the First Amendment (Defendants’ Argument, p. 6). Specifically, the City argued that Kessler’s complaint was untenable in a context where courts had an agreement on how the government should regulate speech. According to precedent, such as *McCullen v. Coakley* (2014), courts have held that: “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the

restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information’”

(Defendants’ Argument, p. 6).

In this case, the City indicates that City Manager Jones’ decision, which modified Kessler’s preferred location—Emancipation Park to McIntire Park, not only had nothing to do with speech content or Kessler’s viewpoint, but also was narrowly tailored to serve a significant governmental interest, and left open ample alternative channels for communication. Because the City’s decision was only aimed at providing a more proper place for Kessler’s demonstration, based on the consideration of size, transportation convenience and public safety, the decision neither prohibited the speech event nor changed the location based on the speech content or Kessler’s viewpoint. Also, the consideration of public convenience and safety was totally tailored to serve a significant governmental interest. The move to McIntire Park was aimed at providing open ample alternative channels for communication of the information (Defendants’ Argument, p. 6).

Particularly, the City argued that moving the rally to McIntire Park was a content-neutral decision. In the Complaint, Kessler had argued that the City’s decision was viewpoint discrimination and not necessary to achieve any compelling government interest, but also it was content based because the City feared the response by the counter-protesters and was driven by them to make the decision. Nonetheless, Kessler’s argument also acknowledged that he and his rally’s members would be

allowed to express their viewpoints at another venue, McIntire Park during the desired hours (Defendants' Argument, p. 7). Kessler also mentioned that there had been a skirmish between a Ku Klux Klan Rally and its counter-protesters during a demonstration in downtown Charlottesville on July 8, 2017 (Defendants' Argument, p. 8). Thus, Kessler acknowledged that others with the same or similar viewpoints as himself had recently been allowed to hold demonstrations in the City. In addition, the City pointed out that Kessler could not support his argument that the City's decision was motivated by fears about how the counter-protesters would respond, only by providing a City's statement "In explaining its plans to prepare for rallies at both Emancipation Park and McIntire Park, the City explained that 'with large crowds of individuals with strongly held and potentially opposing beliefs, there is also the potential for conflict'" (Defendants' Argument, p. 8). The statement that "there is potential for conflict at both Parks" was not evidence that sending Kessler's rally to McIntire Park was because the City was concerned about the response of counter-protesters.

Furthermore, Kessler had argued that the City had expressed a preference for the counter-protesters. But the City cast doubt on Kessler's reasonings. Firstly, Kessler acknowledged in his Complaint that the City had dispersed the counter-protesters with tear gas during the Ku Klux Klan rally on July 8, 2017, though he had alleged that the City has an obvious preference for the counter-protesters with opposing opinions from Kessler's or similar or the same as Kessler's (Defendants' Argument, p. 10). Next, Kessler attributes the disruption of his public meeting by yelling "liar" at him from

counter-demonstrators, to the City's "preference" for the counter-protesters (Defendants' Argument, p. 10). The other claim about Kessler's viewpoint discrimination is that individual members of the City Council allegedly made clear public comments opposing Kessler's viewpoint. The City contends that even governmental persons have a right to convey the message they wish to speak out on important issues. Also, they do not have an obligation to remain neutral on contentious issues. Moreover, Kessler took the comments made by individual City Council members as the representative opinion of the entire Council. The City argued that the powers of local government are limited to the action decided by majority vote rather than individual opinions (Defendants' Argument, p. 11).

Next, the City stated that the City manager's decision to permit Kessler to demonstrate in McIntire Park was narrowly tailored to meet a substantial governmental interest, and provided an ample alternative channel for communication. The City emphasized that Kessler was not only allowed to have his rally on the day he wanted and during the time period he wanted, but also was allowed to have as many attendees as he could attract. The only restriction for him was location. The City acknowledged that McIntire Park did not have the Robert E. Lee statue as a background symbol that could help Kessler convey his viewpoint, but the location of Emancipation Park may have some significance for Kessler, "there is no absolute constitutional right to claim the use of a specific venue for a specific purpose at a specific time" (Defendants' Argument, p. 12), the City argued. Also, there was no reason to suspect that the attendees who Kessler wanted to attract would be less in

number in McIntire Park than in Emancipation Park.

Additionally, the goals for the rally, the City argued could be reasonably questioned. As described on the Unite the Right Rally Facebook page, it claimed: “This is an event which seeks to unify the right-wing against a totalitarian Communist crackdown, to speak out against displacement level immigration policies in the United States and Europe and to affirm the right of Southerners and white people to organize for their interests just like any other group is able to do, free of persecution” (Defendants’ Argument, p. 13). This description may disprove Kessler’s allegation about his goal for the demonstration, which was to protest the removal of the Lee statue and renaming of the park, the City argued. And the City also said that Kessler failed to offer an explanation of how he would solve the problem of oversized attendees. The City would not only facilitate Kessler’s right to free speech by moving the site, but also provide a solution to accommodate a larger number of attendees. The McIntire Park was also more easily accessible for larger numbers of people attending the rally, and there were more free off-street parking spots than Emancipation Park (Defendants’ Argument, p. 15). As a result, the City said that Kessler could not clearly show that he was likely to succeed on the merits of his First Amendment claim.

With respect to the second requirement for an injunction—a finding of irreparable harm if not granted, the City argued that Kessler would not suffer irreparable harm if the Unite the Right Rally took place in McIntire Park. Specifically, Kessler and his rally’s members and their message would not be suppressed by holding the demonstration in McIntire Park. Beyond this, his requests to accommodate the size of

the audience and the duration of the rally would not be limited. The only limitation would be to change the first choice of location. Therefore, the City clarified that there was neither a “chilling effect” on free expression nor any “direct penalization” of First Amendment rights (Defendants’ Argument, p. 15). Since the City’s regulation was reasonable and only concerned with regulating the place of the event, it was invalid for Kessler to request preliminary injunctive relief due to irreparable harm.

Thirdly, the City argued, based on *Mineral Run Oil Co. v. United Forest Service* (2011) and *Spiegel v. Houston* (1981), “When a preliminary injunction is sought against the government or other public institutions or public servants it is appropriate to consider together the final two elements of the preliminary injunction analysis—the public interest and the balance of the equities” (Defendants’ Argument, p. 16).

Accordingly, the City argued that Kessler’s arguments to support the granting of preliminary injunctive relief could not be on the grounds of the balance of equities and the public interest. Specifically, not only did the City not attempt to silence Kessler and his rally’s members, but also it had offered a more suitable place for his rally. Also, the City Police Department indicated that it would provide substantial resources to protect the event, regardless of where it took place.

Moreover, the City revealed that Kessler impliedly proclaimed that he would hold the Unite the Right rally in Emancipation Park regardless of the City’s concerns, because he accurately alleged in the Complaint that “the City Police Department is now preparing for the possibility that people will gather at both parks during the rally” (Kessler’s Complaint, p. 6). The City, thus, pointed out that the balance of equities as

reason to support the granting of preliminary injunctive relief was invalid in the case because of Kessler's disregard for the legitimate safety concerns raised by the City (Defendants' Argument, p. 16). Furthermore, Kessler had offered no practical solutions to the problem of oversized attendees in Emancipation Park, and also provided unreliable information about his attempts to hold the rally. According to his Complaint, he stated to local media outlets that he "intends to have a peaceful rally" of about 400 people who will "avoid violence (Kessler's Complaint, p. 11).

However, the City revealed that he has said in other forums that it will "be like Berkeley" with "thousands of people out here" (Defendants' Argument, p. 17). The City explained the words "be like Berkeley" might refer to "the series of violent protests and clashes this year at the University of California at Berkeley between groups of extremists at both ends of the political spectrum" (Defendants' Argument, p. 17). Hence, the balance of the equities does not favor the granting of preliminary injunctive relief. In addition, the City's decision to modify the location is also based on the consideration of public convenience and safety, which serves the public interest. Therefore, granting the preliminary injunctive relief in this case would be against the public interest.

Finally, the City contended that the court should not consider Kessler's argument regarding a prior restraint on his constitutional rights because this argument could not be supported by any allegation in Kessler's Complaint. The request for preliminary injunctive relief, therefore, the City argued, should be denied (Defendants' Argument, p. 18).

Court's Opinion

The court heard the matter on August 11, 2017, and Kessler's request was granted. Firstly, the court agreed with Kessler's claims that the City's decision was based on a content-based restriction that could not survive strict scrutiny (Memorandum Opinion, p. 3). Given the current record provided by Kessler, the court found that Kessler had shown that he was likely to succeed on the merits of his First Amendment claim. Based on the current record, the Court noted that Kessler provided in support of his argument the fact that the City had only revoked his permit, but left counter-protestors' permits in place. The difference in treatment between Kessler and the counter-protesters suggested to the Court, that the City's decision to revoke and modify Kessler's permit was based on the content of his message and his viewpoints. The City's action was, therefore, not content-neutral. Moreover, the court found there was other evidence to bolster this conclusion. Some members of the City Council had clearly indicated that they were opposed Kessler's political viewpoint on social media (Memorandum Opinion, p. 4).

Additionally, the court emphasized that "content-based restrictions can stand only if they survive strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (Memorandum Opinion, p. 4). Yet, given the existing record, the court argued that the City could not meet this burden. While the City had continued claiming that the decision to revoke and modify Kessler's permit was motivated by the number of attendees, the record showed that their concerns in this regard were not

tenable. And there was no evidence that there would be many thousands of attendees during the demonstration.

Furthermore, the court indicated that the simple action of moving Kessler's demonstration to another park would not avoid the potential of a confrontation between the two groups. According to the court, both sides acknowledged during the hearing that people, either supporters or opponents, would follow Kessler to McIntire Park if the original location changed. Therefore, changing the location of Kessler's demonstration would not make any difference in the confrontational situation between both sides' attendees. Also, because of the timing of the City's decision and Kessler's goal to demonstrate in Emancipation Park, some supporters of Kessler would still be at Emancipation Park, even if the location were moved to another Park. The Court, therefore, pointed out that changing location would not eliminate the need for the City's resources and the need for the law enforcement at Emancipation Park. Instead, the two parks would both need those resources' support. As a result, the court found that there was no substantial evidence to support that changing the location of the event would further a compelling interest and was narrowly tailored to achieve that interest (Memorandum Opinion, p. 5). Consequently, the court concluded that Kessler had proved that he was likely to succeed on the merits of his First Amendment claim.

Secondly, based on the record of Kessler's Complaint and the court's conclusion that Kessler showed a likelihood of success on the merits of his First Amendment claim, the court concluded Kessler had indicated he would suffer irreparable harm in the absence of preliminary injunctive relief (Memorandum Opinion, p. 6).

Finally, the court argued that “given the timing of the City’s decision, the court is of opinion that the balance of the equities favors the plaintiff in the instant case” (Memorandum Opinion, p. 6). In addition, the court concluded that the public interest included an injunction that protects Kessler’s rights under the First Amendment. Therefore, the court held that Kessler’s motion for preliminary injunctive relief was granted. Specifically, the court prohibited the City from revoking the permit to hold a demonstration at Emancipation Park on August 12, 2017.

Conclusion

In general, the author tries to provide a new perspective to understand the right to free expression in the case of hate speech. After clarifying the relevant theories and presenting the precedent and latest cases in relation to how the Supreme Court has looked at hateful expression over the years and the status of hate speech in America today, the author argues that the right to free expression with respect to hate speech is pure and absolute, but conduct is not protected within the section. Before explaining the justification for the absolute right to freedom of expression, it is necessary to clarify the term “absolute” in the context of this paper. In this research paper, the author distinguishes between expression which is absolutely protected and conduct, which does not enjoy full protection under the First Amendment. The word “absolute” only means pure and exclusive. Specifically, the “absolute right to freedom of expression” refers to an inherent right that is naturally given and cannot be deprived. The right to expression should be equal for everyone. Moreover, the term “absolute” reveals that this right is pure and exclusive, but does not include exercising harmful acts toward any other persons or causing a harmful consequence to the public interests or individual interests.

Admittedly, it is hard to recognize the absoluteness of this right because of some objective social limitations or some inevitable infringements. But it cannot change a

fact that the right to freedom of expression is an absolute enjoyed by all Americans. Since *Declaration of Independence (1776)* which provides that "all Men are created equal" is a basic tenet of one of our most cherished and fundamental rights, then all humans are entitled to equal human rights. However, expressive conduct which includes behavior that may cause harm to others breaks the equality of human rights and the principle of social justice. Therefore, the absolute right to freedom of expression actually means an absolutely born right with absolutely legal protection under the absolute limitation.

Similarly, as Raphael Cohen-Almagor (2006) mentioned in his book, there is a necessary balance between the right to freedom of expression and the harm that might result from certain speech or expression. The balance here is imperative and needs to be clarified, even if it may not be achieved in the real world. The underlying premise of the author's argument is in accord with Cohen-Almagor's position to some extent, that the absolute right to free expression does not include the right to cause, intentionally and directly, harm, damage, and loss, whether physical or psychological to another's person or property. There is also no immunity from indirect or unintentional harms. The collateral damage caused by someone's expression is not protected under the absolute right to free speech. As a sane person, he/she is supposed to have a basic understanding of the right and duty so that expressional behavior or speech ought to be conceived under a considerable context or in a consequential mind. Any right naturally comes with a cost. An actor should be more or less responsible for the consequence of his or her actions. Otherwise, such a person may subconsciously

take for granted that the harm is included in the protection given to speech, or forms part of the implied protected sphere under the “absolute right”. Therefore, the right to freedom of expression must be reaffirmed and be interpreted with its constitutional justifications. Racists may not be changed by moral appeals or deterred by the law enforcement.

In the author’s opinion, the concept of free expression and the right to freedom of expression should be treated as two clearly different things. Hate speech or an expression that may produce harmful effects is only one form of free expression and should not equate with the right to freedom of expression. The right of expression, as a fundamental human right, entitles all persons to the right to freedom of opinion and expression but never includes the right to speech which can lead to harm to others. Some may contradict this perspective in that the harms potentially exist in the expression as an associated consequence. The author’s response is that harm is not unavoidable but is a subjective choice. The potential for harm to result does exist in hate speech, but the potential does not exist in all types of expression. People have a choice to express themselves without hateful behavior and harmful intention unless they are insane so that they have no consciousness of what they are doing.

Admittedly, someone would argue that human beings are not as rational as we think. They may not lose their minds but they are still compulsive beings who sometimes will act on impulse or be driven by mood and desire. What if someone’s expression while leads to harmful effect only occurs because of a momentary impulse? Shall we accuse that person or engage the law enforcement to deal with

that? Of course, everyone has a right to hate or to express hateful opinions, even the right to express hatred.

However, this type of expression does not form a part of the right to freedom of expression so that it should not be excused as being under the protection of human rights law. When an individual claims a right, it is granted that he or she will pay for any consequence that results from the exercise of this right. Therefore, if expressing hatred is inevitable in some cases, the cost should be paid by the conductor not by the right of freedom of expression. Furthermore, the exercise of the right to free expression should underlie a primary premise that others' rights will not be jeopardized by one's exercise of this right. Thus, no one should conduct a harmful expression and then expect constitutional protection believing that this harmful expression is covered by the right to freedom of expression.

As the theoretical basis clarified, the essence of Mill's (1869) philosophy actually emphasizes the significance of boundaries on liberty. Mill (1869) affirms the absolute right to freedom of thought, expression and even conduct. However, the absolute right is accepted and justifiable only under certain limitations. Boundaries are the premise for the justification of absolute rights. As long as a person's conduct does not affect others and he/she can be responsible for the consequences, the person shall be entitled to an absolute right to his or her freedom of thought, expression and conduct. The expression with harmful consequence will obviously cause a severe impact on others. Thus, in the case of hate speech, the expression of such speech which leads to harmful consequences violates the human's basic liberty belief so that it is nothing to do with

the absolute right to freedom of expression and not under the protection of free expression. Beyond this, the absolute right, as Mill (1869) stated, is an assertion of an absolutely individual right to free expression. It actually implies that the absolute right is absolutely equal for all humans. Therefore, once an individual's behavior affects or damages others' rights or interests, his/her absolute free right must be limited or restricted. To guarantee this type of equality and social justice, there must be boundaries on liberty in the real society.

Moving to the critiques of the marketplace of ideas, Both Barron (1967) and Bambauer (2006) suggest the need to abandon marketplace of ideas as a doctrine of constitutional theory. Although their viewpoints are based on different perspectives, they both argue that the marketplace of ideas only highlights that full and free discussion should be absolutely supported for seeking the final truth, but it does not define the boundaries of free expression. The author argues that the most critical issue is that the marketplace of ideas lacks a recognition of boundaries. Opinions should not be disordered and chaotic in the market of free expression. Regulations must be established. Rights need to be bound by clear lines to approve and interpret the use of this right. The meaning and the value of any right only exists under the context of boundaries.

The absence of boundaries concerning fully free expression may cause an unbalanced problem. Specifically, the author argues that there is a social cost to free expression, in which the fully free expression reinforces the majority dominance in point of view and stereotypical mores. This "objective reality" is then, imposed on the

minority groups, including racial, ideological, gender groups, etc. This is so, even though this new media environment provides all individuals with more channels for expressing their views. Thus, although it appears that the ability to use the right to expression has become more accessible to more individuals, little has changed. Access to the media continues to be controlled by powerful private groups. The cognitive bias has always been engaging in various decisions. In reality, the discourse, the moral doctrine and the social ideology are permanently dominated by the majority. Opinions expressed actually lack a balanced fluidity due to the mechanism of the marketplace of ideas, instead, they lead to more marginalization of unpopular opinions.

In other words, given the fact of an unequal right of access and cognitive biases in dealing with information, the unpopular opinions will become more and more unacceptable and the dominant opinions from the majority will be reinforced. Delgado (1995) proposes that if an opinion is repeatedly expressed that some people are inferior based on their skin color, then color will soon become “a badge of inferiority and justification for the denial of opportunity and equal treatment” (p. 159). Similarly, Matsuda et al. (1993) points out that “racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship” (p. 36)

Based on the social facts, the right to free expression is actually conditional to minority groups, and no matter how it works, it always serves the majority perspective best. Therefore, in some sense the doctrine of full and free expression

weakens the social equality and justice afforded to minority groups. In addition, if we assume that there is a similar unbalanced issue occurring in the case of hate speech, what if the majority have hateful emotions and express this hateful conduct? Then the balance needed to maintain basic human rights will be severely broken so that we may fall into the tyranny of the majority, with expression hatred liberally made. And when the balance is inclined seriously, which is all in favor of the majority, the whole society may become a tyrant, like Mill (1869) mentioned.

Therefore, liberty in society and freedom for individuals both need boundaries. The right to freedom of expression needs to be regulated and limited. The boundaries, with respect to liberty, between individuals, individuals and government, and individuals and society can protect the bottom line of social justice and can help to eliminate the potential of tyranny of the society. In a word, the “absolute right to freedom of expression” reveals the absolute nature of boundaries in regard to fully free expression. Likewise, Alexander Meiklejohn (1961) emphasizes, in his research regarding the absolute right under the First Amendment, that the First Amendment “does not establish an unlimited right to talk” (p. 261).

Moreover, Barron (1967) suggests that the reason why demonstrations occur is probably because of unequal rights and opportunity to access the media. The dissidents lack enough channels or opportunities to access media to express unpopular opinions, so that they resort to more aggressive methods of expression, such as demonstrations or marching, etc. However, Barron’s (1967) view may not be persuasive in the 21st century. According to Bambauer’s (2006) cognitive bias theory,

some opinions are so inherent and rooted that their holders will not change or embrace new opinions. Similarly, if some dissidents have aggressive or hateful opinions and feelings that they desire to express in a certain way, then they will express it in that way at any rate. It is not directly related to the right or opportunity of access.

Even where the right or opportunity is equal or enough, those inherently aggressive or hateful opinions can hardly be alleviated in that choice to demonstrate is not because the expresser has no other channels of expression, but because he or she deliberately choose the channel of demonstration. Since each expressive channel has its own feature and effect, and serves different goals, the choice to demonstrate occurs not because there is no choice or opportunity to access other means of expression, but because demonstration meets a particular need for expression. Symbolic expression includes acts, such as demonstrating, marching, torch-lighting rallies, cross burning, and these methods of expression may be more direct and powerful for those dissidents who are eager to express a minority opinion, than other media channels. In this era of multiple self-media, groups actually have more channels through which to express, including uploading videos or audios or social media, such as Facebook and Twitter, etc. But some people still choose demonstrations because it serves their goals.

Concededly, there is no proper way to reduce hatred in practice. But it is still appropriate to provide regulations for expression in order that the right to free expression obtains absolute protection under the Constitution and the boundaries can be clarified by recognizing that some expression is not protected because of its harmful nature. Therefore, the core of the absolute right to freedom expression is to

guarantee the absolute right to expression and at the same time to ensure others' human rights will not be affected or damaged, in the effort to recognize and claim one's own freedom of expression.

Accordingly, the boundary of tolerance is also worthy of discussion. The author believes that the degree of willingness to tolerate intolerant behaviors has a direct relationship with how much cost or harm results from the intolerant conducts. The boundary of tolerance should vary by cost or harms. Taking the Charlottesville incident as an example, if there was no escalating car attack and no harm and death, it would only be considered an aggressive demonstration. Public opinions and attitudes toward tolerance must be different. The result of harm and death has challenged people's bottom line of tolerance. Harmful or huge cost consequences can incite anger and justify a zero tolerance perspective in human's mindset. Moreover, this tolerance concept makes sense only in the context where human rights are threatened or have already been damaged. Likewise, Rawls (1973) proposes a question, regarding his tolerance theory, of "whether the tolerant have a right to curb the intolerant when they are of no immediate danger to the equal liberties of others" (p. 218). He does not believe that people are entitled to a right to choose to tolerate or not tolerate the intolerant language in any situation. He suggests that only in conditions of immediate threat or danger is the right of tolerance to curb the intolerant justifiable and reasonable. In other words, in practice, there is no clear and stable boundary for tolerance because it is fluid and contextual. The changeable line of tolerance depends on the degree of cost or harm.

As a result, the author suggests that the constitutional doctrine ought to scrutinize the conventional theory, stated by Justice Oliver Wendell Holmes in *United States v. Schwimmer* (1929), that “if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought -- not free thought for those who agree with us, but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within, this country” (p. 279). The convention as a constitutional principle for weighing related legal cases seems to be romantic in a real context. It fails to take into account situations where harmful effects accrue from expression. The constitutional doctrine concerning the boundary of protection associated with tolerance should more likely consider the practice and contextual situation, on a case by case basis.

Admittedly, it is still problematic to determine the immediate danger or true threats. The complexity and capriciousness of humans make a real situation more unpredictable. The standard for justifying the prior restriction also needs more scrutiny in practice. Kessler’s case and other precedent cases may provide new perspectives for regulating speech.

Basically, the significance of Kessler (2017) brings two key points. One is that the case presents the certainty of an absolute constitutional right, thereby implying the inherent legitimacy of the absolute right to freedom of expression. The other is that Kessler (2017) provides a critical reference for similar cases in weighing situations involving hate speech. The decision seems consistent with the earlier Illinois Appellate Court after Supreme Court reversed the Illinois Supreme Court's decision in

Skokie (1977).

Firstly, despite any position for arguments in this case, Kessler is under a certain premise that his constitutional right is absolute and should not be violated. Even though the content of the rally appears sensitive, the behavior may be aggressive, the opposite side will cause serious intense problems, and the City indeed may have shown preference to counter-protesters, Kessler was always entitled to the right to express his opinion. No matter where his rally was moved to, he could always be allowed to express his viewpoints at the time he wished.

However, given that the case is related to the Charlottesville car attack and hindsight is 20-20, and the incident is severe, the author has some different views on the court's opinion. The author argues that the court, to some extent, neglected some points from the City's argument in weighing merits re-location of Kessler's rally. Firstly, according to the City's document, there was reasonable suspicion about whether the real purpose of Kessler's demonstration was as stated in the application. Secondly, the City's suggestion to relocate Kessler's rally to a larger accommodation could have been taken into account based on the also reasonable concerns raised. Given the large expected numbering attendees from both sides, the larger space could help to alleviate the confrontational situation between the two sides and make it easier and more convenient for police resources to maintain order.

Moreover, it's not hard to see from the map or based on the local situation that the court should have known, that even the residency around Emancipation Park is much denser than around McIntire Park leading to the greater possibility that the tragic

ending to the events could have occurred and was foreseeable. And the car attack occurred in the block around Emancipation Park. The author does not suggest that had the court approved the location change, then the tragedy might not have happened, since the incident was unpredictable and might have occurred in the new location. The author only proposes that, based on the location of McIntire Park, it would be a safer venue for the massive demonstration to communicate sensitive content. In addition, if the goal of the demonstration, as stated by Kessler, was correct, the statue in Emancipation Park was indeed important as a backdrop to his speech. Hence, based on the consideration of the sensitive content, the serious intense feelings from both sides, and the large size of attendees, from both camps, the question arises whether the court should have considered allowing the change of location to a venue where there was no statue, but also more space and more safer surroundings, to alleviate the serious incitement and the potential for danger. While Kessler is entitled to exercise his constitutional right to expression, the potential of threats should also be moderated.

Thus, in *Skokie* (1977) the Illinois Appellate Court imposed a reasonable regulation which not only ensured the constitutional right to free expression, but also considered the necessity of alleviating incitement. Specifically, the court considered the brutal history surrounding the Holocaust, and decided, while allowing the march, participants would not be allowed to display the symbol of the Swastika. The court's opinion uses a very reasonable interpretation of the right to freedom of expression. The constitutional right to free expression is positively affirmed by the court,

meanwhile the dangerous incitement which accompanies the speech is alleviated to some extent. It also asserted that the absolute right to expression must be guaranteed but it does not mean that the right is unlimited. Above all, the two cases suggest an approach that courts' decision should be more thoughtful and flexible. The consideration should depend on the certain context and try to ease incitement or reduce the potential of harm while ensuring the constitutional right for free expression.

Finally, while *Brandenburg* (1969) establishes such protection is absolute in the absence of a true threat, *R.A.V.* (1992) continues this thread of argument establishing a right even where racists burn a cross in a private yard. Perhaps the case that should be greatest in focus in relation to the definition of absolutism is the 2003 case *Black* where the Court, while holding a Virginia Statute to be unconstitutional, nonetheless found that because of its historical significance and relation to abuse and violence against black people, cross burning could be regulated by the government. This decision, like *Skokie*, embodies a full understanding of what absolute means in the context of the First Amendment. It provides the leeway to an understanding that while the First Amendment is absolute, there are other rights within the discourse that must also be considered. Thus, speech which has the tendency to cause physical harm or fear of such harm is not necessarily protected under the Constitution. If we accept that there are limits to the right to freedom of expression and that racist speech, such as cross burning and marching with a Swastika can be proscribed, the next question for us is what are the acceptable contours of the limitations on speech in the arena of hate

speech.

Other three precedent cases are all in favor of protection of the First Amendment. These cases embody a clear atmosphere of the Court toward hate speech issues in history, which follow a fundamental doctrine that the right to freedom of expression is absolute and the constitutional right to protect free expression has priority and unshakable status. The absolute right to freedom of expression reveals that the natural human right is pure, exclusive and equal, and the boundary is a primary precondition that can guarantee for smooth exercising the right under the principle of social justice. Every one deserves an absolute right to express himself, but no one deserves harm by the expression.

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