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Freedom of expression in turbulent times – comparative approaches to dangerous speech: the ECtHR and the US Supreme Court

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ABSTRACT

The European Court of Human Rights (ECtHR) and the US Supreme Court (USSC) have emphasised the foundational importance of freedom of expression. However, when the exercise of this liberty appears to endanger the democratic institutions or the national security of the state, readiness to uphold limitations of this right increases. Over the years each judicial body has adopted a distinctive approach towards limitations on dangerous speech. The US Constitution envisages free speech as an unconditional freedom; a 'free market of ideas' is the key concept, suggesting that the protection availed to speech should be the widest possible. The USSC gradually adopted a viewpoint-neutral approach focusing solely on the secondary effects of the speech, thus protecting even abstract advocacy of violence. On the contrary, the ECtHR may contracted freedom of expression in view of wider societal interests; the key concept is that of a militant democracy capable of protecting itself. The ECtHR adopts a lower threshold of protection that precludes abstract advocacy of violence and applies an intricate balancing exercise. ECtHR's approach allows more space for indeterminacy and obscurity in its jurisprudence. The USSC's case-law may serve the ECtHR as a source of inspiration with a view to refining its standards.

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1. Introduction

It is a common belief that extraordinary times call for extraordinary measures. In times of political crisis, armed conflict or other exigencies, calls for restricting civil liberties as a means to serve the common good and the national interests fall on fertile ground. Behind this idea lies the assumption that there are times during which the political fact overrides the law, thus granting the sovereign exceptional, wider and more intrusive powers.[1] If this assumption sits comfortably with authoritarian rule, it is more difficult to reconcile with forms of governance adhering to the rule of law, human rights and liberal democracy. The reason for this being that civil liberties are more needed exactly during those turbulent times.

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The freedom of expression is often one of the first liberties to be curtailed. Silencing critics is thought to preserve the societal peace that is required for the country to overcome the challenges it faces. Still, there are convincing reasons to argue that strong protection of free speech is needed especially during these times. The clash of ideas and cultural mindsets such as the classical and the judeo-christian traditions, disputes between Catholics and Protestants, despotism and enlightenment, capitalists and socialists, authoritarianism and liberal democracy shaped the dynamics of our civilisation. Determining which ideas designate as dangerous is relative and subjective and often goes far beyond the obvious. Many of our now well established values were considered dangerous in the past.[2] Criticising an unfair and destructive war can be regarded as seditious by governments. Furthermore, democracies by definition and with the aim to create consensus should be particularly interested in allowing the most diverging opinions to compete for approval in any public debate.[3]

This faith in the value of disturbing and seemingly provocative speech coupled with the suspicion that the exigencies might often be used as a pretext to justify arbitrary intervention with personal and collective autonomy, led me to focus on the protection that legal systems avail to utterances that are perceived as subversive or as undermining national security. Such utterances constitute the litmus test of a jurisdiction's protection of free speech, and are thus very telling of how far a jurisdiction's commitment to the notions of liberty and autonomy reaches.

In this respect, the jurisdictions to be compared should demonstrate a manifested faith in the liberal values. Human rights being a legal concept created by the West, Europe and the United States come to mind first as possible case studies. But if focusing on the most prominent Court in the US, the Supreme Court (USSC), is easy what about the dozens of national jurisdictions across Europe? It seemed reasonable to concentrate not on a single European legal order, but rather on a Court that interacts with all of them but still stands above them: the European Court of Human Rights (ECtHR).

This paper aims to present how the USSC and the ECtHR adjudicate cases concerning dangerous speech and evaluate their approaches in terms of predictability and from a libertarian standpoint. For the purposes of this paper dangerous speech refers to utterances that allegedly challenge national security and democratic order. Cases concerning the disclosure of confidential information do not fall within the scope of this research, since they are characterised by specificities which would require further discussion that the limited space does not allow.

Apparently, freedom of speech does not mean that everything can be said.[4] All jurisdictions acknowledge that sometimes speech may be restricted to serve other purposes; The problem is establishing when contracting freedom of expression is truly justified.

1.1. Methodology and outline

The doctrinal study of the USSC's and ECtHR's case law is the primary focus, since it demonstrates each jurisdiction's willingness to avail protection to dangerous speech. The cases were retrieved using the search engines available in the courts' websites (JUSTIA, HUDOC). The cases which were selected are representative of the respective Court's jurisprudence; they either establish the standards of review or illustrate best their application by reference to the judgment that initially set them. They are seminal

in the sense that they have been frequently recited in later judgments and in academic literature. Especially as regards the ECtHR, out of the 17 judgments discussed in this paper 9 have been identified by the Court itself as being 'key cases' or having a level one importance level according to HUDOC's classification system. Rather than studying isolated instances where free speech has been put under pressure, there has been an effort to study periods during which free speech encountered systemic challenges in each jurisdiction, i.e. the exigencies in South-east Turkey or the Vietnam War. This allows to assess each Court's response to restrictions on free speech in a comprehensive manner within a solid factual context. In this respect, the level-2 importance cases discussed contribute to the contextual study of ECtHR's jurisprudence. Furthermore, the analysis is diachronic, since it acknowledges that existing judicial standards developed over decades of judicial debates and often contradictory verdicts. In this respect, dynamics within each court are also considered; dissenting opinions are often as revealing as the Court's decision and suggestive of emerging trends that may well end up shaping novel standards. Finally, doctrinal analysis of the legislation and academic literature gives more insight to and enhances the understanding of the Court's jurisprudence. The reader will notice that as regards ECtHR the focus is not on recent judgments. The reason for this is that there have been no new leading cases on article 10 during the past decade and the Court itself has identified none of the judgments issued on article 10 during this period as key-cases or as having a level 1 importance. Thus, the analysis can safely rest on the previous case-law which actually established the principles that are still applicable.

Chapter 2 provides an overview of the conceptualisation of free speech in each jurisdiction and the principles that underlie it. The case-law of each Court regarding dangerous speech is studied separately in chapter 3. Chapter 4 draws conclusions with regard to the consistency and precision of the two jurisprudences studied. Finally, chapter 5 discusses the key-doctrines that altogether make up each court's approach from a libertarian perspective. Having the previous analysis as a point of departure, this final chapter aims to establish which jurisdiction provides more guarantees for the protection of speech and proposes possible ways in which the ECtHR could enhance the level of protection that it offers.

1.2. Apples and Apples

Contrasting ECtHR's and USSC's jurisprudence raises questions on their comparability. The courts have a different mandate, the former being an international human rights court supervising a human rights treaty, the latter a constitutional court of general jurisdiction. The ECtHR often defers issues to the margin of appreciation of the responding states and has to reconcile different legal cultures and families, such as the Anglo-Saxon and the continental. The USSC on the contrary, is a more powerful court that has a pivotal role in domestic checks and balances and is capable of enforcing its views by invalidating state and federal legislation as unconstitutional.[5] Nor should one lose sight of the fact that the USSC has a longer history. Are we comparing apples with oranges?[6]

These concerns will prove very helpful when trying to understand differences, but the two courts still make a good comparison. First, despite having different mandates the ECtHR and USSC have a similar function. They are the ultimate guarantors of unified

and valued-based discursive context that they have created themselves based on a human rights treaty and the US constitution respectively.[7] Second, despite deference to national authorities, the ECtHR has assumed the role of a constitutional court in light of ECHR's constitutionalisation.[8] As such, the ECtHR exercises international public authority having a huge impact on nation-states.[9] Both courts enjoy an almost unmatched visibility that makes their decisions seminal and respected. Thus, the status and influence of the ECtHR compensate for its more limited powers. Third, our substantive focus renders the courts' differences irrelevant to some extent. The standards under study are established through similar forms of judicial procedures. Based on individual complaints about individual rights the courts review decisions of lower courts, examining both the facts and the law of the case under the purview of a legal instrument that enjoys supremacy in the hierarchy of national legislation. Indeed, differences have not prevented ECtHR from using its counterpart's jurisprudence as a source of inspiration or a point of comparison.[10] Finally, the differences between two highly emblematic courts do not impede their comparison, since this is actually an elementary aspect of comparative legal analysis.[11] Apples are apples and they are not always alike.

2. Freedom of speech as a core democratic value

The forum Romanum is a famous remembrance of the glory that was Rome. The word *forum* in Latin stands for 'marketplace'. Romans went there to buy delicacies and luxury products from all over the empire. Nevertheless, the marketplace had another function. Before mass communication was possible, people had to actually meet to exchange information and ideas. A marketplace of goods amounted to no less than a marketplace of ideas. Few of the forum's buildings survived time. The temple of Janus is no exception. Located rather centrally in the forum, the temple was dedicated to Janus, the two-faced deity. This excursion in Rome is less irrelevant than it seems, when it comes to giving an overview of the USSC'S and ECtHR's approaches to freedom of expression; the former recalling a marketplace of ideas, the latter reserving in its marketplace some space for Janus' cult.

2.1. The ECtHR: a Janus-faced jurisprudence

In the early *Handyside* case, the Court clearly established that freedom of expression is an 'essential foundation of a democratic society'[12]; ideas that shock or disturb enjoy protection under the Convention, as required by tolerance and pluralism.[13] Interestingly enough however, the Court found no violation of freedom of expression in the seizure of a book's copies. The ECtHR was convinced of the necessity and proportionality of the measure that British authorities took with a view to protect morals.[14] Deciding measures of protection fell within the state's margin of appreciation.[15] The Janus-faced understanding of freedom of expression has made its occurrence in cases under the ECHR dealing with dangerous speech as well.[16] Such contradictory judicial opinions are more of delicate way to strike a balance between freedom of expression, staying within the limits of the court's legal mandate as circumscribed by the Convention and taking national concepts of freedom of expression into account.

2.1.1. A militant democracy[17]

What the Court's words in defense of freedom of expression as a foundation of democracy conceal is an inconspicuous and determining quality of European democracies: many of them are militant democracies, reserving for themselves the right to defend against extremists who might abuse democratic freedoms and institutions aiming to abrogate democracy.[18] In the aftermath of the Second World War, European states, shocked by the destructive forces authoritarianism had unleashed, sought to combat political extremism and bulletproof democratic stability. Nowadays, most European states have introduced in their legislation measures that prohibit extremism and abuse of rights.[19] Suppressing anti-democratic expressions as an instance of abuse of rights is just one of the militant instruments democracy avails to itself.[20]

The ECtHR has never referred to the concept of militant democracy.[21] However, the drafters of the Convention were no less concerned about the survival of their fragile democratic institutions.[22] The CoE itself was part of an effort to protect democracy.[23] The Preamble to the Convention sets out democracy as the political system within which the rights it enshrines can be realised. Indeed, the Court has admitted that maintaining democratic order sometimes requires contracting certain freedoms.[24] The abuse of rights clause of Article 17 was from the drafter's point of view the key instrument for democratic self-defense against totalitarianism.[25] The ECtHR has held that Article's 17 role is to prevent anti-democratic political parties and individuals from exploiting the Convention's rights and freedoms in order to further their cause.[26] The Court relied many times on Article 17 to deny protection of expressions embracing the nazi ideology and propaganda.[27] Yet, under Article 10 (2) the drafters included an additional limitation clause to freedom of expression that entails a proportionality test with a view to its legality, legitimacy and necessity.

Under the ECHR freedom of expression is a conditional freedom that comes with 'duties and responsibilities',[28] not an absolute one. As such, it can be contracted when the maintenance of democracy calls for it. The underlying concept of militant democracy is crucial in understanding the Janus-faced jurisprudence of the ECtHR. Despite of the appraisal of freedom of expression as fundamental, the Court, like the Temple of Janus that had its gates open only in wartime, reveals its second face when taking up arms to defend superior interests such as democratic institutions.

2.2. USSC: a free market of ideas

The limitations of articles 10(2) and 17 ECHR have no equivalent in the American constitution. The first amendment to the US Constitution declares the right to freedom of speech, suggesting that no law prohibiting freedom of expression is permitted. The words 'no law' leave no room for misinterpretation and freedom of expression is seemingly a non-negotiable value in the USA. In reality, however, establishing a free market of ideas in the US was a lengthy process.

2.2.1. Establishing a marketplace of ideas in the US

Only in twentieth century did the USSC start dealing with cases regarding freedom of expression.[29] In its early *Schenck* (1919) case the USSC held that in wartime, expressions undermining the nation's war effort do not enjoy protection under the first

amendment.[30] The USSC has come a long way since then. The same year in a similar case justice Holmes dissented, marking that the clash of ideas should be decided by their competition in the 'market'.[31] This was the first time the notion of freedom of expression was associated with the concept of free market.[32] In *Gitlow v New York* (1925), the Court established freedom of speech as a fundamental value, underlining however that as such it comes with responsibilities and may be subject to restrictions if abused.[33] The fundamental value of free speech was restated in *Lovell v City of Griffin*, this time with no reference to a possibility of abuse.[34] These cases suggested that the court was now putting emphasis on prohibiting restrictions on free speech[35] and that strict scrutiny was applicable in this respect.[36]

From recognising the fundamental character of freedom of speech to creating a marketplace of ideas has been a short distance. In the early 40s the Court referred to the 'free trade of ideas', echoing Holmes' metaphor.[37] In *Terminiello v. Chicago*, the Court regarded freedom of expression as a distinctive element of democracy.[38] Furthermore, the Court stressed that it is a function of speech to challenge the established order.[39] It was Justice Douglas, who took up[40] Holmes' dictum of a market of ideas, coining the marketplace concept.[41] The foundations for a marketplace of ideas in the US had been laid.[42]

2.2.2. From the categorical approach to content-neutral regulations

In *Yates v. United States* (1957), the Court reversed the conviction of communist party members stating that abstract advocacies of violent overthrow of the government, obnoxious as they might be, are protected under the first amendment.[43] However, one should not draw the conclusion that no regulation of speech is possible in the US.

While appraising the fundamental value of free speech and increasingly embracing the concept of a marketplace of ideas,[44] the Court developed categories of speech that are excluded from constitutional protection. *Chaplinsky v. New Hampshire* (1942) established the main categories of unprotected speech: obscenity, defamation and fighting words.[45] What the categorical approach actually entailed was an axiomatic lenient scrutiny allowing for – but not necessarily leading to – the restriction of certain forms of 'unprotected' speech based on its content.[46] Under the categorical classification, a marketplace existed but fair competition between competing ideas was yet to be established. Unprotected speech could still make a successful claim before the USSC, but the court applied a less strict balancing test compared to protected expressions.[47] In this respect, designating the expression concerned as protected or unprotected features as a preliminary issue for the court to be decided before reviewing the case under the first Amendment.[48]

Gradually however, a series of cases narrowed down the relevance and applicability of the categories[49] to the point that they are considered obsolete by most justices.[50] Establishing a nexus between freedom of speech and equality before the law, i.e. equality of ideas that individuals and communities hold,[51] was a crucial parameter in setting aside the categorical approach.[52] The principle of equality facilitated the transition from the categorical content-based approach to the currently prevalent viewpoint-neutrality of regulation. The principle of content-neutral regulations entails that regulations of speech should respect the 'equality of status' that all ideas enjoy.[53] Under this principle, regulations based on the speaker's point of view are impermissible.[54] All ideas are

considered equal and their evaluation rests not upon the Court but upon competition with other ideas.[55] Indeed, the Court now applies strict scrutiny when reviewing content-based restrictions on speech that pose the risk to single out certain viewpoints from the marketplace.[56] Nowadays, the USSC can claim that a marketplace of ideas is firmly established.[57] However, it is important to note that certain types of speech that are particularly relevant for our research, i.e. threats[58] and incitement to violent acts,[59] are still considered unprotected under the first amendment based not on their content but on the secondary effects, such as the present danger that they pose.

3. The king is but a man[60] – dangerous speech

Courts operate under political pressure in wartime or whenever there is antagonism over a country's form of governance. Thus, they often appear more willing to uphold the executive's effort to contain dissent and criticism. Indeed, freedom of expression is more susceptible than ever to judicial restraints every time national security and democratic order are at stake. This fact raises serious concerns. First, if there are two decisions that require fierce debate, these are which political system should prevail and whether a nation should march its boys off to war. Second, modern wars are oftentimes undeclared, time-unlimited, involve non-state actors and low-intensity incidents that wouldn't designate as acts of war in the past.[61] The perpetual war on terror is a vivid example of this. Under these circumstances, legal certainty is undermined and the invocation of national security in view of the exigencies of war might well serve as a pretext to strangle any form of domestic opposition. Therefore, enhanced judicial scrutiny, instead of large deference to the executive is required whenever national security is put forward as a justification to restrict speech. This chapter studies restrictions on speech that poses a threat to the democratic institutions, national security and territorial integrity of the state, notably cases regarding limitations imposed during wartime or against 'extreme' political parties.

3.1. ECtHR

3.1.1. Partisans and parties

Strasbourg has addressed a considerable number of cases concerning militant measures ordering the dissolution of political parties that allegedly contested the democratic order. In heated times that the Court had gained no authority yet, the Commission was quick to declare inadmissible under Article 17 the complaint filed by the German Communist Party.[62] Complaints for attempts to reinstate the Nazi party in Germany shared a similar fate.[63]

Subsequently however, the Court developed more sophisticated standards of review in a series of cases, which, although discussed solely under article 11, were interlinked to freedom of expression, since the Court described political parties as a form of 'collective exercise of freedom of expression'.[64] In *TBKP v Turkey* (1998), the Court indicated which criteria determine the necessity of interfering with the freedom of a political party. First, it should be assessed based on factual evidence whether the party abides by the principles of democracy or poses a 'real threat to the state' instead.[65] In later cases, the Court further explained this test by holding that advocacy of political change is acceptable to the extent

that the party adheres to legal means and its political agenda is compatible with democratic foundations.[66] In this respect, the question whether the party advocates force or resorts and incites to violence is the determining element of the case. The lack of evidence that Turkey's socialist party advocates violence in its programme led the Court to find a violation.[67] On the contrary, the Court unanimously found that a party's preaching radically intolerant Islamism[68] or advocating discrimination and use of violence[69] justified interference with its freedom of assembly and expression. Interestingly, the Court also tries to determine whether it has been domestically established that the party concerned advances a hidden agenda that differs from its apparently democratic programme.[70] It is also to note that the Court does not seek to establish a concrete incident of direct incitement to revolutionary acts against the constitutional order, but rather examines the party's political doctrines and goals in abstract.

Moreover, the Court takes into account the context of the case and the proportionality of the interference. In both the *TBKP* and the *Socialist Party* case against Turkey, the exigencies in the South-east part of the country did not justify such a 'drastic' interference with a political party, which although departing from national policy and principles of the Turkish constitution, did not advocate violence and separatism.[71] Furthermore, dissolving a political party constitutes a severe and thus disproportionate measure, unless there is a real threat to democratic order.[72]

Moreover, Strasbourg also had to decide on national measures contracting freedom of expression of certain parties' affiliates. German legislation imposes a duty of loyalty on civil servants, obliging them to 'consistently uphold' the democratic system.[73] In *Kosiek* and *Glasenapp*, ECtHR had to address the issue of whether denying appointment as a teacher on the basis of the applicants' demonstrated affiliation to the nationalist and the German communist party (DKP) respectively violated Article 10. In both cases, the Court found no interference with the applicants' freedom of expression, stating that they had both failed to meet a qualification that was required by anyone interested in the post.[74] A decade later however, the Court in *Vogt* found a violation of Article 10, holding that the duty of loyalty is of a strikingly 'absolute nature' and noticing that other state-parties to the Convention did not impose such restrictions.[75] The national measures against the applicant in *Vogt* concerned like in *Glasenapp* her membership to the DKP. Although the Court suggested that *Vogt* was different in terms of the applicant not being denied access to civil service, but having rather been dismissed from it,[76] it is clear that ECtHR departed from its previous case-law. Had the Court wanted to apply the same test, it could have done so as the element of 'consistency' required by German legislation and the strong dissent (9-8) suggest. In *Vajnai* (2008), the Court unanimously found that sanctioning the display of communist symbols violated article 10 as long as the respondent state could prove no actual danger for democracy.[77]

3.1.2. The Kurd has no friend but the Strasbourg Court

The Turk has no friend but the Turk, a Turkish proverb says. Since 1985, Turkey faces a serious and bloody crisis concerning the Kurdish separatist movement, led by the armed group PKK. Because of its concerns, Turkey introduced legislation prescribing any form of support to PKK in an effort to protect its national security and territorial integrity.[78] The ECtHR has ruled on dozens of cases concerning measures directed against the dissemination of ideas that further the cause of Kurdish self-determination or glorify the

acts of the PKK, often deciding unanimously or in great majorities that Turkey's practices violate the Convention.

When faced with cases involving threats to national security by terrorist organisations the ECtHR applies a three-prong test of legality, legitimacy and necessity. The latter is the decisive component of the test, urging strict scrutiny.[79] In this respect, the Court has repeatedly stated that the interference should correspond to a 'pressing social need'[80] as defined by the responding state, albeit urging national authorities to demonstrate self-restraint.[81] Moreover, the Court examines the proportionality of the interference against the overall backdrop of the case.[82] The study of the case-law identifies three critical factors for the Court's assessment of the proportionality of the interference: the role of the speaker, the context and the content of the expressions.

Despite concerns of national security, Strasbourg allows few interferences with issues that form part of the political discourse.[83] In this respect, speakers acting in their political capacity, i.e. politicians[84] or trade-union leaders,[85] enjoy the greatest freedom of expression possible, especially when criticising the government.[86] The same principle applies when the speaker is a journalist, since the press contributes to the well-functioning of democratic institutions.[87]

Inevitably, the Court takes into account the context of the case, Turkey's fight against PKK's terrorism. In *Zana* the 'explosive situation' in South-eastern Turkey was decisive in upholding national measures.[88] In addition, in *Sürek* against the background of deep-rooted prejudices that existed found no violation of article 10.[89] This however does not mean that the exigencies in Turkey's eastern provinces can justify every interference with free speech. Indeed, the study of its case law demonstrates that with regard to the Turkish cases the Court very often finds a violation despite this context, even unanimously.[90] In *Incal*, the Court disassociated the applicant from the conflict with the PKK.[91] Reading between the lines, the Court in that instance seemed to disregard Turkish government's tendency to frame any form of opposition as a threat to national security related to the exigencies of counter-terrorism.[92] Similarly, in *Dilipak* the ECtHR condemned what seemed to be an 'attempt to suppress ideas' in the name of national security.[93]

The content of the speech is a weighty consideration in the Court's balancing exercise. The ECtHR closely reviews the exact wording and style of the expressions. In *Sürek* the fierce words used demonstrated an intent to stigmatise.[94] Despite criticism that the ECtHR sticks on a detailed review of words,[95] a closer examination of the jurisprudence shows that such comments are not thoroughly valid. In *Ceylan*, the '*acerbic*' and '*virulent*' style of the speech did not lead the Court to find a violation.[96] In *Alinak*, the expression's artistic nature justified the use of very graphic description of torture that might stir up hatred and anger.[97] What is finally the weightiest factor is whether the utterances entail a message amounting to a call to violence or a justification thereof.[98] In *Sürek* the speech amounted to a call to revenge thus justifying interference.[99] In *Zana,* it was the comments' ambiguity towards crimes of the PKK that implied favouritism for violent acts, making state interference necessary.[100]

Judge Bonello has repeatedly emphasised that the ECtHR fails to distinguish between abstract advocacy of and direct incitement to concrete acts violence, urging for adopting the USSC's standards.[101] Bonello makes a convincing argument in favour of creating clearer dividing lines in the Court's jurisprudence and ensuring a high threshold of 'danger' that expressions must meet. In his scholarship, Bonello

further elaborates his view, distinguishing between dangerous and non-dangerous calls for violence based on their likelihood to actually cause violent acts; speech may be restricted only when it causes a harm that would not have taken place otherwise.[102] Moreover, Bonello suggests that incitement to legitimate violence as a last refuge to protect human rights and democratic values, i.e. in cases where the peoples' right to self-determination is denied, should be justified under the Convention.[103] These considerations however, should not make the reader lose sight of the fact that the ECtHR does not easily find a link between the expression concerned, provocative and offensive as it may be, and the incitement to violence. In *Yagmurdereli,* the speaker's reference to the 'mountains', a clear connotation to the Kurdish rebels, could not be regarded as an incitement.[104] In *Sürek and özdemir*, PKK fighters stating in an interview that they will fight till the last man standing, was considered merely as a demonstration of the speaker's resolution.[105] Participation to proscribed PKK was not deemed as sufficient reason to abridge free speech.[106]

Finally, considerations on the adequacy of procedural guarantees against abuse of prior restraint orders[107] and on the severity of the penalty[108] also influence the Court's balancing exercise.

3.2. USSC

3.2.1. The clear and present danger test and the great dissenter

The sinking of the ocean liner *Lusitania* urged the US to enter WW1, causing severe domestic opposition, especially by newly-emerged socialists. A side-effect of *Lusitania's* sinking was that the USSC developed the first amendment standards that it would apply for decades. In *Schenck (*1919*)*, a case concerning opposition to the draft, the Court articulated the clear and present danger test, according to which expressions may be restricted in wartime if they create a clear and present danger of bringing about a substantive evil, ie obstructing the draft and undermining the nation's war effort.[109] Although nominally requiring that the risk for national security should be imminent in terms of proximity and degree,[110] the Court upheld the conviction of protestors who had only resorted to peaceful acts without actually proving whether the petitioners posed a clear and present danger to national security.

Schenk created the constitutional standard on the basis of which restrictions of free speech in the name of national security were to be assessed. In *Frohwerk* (1919), the USSC found no reason to differentiate from *Schenk* and upheld the petitioner's conviction for publishing pacifist articles.[111] The threshold to meet the clear and present danger test was significantly low in view of the fact that 'a little breath could be enough to kindle a flame' against the case's social backdrop.[112] *Debs* (1919) was the third case in this sequence. Although distinguishing at a level of principle between abstract advocacy of ideas and utterances that are likely to adversely affect national interests,[113] the USSC retained a low standard of review and affirmed the convictions.

Justice Holmes was the father of the clear and present danger, delivering the opinion of the Court in all three cases. Surprisingly, Holmes proved to be the modern Cronus, swallowing his own child. *Abrams* (1919) and *Pierce* (1920), was supposed to be business as usual for the USSC, which upheld convictions for exercising freedom of expression largely based on the wording[114] of the utterance and the overall context.[115] Yet, the interest

lies elsewhere. Although based on the utterances the case against the seditious anarchists in *Abrams* seems stronger than in *Debs* or *Frohwerk*, Justice Holmes, joined by Brandeis dissented in what would be a pivotal moment in the first amendment jurisprudence.

A complex set of acquaintances and experiences led Holmes to this stunning turnaround.[116] Holmes rejected the claim that the expressions constituted an attack to the form of government of the US and that what he described as '*silly leaflets*' could impede the war effort whatsoever.[117] These remarks do not constitute a change of principle with regard to Schenk; instead they urge to refine the test by applying stricter scrutiny of the facts of the case with a view to the expressions' ability to induce a substantive evil imminently.[118] Moreover, Holmes emphatically rejected the argument that the exigencies of war justify an erosion of first amendment guarantees, stating that the principle of free speech always remains the same.[119] The joint dissent in *Pierce* starts from the same premise, calling for better demarcation and stronger adherence to the imminence of the clear and present danger test.[120] Justice Brandeis also underlined the importance of fierce debate in matters of great public concern.[121] These dissents were later mainstreamed, forming the doctrine that governs USSC's approach to free speech limitations in view of national security.

3.2.2. The red scare pendulum: yates' new equilibrium position

For the following forty years, a swing between two opposing views determined the USSC's decisions; Does the participation in left-wing parties and the advocacy of the Communist ideology, which entails an expressed wish to change the form of government by revolutionary means, meet the clear and present danger test that justifies restrictions? In a certain way, the discordance within the USSC was a continuation in a new context of the legal debate that Holmes' dissent started. Once again the problem lies in the threshold that the facts have to pass to qualify as clear and present danger.

American jurisprudence operated under fierce political pressure that did not allow much space for coherence. In *Giltow (*1925*)*, the majority rejected an absolutist interpretation of first amendment rights[122] and adopted a very restrictive approach. First, the Court held that ambiguity should be resolved in favour of the constitutionality of the legislation restricting speech.[123] The USSC showed great deference to the state's determination of what serves the national interests. It held that only unreasonable and arbitrary regulations should be deemed unconstitutional, since the government cannot be expected to demonstrate a jeweller's precision when restricting civil rights during times of emergency.[124] Notwithstanding the absence of any material implication on national security, the Court upheld the convictions.[125] Holmes dissented stating that the evidence did not suggest an immediate call to overthrow the government.[126] In *Whitney (*1927*),* the USSC persisted on its views.[127] In a separate opinion, Justice Brandeis once again called for closer adherence to the reasonableness and imminence with regard the danger posed to national security and the principle of proportionality regarding state interference.[128]

A series of opinions indicated that Holmes' views were listened to. In *De Jonge (*1937*),* the USSC unanimously reversed the applicant's conviction. The USSC held that the objectives and ideology of the Communist party and the applicant's attendance of tis public meetings were inadequate basis for conviction.[129] The Court stressed that any interference with freedom of expression should be proportionate to its abuse and leave

the essence of the right intact.[130] Similarly, in *Herndon (*1937*)* the Court freed the applicant, insisting that restrictions of free speech must be exceptional and appropriate to the exigencies and that the government has no blank cheque when determining what constitutes a danger.[131] *Herndon* and *Stromberg* (1937) seemed to embrace the principle that only incitement to violence could justify restrictions.[132] Aiming to ensure the broadest scope possible for the free speech guarantees, *Bridges (1941)* restated that only 'substantial' and 'extremely' serious threats of 'extremely' high imminence might justify restrictions.[133]

So, was the US over with its red scare? Unfortunately, *Dennis (1951)*, a major and embarrassing setback in the protection of free speech, confuted expectations. The USSC insisted that Dennis should be convicted, overruling the trial judge's opinion that only utterances calling to overthrow the government as 'speedily as circumstances' justify restrictions.[134] In a 6-2 decision, the Court held that, by serving as secretary general of the Communist party, the applicant conspired to overthrow the American government. The mere existence of the conspiracy, which was the existence of the party in itself, sufficed to meet the threshold of the clear and present danger test, although no insurgency acts had taken place.[135] The government was allowed to interfere with the applicant's civil rights preemptively, before revolutionary acts happen.[136] The readiness with which the court accepted the existence of a conspiracy against the government, despite the absence of evidence, is more than alarming. Frustrated dissent Black wished elegiacally that *in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society*.[137]

Calmer times did not come. Yet, the USSC decided to stand its ground firmly. *Brandenburg (*1969*)* usually gets all the credit when it comes to free speech protection, notably hate speech. But it was actually *Yates (*1957*)* that presaged *Brandenburg* changing irrevocably the landscape of the first amendment. Decided in the heyday of the Cuban revolution, *Yates* established a novel equilibrium, removing the Damocles' sword which was hanging above the head of any political opposition within the US. The Court overruled *Giltow* and *Dennis*.[138] The abstract advocacy of violent overthrow of the US government enjoyed full protection under the Constitution.[139] It can be argued that *Yates* is the single most important case in the USSC's free speech jurisprudence: it significantly tightened the *Schenk* test thus inspiring the seminal *Brandenburg* test that came years later;[140] it resolved a half-century long debate within the court; it practically created an argument *a maiore ad minus* for political opposition in turbulent times. *Noto (*1961*)* suggests clearly that only sanctions imposed on incitements to violently overthrow the government that are present, concrete, sufficiently 'strong and pervasive' and distinct from a party's general political agenda may pass scrutiny.[141] USSC's approach had consolidated as being oriented towards the secondary effects of the utterances, not its content. A new expansive era on first amendment rights had dawned.

3.2.3. Good morning, anti-war movement

The Vietnam War gave rise to the most tenacious pacifist movement in US' history. Contrary to WW1, the USSC demonstrated a wholly libertarian approach to domestic opposition to the war. The USSC upheld not a single conviction based on the content of expression opposing to the military intervention.[142]

In *O' Brien (1968)*, the USSC upheld the conviction for burning registration certificates only due to the secondary effects of the conduct-element of the expression.[143] It was due to the obstruction of the 'substantial' state interest to establish a system of registration that the applicant was convicted.[144] Had the applicant expressed his opposition to the war and recruiting process without engaging in the specific act of burning draft cards, he would have been freed by the USSC.[145] The Court applied a strict test, according to which the state interference should be justified in view of a compelling interest and be proportionate to serve it.[146] In *Cohen (1971),* sanctions on another instance of expressive conduct, wearing a '*fuck the draft*' jacket, were found to be unconstitutional in the absence of a compelling state interest. Contrary to early case-law the USSC disregarded the wording of the utterance;[147] those who wanted to 'avoid further bombardment of their sensibilities' can do so 'simply by averting their eyes'.[148] Cohen's slight majority however, is indicative of the fact that the Court is more inclined to accept limitations on expressive conduct.

In the unanimous *Bond (*1966*)* decision, the Court reversed a refusal to seat a senator who opposed the Vietnam war. It stated that undoubtedly criticism on foreign policy issues is protected under the first amendment,[149] unless it incites to unlawful acts.[150] The 6-2 *Tinker (*1969*)* judgement stands out for recapitulating the new post-Yates credo of the Court in an elaborate style. While in wartime, the Court held that the nation's strength lies in embracing a 'hazardous freedom' of opinions.[151] National security does not justify any viewpoint-discrimination and no idea shall be prohibited, unless it spreads disorder.[152] The Court trusted students as capable of forming their own opinion, which may well diverge from the public opinion or national policy.[153] In *Watts (*1969*)*, the speaker's threat to fire the US president if drafted was deemed as a 'political hyperbole' that enjoys constitutional protection.[154]

4. Comparative remarks: the two jurisdictions vis-a-vis in terms of their precision and consistency

In light of the previous chapters, it is possible to sum up the key standards applying to dangerous speech limitations in each jurisdiction and evaluate their legal coherence and precision. In order to assess the coherence and precision of the jurisprudence, one needs first to establish what the two notions entail. Precision entails that the standards that each court sets out are relevant to the issue of dangerous speech, unambiguous and not self-conflicting. Coherence refers to consistency. Coherence is achieved when the court's standards are not characterised by significant variation over time. This quality, in turn, enhances the foreseeability of the Court's future judgments by reference to standards consistently applied in the past.

In both jurisdictions, much time was required until a certain approach to dangerous speech had consolidated. In their early jurisprudence, both Courts were exposed to fierce political pressure. The ECtHR responded by watering down protection of dissident movements, but it did so in an unambiguous and consistent manner, rendering complaints inadmissible. The USSC on the contrary, wavered between conflicting approaches for several decades, before firmly establishing its standards of review. The *Yates* judgment in the US and the fall of the iron curtain in Europe mark a new era in the freedom of expression jurisprudence of each Court. This new era is characterised by a more stringent

review of limitation of speech before the ECtHR and by significantly enhanced congruence between the USSC's judgment. After this turning point, the standards of both courts are less influenced by political objectives and attain remarkable consistency.

Both courts consistently stick to the threshold of protection each one has established. Viewpoint neutrality is an absolute imperative for the USSC. If the regulation of speech passes this test, then the USSC only has to decide based on the secondary effects of the speech whether the utterances qualify as direct and imminent threat to public order, national security or the bodily integrity of an individual. If that is the case, the interference must still be narrowly tailored to stave off the threat. A US citizen can reasonably foresee that his first amendment rights will be protected, unless his utterances amount to a direct call ot violence. Such is the consistency of USSC's approach to dangerous speech that ever since the Vietnam war the government refrains from interfering with it, knowing that it is very difficult to meet the high standards that the Court has set. Clear and visible high standards of protection have a preemptive effect.

With regard to speech that poses a threat to national security the ECtHR's standards gradually also acquired considerable certainty and coherence; there is higher consistency in availing significant protection to political speech. In national security cases, the ECtHR is mostly concerned with identifying incidents of advocacy of violence or incitement thereof. The Strasbourg Court uses an intricate balancing exercise, in which content and context of the speech are of paramount importance. The role of the speaker, the style and wording of the utterance, the context and background of the case are also relevant factors. Resort to these standards of review shows no significant variation across cases. Although it is clear that even abstract and general advocacy of violence is impermissible under the ECHR, what exactly constitutes advocacy of violence is more indeterminate. What is the difference between *Zana's* statements that try to apologise for the collateral damage caused by PKK's operation and the statements of PKK fighters that they will fight till the end? Based on which criterion did Strasbourg find a violation in the latter case, while upholding sanctions in the former?

Such examples demonstrate that despite consistency in standards, the intricate nature of the balancing exercise distorts the consistency and predictability of the outcome of the Court's deliberation regarding the protection of speech. In this respect, a better demarcated, more principled and less fact-specific determination of what amounts to advocacy of violence would contribute to legal certainty and actually contribute to the protection of free speech. The ECtHR seems to move towards this direction as its findings in the Turkish cases indicate, since the context and the wording rarely justify a violation on the grounds that the applicant advocate resort to violence. The reason for this is that distinguishing a justification of violence from a political discussion, journalistic report or a discussion of the perpetrator's motives has some inherent subjectivity. On the contrary, determining whether an utterance amounts to a direct call to violence in light of its content is an easier exercise.

5. A pro-liberty assessment of the courts' case law

The legislation of each jurisdiction in itself predisposes the courts to adopt a different approach. Both jurisdictions recognise the fundamental value of free speech, especially with regard to public debates and political discourses. However, since this is not the

single right or value that has to be protected in a society, freedom of expression is not an absolute right in any of the two jurisdictions. It has to be balanced against other rights and public goods. Having acknowledged the importance of free speech already in the introduction, the paper concludes with some remarks with regard to the extent to which dangerous speech is protected in each jurisdiction.

Gradually, both courts stopped yielding to political whims and developed stringent tests and standards, thus managing to act as a bulwark against the mass hysteria surrounding radical political agendas and political opposition to national policy that governments often embrace with wiliness. Of course one could notice with the tongue in the cheek that ECtHR's, in stark contrast to the USSC, started standing its ground with regard to restrictive measures on left-wing parties only after the cold war was over. Even so, however, the standards that have emerged inspire optimism for the protection of speech and ECtHR has recorded great victories in this respect.

5.1. A libertarian review

The objective way to compare the jurisdictions from a libertarian perspective is to compare which threshold of danger and offensiveness speech has not to exceed in order to enjoy protection. In this respect, there are two relevant aspects. First, the US approach is premised upon viewpoint neutrality, which means that no idea may enjoy preference by state authorities or fall into disfavour. On the contrary, the very existence of article 17 illustrates that there are certain viewpoints that might not enjoy protection under the ECHR. Second, when it comes to the proportionality test, each Court adopts a different threshold that dangerous speech should meet so that it may be permissibly restricted. Since *Yates,* the USSC has firmly established that general advocacy of violence or racial hate, abstract calls to overthrow the government are protected under the constitution. Only direct incitement to imminent lawless actions, for instance to overthrow the government, can justify the interference with one's freedom of expression. The ECtHR on the contrary has repeatedly illustrated that it adopts a lower threshold; the general glorification of violence (*Zana)* or the advocacy of a political vision incompatible with liberal democracy (*Refah Partisi; Hizb ut Tahrir*) is not protected. In this respect, Strasbourg takes the party's programme into account, something the USSC would no longer consider a relevant criterion.

It is to note that there are several voices within the Court calling for a higher standard of protection inspired by the USSC. Bonello proposes a higher and more nuanced threshold, directly inspired by the American secondary effects-oriented jurisprudence; yet, it might be too optimistic asking an international Court to order states to tolerate speech that undermines their territorial integrity. The USSC itself, a potent national court, needed half a century to do so. Therefore, what might be more productive as explained in chapter 4 is to seek a closer determination of what constitutes 'advocacy of violence' for the purpose of the ECHR.

5.2. Judicial dialogues: a path towards enhanced protection of dangerous speech?

What was made clear in several instances in the course of this research is that the formation of judicial standards is also the outcome of lengthy and fierce debates between

those defending a judicial status quo and those advocating a change. Decades of dissent paved the way for *Yates*, the very decision that created a stronghold for opposition to the Vietnam War. The research took into account the dynamics within both Courts. In this regard, one takes note of the fact that the ECtHR is often split when it comes to limitations on dangerous speech. Not only are several cases decided on slight majorities, but also the dissenting judges often suggest a very different approach to dangerous speech.

Strasbourg has proven to be a Court that welcomes input from its counterparts, the USSC not being an exception. Dissenting opinions in the ECtHR often indicate best practices of the USSC should be adopted by Strasbourg as a means of enhancing protection of free speech. Embracing the *Yates* threshold would be a major step towards this direction. But even if the ECtHR does not want to depart from its current approach, embracing viewpoint neutrality, there are several lessons to learn from the long history of the American court. The most important would be reviewing the utterances as such, reducing reliance on the style, the role of the speaker or even the backdrop of the case. Focusing on the secondary effects of the speech on national security and public order could make ECtHR's case-law more predictable, coherent and precise.

5.3. The limits of law

After months of intensive legal research, one should not lose sight of the fact that judicial standards are not the panacea for all ills. The fact that the USSC established a high standard of protection for dangerous speech forced the government to tolerate fierce criticism during the Vietnam and Iraq war, without restricting speech. This fact however did not prevent the US government from actually carrying out these wars. Furthermore, it would be naive to think that the huge anti-war movement in the 60s was the direct outcome of USSC's high regard of free speech. A court of law in itself is incapable of determining the fate of a nation. The most that a court can do is to guarantee the public forum within which citizens can convene, exercise their liberties and take decisions, for better or worse, with regard to their collective challenges and their shared vision. In this respect, the maximum service that freedom of expression can do is to allow every idea to be expressed in order to shape the collective will in the most representative manner possible. This paper is a contribution to this collective endeavour.

Notes

1. Cf. Giorgio Agamben, *State of Exception* (Chicago: Chigaco University Press 2005), ch 1.
2. Giovanni Bonello, 'Freedom of Expression and Incitement to Violence', in *Freedom of Expression- Essays in honour of Nicolas Bratza*, ed. Josep Casadevall (Wolf Legal Publishers 2012), 349–59.
3. Robert Post, 'Racist Speech, Democracy, and the First Amendment', *Wm. & Mary L. Rev.* 32, no. 267 (1991): 283.
4. Stanley Fish, *There's No Such Thing as Free Speech … and It's a Good Thing Too* (Oxford: Oxford University Press 1994), 102–19.
5. USSC, *Marbury v. Madison*, 5 U. S. 137, 177 (1803).
6. Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2009), 270.

7. Marc Loth, 'Courts in Quest for Legitimacy: A Comparative Approach', Boom Uitgevers, Den Haag, https://hdl.handle.net/1765/11005, 8.
8. *Al-Skeini and Others v. the United Kingdom* [GC], § 141, ECHR 2011-IV.
9. Armin von Bogdandy and others, eds, *The Exercise of Public Authority by International Institutions* (Berlin: Springer 2010), 4–16.
10. *Vona v Hungary*, no 35943/10, § 31, ECHR 2013-IV;Judge's Bonello separate opinions *in Ceylan v Turkey,* no. 23556/94, ECHR 1999-IV; *Sürek and özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, ECHR 1999; dissenting in *Sürek v Turkey (1)* [GC], no. 26682/95, ECHR 1999-IV; Judge's Villiger concurring opinion in *Vejdeland v Sweden*, no. 65681/13, ECHR 2015 Judge's Palm concurring opinion in *Sürek and özdemir.*
11. Lasser, *Judicial Deliberations*.
12. *Handyside v. the UK* (1976) no. 5493/72 Series A No 24 § 49.
13. Ibid.
14. Ibid § 45.
15. Ibid § 48.
16. ECtHR *Sener v. Turkey*, no. 26680/95, § 39(i), ECHR 2000; ECommHR, *Communist Party of Germany v. Federal Republic of Germany* (1957) No. 250/57 (1955-1957) 1 Yearbook 222.
17. The term first appeared in already in the 1930s: Karl Loewenstein, 'Autocracy versus Democracy in Contemporary Europe I', *The American Political Science Review* 29, no. 4 (1935): 571; Karl Loewenstein, 'Militant Democracy and Fundamental Rights I', *The American Political Science Review* 31, no. 3 (1937): 417.
18. Angela Bourne and Fernando Bértoa, 'Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945–2015)', *European Constitutional Law Review* 13, no. 2 (2017): 221, 222; Gregory Fox and Georg Nolte, 'Intolerant Democracies', *Harv. Int'l. L. J.* 36, no. 1 (1995): 10–14.
19. Spanish Constitution art. 6; Portuguese Constitution art. 46(4); Greek Constitution art. 25 (3); Italian Constitution Transitory Provision XII.
20. Basic Law Germany art. 18; Karl Popper, *The Open Society and its Enemies* (Routledge, 2012), 581 (endnote 4).
21. Paulien De Morree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Intersentia, 2016), 227.
22. A.H. Robertson, ed., *Collected Edition of the 'Travaux Préparatoires*, Vol. II (Martinus Nijhoff, 1975–1985), 60.
23. Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010), 7.
24. ECtHR, *Klass and others v. Germany (1978)*, no 5029/71, § 59, Series A No 28.
25. Robertson, *Collected Edition of the 'Travaux Préparatoires*, 136.
26. ECtHR, *Ždanoka v. Latvia [GC]*, no 58278/00, § 99 ECHR 2006.
27. See inter alia *Witzsch v. Germany* (no. 1) (dec.), no. 41448/98, 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Gollnisch v. France* (dec.), no. 48135/08, 2011.
28. ECHR art. 10(2).
29. Elisabeth Zoller, 'The United States Supreme Court and the Freedom of Expression', *Ind. L. J.* 84 (2009): 885.
30. Ibid; Also see USSC, Debs v. United States, 249 U. S. 211, 213, 215 (1919).
31. USSC, *Abrams v. United States*, 250 U. S. 616, 630 (1919).
32. Richard Parker, 'The Case of the Contentious Metaphor: The Marketplace of Ideas as Modernist Mystery', *Free Speech Yearbook* 44, no. 1 (2009): 4.
33. USSC, *Gitlow v New York*, 268 U. S. 652, 666 (1925).
34. USSC, 303 U. S. 444, 450 (1938); See also *Schneider v State*, USSC, 308 U. S. 147, 161 (1939).
35. Ibid.
36. Zoller, 'The United States Supreme Court', 890.

37. USSC, *Bridges v. California*, 314 U. S. 252, 283 (1941) (Frankfurter dissenting); Thomas v. Collins, 323 U. S. 516, 537 (1945).
38. USSC, 337 U. S. 1, 4 (1949).
39. Ibid.
40. USSC, *Dennis v. United States*, 341 U. S. 494, 584 (1951) (Douglas dissenting).
41. USSC, *United States v. Rumely*, 345 U. S. 41, 56 (1953) (Douglas concurring).
42. Parker, 'The Case of the Contentious Metaphor', 5; Wat Hopkins, 'The Supreme Court Defines the Marketplace of Ideas', *Journalism & Mass Comm. Quarterly* 73, no. 1 (1996): 40, 42.
43. 354 U. S. 298, 344 (1957) (Black concurring).
44. 28 mentions between 1967 and 1988, See Parker, 'The Case of the Contentious Metaphor', 5.
45. 315 U. S. 568, 572; New categories were established as well: commercial speech, Valentine v. Christensen, 316 U. S. 52 (1942); child pornography, New York v. Ferber, 458 U. S. 747 (1982).
46. Daniel Farber, 'The Categorical Approach to Protecting Speech in American Constitutional Law', *Ind. L. J.* 84 (2009): 917, 919 and 928; Keith Werhan, 'The Liberalisation of Freedom of Speech on a Conservative Court', *Iowa L. Rev.* 80 (1994): 51, 54.
47. Farber, 'The Categorical Approach to Protecting Speech', 928–30.
48. *Cohen v. California*, 403 U. S. 15, 19–20 (1971).
49. *The New York Times Co. v. Sullivan*, 376 U. S. 254, 269, 280 (1964) establishing the 'actual malice' criterion for defamation; Miller v. California, 413 U. S. 15, 24–27 (1973) establishing a three-prong obscenity test; Brandenburg v. Ohio, 395 U. S. 444, 447 (1969) linking fighting words to 'imminent lawless action'.
50. Zoller, 'The United States Supreme Court', 905; For an exceptional use of the categorical approach in USSC see Morse v. Frederick, 127 US, 2618, 2630 (2007).
51. Peter Molnar and Robert Post, 'Interview with Robert Post', in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, ed. Michael Herz and Peter Molnar (Cambridge: Cambridge University Press, 2012), 17.
52. Zoller, 'The United States Supreme Court', 907.
53. *Police Dept. of City of Chicago v. Mosley*, 408 U. S. 92, 95–96 (1972).
54. *Ibid 95; Regan v. Time, Inc.,* 468 U. S. 641, 648–49 (1984).
55. *Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 339–40 (1974).
56. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115–18 (1991); Werhan, 'The Liberalisation of Freedom of Speech' 60.
57. *Virginia v. Hicks*, 539 U. S. 113, 119 (2003); *New York State Bd. of Elections v. Lopez Torres, 552 U. S. 196* (2008) (Scalia*); Davenport v. Washington Ed. Assn.,* 551 U. S. 177 (2007); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844 (2005) (O'Connor, concurring).
58. *Virginia v. Black*, 538 U. S. 343, 359–60 (2003).
59. Brandenburg v. Ohio, 447.
60. Shakespeare, *Henry V*, 4. 1.
61. Ronald K. L. Collins and David M. Skover, 'What is War: Reflections on Free Speech in Wartime', *Rutgers L. J.* 36 (2005): 833, 839–40.
62. *Communist Party of Germany v. Federal Republic of Germany.*
63. ECommHR, *Kühnen v. Germany* no. 12194/86, *1988*.
64. *United Communist Party of Turkey and Others (TBKP) v. Turkey*, no. 19392/92, § 43, ECHR 1998-I; *Partidul Comunistilor (Nepeceristi) (PCN) v. Romania*, no. 46626/99, § 45, ECHR 2005-I.
65. *United Communist Party of Turkey and Others (TBKP) v. Turkey*, § 54.
66. *Partidul Comunistilor (Nepeceristi) (PCN) v. Romania*, § 46.
67. *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, § 45, ECHR 2003.
68. *Hizb ut Tahrir v Germany,* 31098/08, § 73–78, 2003.
69. *Refah Partisi (the Welfare Party) and Others v. Turkey [GC]*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 131, ECHR 2003-II.

70. *United Communist Party of Turkey and Others (TBKP) v. Turkey*, at 58; *Partidul Comunistilor (Nepeceristi) (PCN) v. Romania*, § 56.
71. *United Communist Party of Turkey and Others (TBKP) v. Turkey*, at 59; *Socialist Party of Turkey (STP) and Others v. Turkey*, § 43.
72. *Socialist Party of Turkey (STP) and Others v. Turkey*, § 50, finding a violation; *Refah Partisi (the Welfare Party) and Others v. Turkey [GC]*, § 100, 107, finding no violation.
73. Land Civil Servants Act, 1971, section 6.
74. *Kosiek v Germany*, no. 9704/82, § 39, 1986; *Glasenapp v Germany*, no 9228/80, § 53, 1986.
75. *Vogt v Germany*, no. 17851/91, § 59, Series A No 323.
76. Ibid § 44.
77. *Vajnai v. Hungary*, no. 33629/06 § 55, ECHR 2008-IV.
78. Ibid, § 48; *Incal v Turkey*, no 22678/93, § 41, ECHR 1998-IV; *Bayar and Gürbüz v Turkey*, no. 37569/06, § 7, ECHR 2012.
79. *Yagmurdereli v Turkey (2002)*, no. 29590/96, § 44.
80. *Zana v Turkey*, no. 18954/91, § 51, ECHR 1997-VII; *Ceylan v Turkey*, § 32.
81. *Dilipak v Turkey(2014)*, no. 29680/05, § 63; *Sürek and özdemir v. Turkey* § 60.
82. *Zana v Turkey*, § 51; *Ceylan v Turkey*, § 32.
83. *Faruk Temel v Turkey(2011)*, no 16853/05,§ 55.
84. Ibid, § 59.
85. *Ceylan v Turkey*, § 36.
86. *Incal v Turkey*, § 54.
87. *Sürek v Turkey*, § 59; *Sürek and özdemir v. Turkey*, § 58.
88. *Zana v Turkey*, § 60.
89. *Sürek v Turkey*, § 62.
90. *Bayar and Gürbüz v Turkey*, § 34.
91. *Incal v Turkey*, § 58.
92. Ibid § 44.
93. *Dilipak v Turkey*, § 69.
94. *Sürek v Turkey*, § 62.
95. *Sürek and özdemir v. Turkey*, joint concurring opinion of judges Palm, Tulkens, Fischbach, Casadevall, Greve.
96. *Ceylan v Turkey*, § 33.
97. *Alinak v Turkey (2005)*, no. 40287/98, § 41.
98. *Dilipak v Turkey*, § 62; *Incal v Turkey*, § 50.
99. *Sürek v Turkey*, § 62.
100. *Zana v Turkey*, § 58.
101. Bonello concurring in *Ceylan v Turkey*; *Sürek and özdemir v. Turkey*; dissenting in *Sürek v Turkey*.
102. Bonello, 'Freedom of Expression and Incitement to Violence', 349–59, 352–54.
103. Ibid., 349–59, 357.
104. *Yagmurdereli v Turkey*, § 52.
105. *Sürek and özdemir v. Turkey*, 61.
106. Ibid.
107. *Halis Dogan v Turkey (2006)*, no. 50693/99, § 27.
108. *Sürek and özdemir v. Turkey*, § 61; *Incal v Turkey*, § 56.
109. *Schenck v. United States*, 249 U. S. 47, 52.
110. Ibid.
111. *Frohwerk v. United States*, 249 U. S. 204, 207.
112. Ibid., 209.
113. Debs v. United States, 216.
114. *Abrams v. United States*, 621.
115. Ibid., 622.

116. Thomas Healy, 'The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story behind Abrams v. United States', *Journal of Supreme Court History* 39, no. 1 (2014): 35, 55–72.
117. *Abrams v. United States*, 626 and 628.
118. Ibid., 627, 630.
119. Ibid., 628.
120. *Pierce v. United States*, 252 U. S. 239, 253, 271, 272, (1920).
121. Ibid., 269, 273.
122. *Gitlow v New York*, 666.
123. Ibid., 668.
124. Ibid., 668–9.
125. Ibid., 656, 664.
126. Ibid., 673.
127. *Whitney v. California*, 274 U. S. 357, 371 (1927)
128. Ibid., 376–7.
129. *DeJonge v. Oregon*, 299 U. S. 353, 364–5.
130. Ibid.
131. *Herndon v. Lowry*, 301 U. S. 242, 258 (1937).
132. Ibid., 259; Stromberg v. California, 283 U. S. 359, 369 (1931).
133. *Bridges v. California*, 263.
134. *Dennis v. United States*, 510.
135. Ibid., 511.
136. Ibid., 509.
137. Ibid., 581.
138. *Yates v. United States*, 354 U. S. 298, 318–20.
139. Ibid., 312–27.
140. Brandenburg v. Ohio, 444, endnote 2.
141. *Noto v. United States*, 367 U. S. 290, 298-299.
142. Douglas Fraleigh, Joseph Tuman, *Freedom of Expression in the Marketplace of Ideas* (SAGE Publications 2010), 94.
143. *United States v. O'Brien*, 391 U. S. 367, 376.
144. Ibid., 377, 380.
145. Ibid., 382.
146. Ibid., 376.
147. *Cohen v. California*, 27.
148. Ibid., 21.
149. *Bond v. Floyd*, 385 U. S. 116, 132.
150. Ibid., 134.
151. *Tinker v. Des Moines Independent Community School District* 393 U. S. 503, 509.
152. Ibid., 509, 511.
153. Ibid., 511.
154. *Watts v. United States*, 394 U. S. 705, 708.

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