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Argumentation typologies in the jurisprudence of the US Supreme Court related to the foundations and limitations of the freedom of expression, and their relevance to the sociology of values

Introduction

Methodology

The purpose of the present paper is to investigate the considerations upon which the decisions of the United States Supreme Court (SC) regarding the freedom of opinion are based, and to identify the general, mainly socio-philosophical, principles underlying them. Any reasonable answer to the above question requires the assumptions of the research to be clarified and formulated, since the selection of the methodology in itself determines both the subject of the research and the major characteristics of its results.

As the first step, the research will apply the methodology of document analysis to the various SC decisions. Our starting point is that court judgements may not only be read as texts with normative relevance in the given legal system—ie as 'legal texts'—but also as simple texts in which, similarly to any other types of text, the expressions of certain values may be identified.[1] That is, it is not the legal aspects of SC judgements (the position of the court, the relationship of the judgement to previous decisions, the legal constructs used in the argumentation) that are important for our research, but their nature as carriers and mediators of values.[2]

The underlying values and their constellations are, however, only very rarely obvious from the texts of these judgements. It is a characteristic of legal texts, especially court decisions, that they are governed by various constructs of argumentation. These, of course, may be grouped along the lines of several different principles according to the characteristics of legal logic.[3] Nevertheless, however we approach these arguments, there is always one common feature: their objective is to achieve the acceptance of a

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[1] See R Rezsőházy, *Sociologie des valeurs* (Armand Colin 2006) 48–54.

[2] On the nature of legal texts see in detail JB White, 'Reading Law and Reading Literature' in JB White, *Heracles' Bow. Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press 1995) 77–106.

[3] See in detail M Szabó, *Trivium: grammatika, logika, retorika joghallgatók számára* (Bíbor 2001).

given position. This position, by its very nature, means a choice between the possible and adequate answers to the given statement of the facts and the legal problem based on it.[4] As such, the arguments of court judgements are always position statements too, in favour of a certain value as opposed to other values that could equally be 'defended' with similar arguments.

On the basis of the above, the present paper attempts to carry out an analysis of certain SC judgements from the aspect of the sociology of values. It tries to identify those values that are fundamental in the field of the freedom of expression. In the interest of this:

(i) as a first step, we shall identify the the major argumentation paradigms present in the judgements that are relevant from the aspect of the freedom of opinion;[5] then

(ii) we shall examine the values and other socio-philosophical assumptions these indicate;

(iii) comparing the thus identified values may show a value constellation—if any—along which the relevant case law of the SC operates, ie the way the legal culture of the United States regards the theoretical issues relating to freedom of expression.

The importance of the findings goes without saying, since the American solutions in the field of the freedom of the press and freedom of expression constitute one of today's definitive paradigms in respect of the right to freedom of speech. Understanding the theoretical foundations may thus bring us closer to understanding other—similar or different—national regulations and legal practices that evolved under the influence of this paradigm. The influence of American jurisprudence on European legal thought on the freedom of speech is well shown by the fact that these arguments are relevant and very much alive in debates, even if a given piece of legislation or a particular decision is based on different foundations.[6]

The characteristics of American judicial style

Within the limits of the present paper it would be impossible—and unnecessary—to give an exhaustive presentation of the characteristics of American judicial style. Nevertheless, since it is essential to be aware of the given context, some of its features need to be mentioned. The first such important point that should be recorded is that, although the judicial style applied in the United States originates from the common law legal culture,[7]

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[4] Cf. M Villey, 'Questions de logique juridique dans l'histoire de la philosophie du droit' (1967) *Logique et Analyse* 37, 3–22.

[5] On the analysis of the argumentation paradigms of SC in Hungarian literature, see A Molnár, 'Érvelési minták a 'Lochner-bíróság' munkaidő- és minimálbér-szabályozás alkotmányosságát vizsgáló döntéseiben' (2009) *Jogelméleti Szemle* 4.

[6] For a summary of the influence of the First Amendment abroad, see T Zick, *The Cosmopolitan First Amendment. Protecting Transborder Expressive and Religious Liberties* (CUP 2013).

[7] As a starting point, see B Rudden, 'Courts and Codes in England, France, and Soviet Russia' (1974) 48 *Tulane Law Review* 1010.

it is not wholly identical to that culture. The analogy with common law only holds water insofar as, up until the first half of the nineteenth century, American court judgements mostly shared the features of British judgements. From the second half of the nineteenth century, however, their argumentation and style have become increasingly independent, leading to the evolution of a distinct American style.[8] That is, assumptions related to common law judgements should not be automatically relied upon when examining the American decisions.

The most important features of modern American court decisions with an effect on their manner of argumentation are the following: (i) judges have an affinity towards so-called statistical syllogisms, ie if there exist a significant number of decisions in similar cases, they tend to decide on future cases similarly;[9] (ii) judges usually treat the sources of their decisions as equivalent and therefore, besides legal provisions, other sources (eg Restatements, encyclopaedias, textbooks or scholarly articles) may also be relevant to a decision, although, from the continental perspective, these have no legal binding force and may even seem to be inadequate components;[10] (iii) on average, the decisions of the SC are shorter than the average British high court decisions, although there are exceptions to this of course, and it may be said that SC judges do not indulge in lengthy statements of the facts and argumentations characteristic of British courts.[11] Hence, whilst the common law roots of American court decisions should be borne in mind, it is better to understand the judgements of SC and the argumentation of the judges as a separate style with independent features, and to treat any British analogies with caution.

Analysis

The starting point—the First Amendment

Before examining the definitive argumentation patterns of the decisions, we must dwell upon their starting point, the First Amendment. It is this constitutional provision that defines the initial legal situation on the basis of which judges are required to assess the specific facts of the case.

The First Amendment, attached to the text of the Constitution of 1791 as part of the Bill of Rights, names three fundamental rights, one of which is the freedom of speech and the freedom of the press. With regard to each of these rights, the Amendment follows the principle of negative regulation, ie it expressly prohibits Congress from adopting any legal provisions that would limit or circumscribe these rights. That is, the regulation

[8] J-L Goutal, 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 *The American Journal of Comparative Law* 55.

[9] ibid 51–52.

[10] ibid 53.

[11] ibid 56.

reflects classical fundamental law dogmatics; the First Amendment binds the legislator to abstain from passing any legislation that would limit this right of the citizens or inhibit its exercise.[12]

In any specific case brought before the SC, therefore, the judges must ensure the prevalence of this prohibition; this is what constitutes the final limitation of their freedom of argumentation. The text itself, however, provides significantly greater leeway to judges as, apart from the prohibition of the limitation of these rights, it practically gives no directions to follow when passing judgements. As such, it leaves it to the judges to continuously develop the various principles and tests. It was not by chance that, in a critical comment, a prominent expert on the issue, Thomas Irwin Emerson, expressly called attention to the fact that the SC has no coherent and general theory on how it must apply this passage in reality.[13] Not only judges, but scholars, too, have proposed several different interpretations of the 'exact' meaning and application of this Amendment, as a result of which the literature on the subject is practically infinite. The provisions of the First Amendment on the freedom of speech have thus often been the centre of legal debates, and many conflicting positions have been argued for in relation to the problems that arise.

As such, the First Amendment is actually an infinite treasury of legal issues and problems, since life itself constantly produces new phenomena (eg the explosive development of media technology) that affect the freedom of speech; moreover, the level and sensitivity of public thought and speech towards problems is also constantly changing. This abundance of problems that presents a major challenge to jurisprudence and academic research, however, is actually rather advantageous from the aspect of the present study, since the new facts and the changes of public thought demand continuous reflection from the judges of the SC and inspire the continuous renewal of their legal argumentation. In other words, there are even examples when certain social-cultural changes have caused the previous interpretation of the law to be overruled entirely.

The various types of arguments

On the basis of the sociology of values analysis of the most important case law decisions related to the freedom of speech and the freedom of the press described above, six distinct types of arguments may be identified. Since the research did not analyse all the judgements of the SC related to this area, we naturally may not claim that these six types of arguments are the only ones; however, it may perhaps be asserted that these are the most significant.

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[12] Verbatim, the text provides that: 'Congress shall make no law ... abridging the freedom of speech, or of the press.'

[13] TI Emerson, *The System of Freedom of Expression* (Random House 1970) 15.

The six arguments types may be grouped as follows:

(i) Arguments providing the grounds for the freedom of speech and the freedom of the press. Common to these is that they strive to formulate arguments that justify the existence of these freedoms and the general prohibition of their limitation.

(ii) Arguments providing the grounds for the limitation of the freedom of speech and the freedom of the press. This set of arguments is not only significant in that it points out the limits of these freedoms and, thereby, highlights how political, social, and cultural realities influence the operation of such an abstract fundamental right. It is also significant because the nature of the various limitations actually casts light on the foundation of these rights, since by pointing out their limitations they render the arguments in favour of the fundamental rights more distinct and understandable.

Two arguments belong to the first group: 1) the prevalence of the truth via the free market of ideas and ideals; 2) the claim of the right of the public to information. By contrast, we find four independent arguments in the second group: 3) the reference to a state of war; 4) the denial of the absolute nature of the freedom of speech; 5) the emphasis on technological development and the scarcity of resources; 6) the performance of or incitement to clear and immediate illegal acts.

Ad 1. We may find the first classic argument for the freedom of expression in a dissenting opinion of Holmes J. in the *Abrams*[14] case, brought before the SC in 1919. The court had to decide on the constitutionality of a sentence of imprisonment imposed because of the distribution of a revolutionary pamphlet in English and Yiddish in New York in 1918. The authors of the pamphlet based their claim on the freedom of expression, while the lower level court convicted the defendants for conspiracy, violating and endangering the war interests of the United States.

Although the court upheld the previous judgement and accepted the argument that the right of the freedom of expression may be limited in a state of war, since the extraordinary situation overrules the usual regulations, in his dissenting opinion[15] Holmes J disputed this, and thereby created the foundations for a line of argumentation that has become the starting point and almost constant *topos* of all judgements related to the freedom of expression.

> 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 the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.[16]

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[14] *Abrams v United States*, 250 US 616 (1919).

[15] For a description of the philosophical foundations of Holmes' thought, see A Koltay 'Justifications for Freedom of Speech' in A Koltay, *Freedom of Speech. The Unreachable Mirage* (CompLex 2013) 3–8.

[16] *Abrams* (n 14) 630.

As we can see, Holmes J believed that the sense of the freedom of expression is that it ensures that truth shall prevail. According to him, the free competition of thoughts and ideas necessarily leads to the gradual extinction of erroneous or 'untrue' thoughts as, due to the competition, they are gradually forced out of public thinking. On the basis of the obvious economic analogies—market, competition, efficiency—this line of thought is easy to understand and offers suitable grounds for a rather strict attitude towards possible limitations, since such limitations—irrespective of their bases—render the recognition and understanding of the truth impossible, ie they distort the conditions of the prevalence of the truth, the market itself.

In his dissenting opinion in the *Whitney* case,[17] supported by Holmes J as well, Brandeis J projected this concept upon the world of politics. In this case, the justices of the SC examined the constitutionality of the law under which a citizen may be convicted for criminal syndicalism simply because of their membership of the 'California branch of the Communist Labor Party'. The SC found the California law providing the legal basis to be constitutional; however, the concurring opinion of Brandeis J very aptly pointed out the connections between the freedom of speech and political public speech.

According to him, while considering such issues it must always be borne in mind that the final end of the State is to make men free to develop their faculties. Liberty is thus both an end and a means to realising these objectives. In the world of politics this is also necessary because the freedom of expression is indispensable to the discovery and spread of political truth. That is, not only truth in general, but political truth in particular can only rise to the surface and reach the members of society via free and unlimited debates.[18] Any limitations must be tailored to fit this eminent interest and may only be justified in the most extreme of cases. According to Brandeis J, only the doctrine of 'clear and present danger' may justify such limitations.[19]

Subsequent judgements have refined this concept in several directions. Taking the political interpretation further, for example, they have pointed out that ensuring the free flow of ideas significantly contributes to future political and social changes, therefore—when all is said and done—the free marketplace of ideas is a precondition of social and political progress.[20] That is, content must be treated in the most permissive manner possible, but this—as the SC expounded in the *Miller* case—does not mean that there are no limitations at all. For example, the business of pornography may not be treated in the same way as the fundamental issues of the freedom of expression, as this could 'devalue' the essence of the First Amendment and the struggle for freedom underlying it. Rather, it should be regarded as an abuse of rights.[21] That is, communications with expressly obscene content must be regulated in the States, but the above objective has to be borne

17 *Whitney v California*, 274 US 357 (1927).
18 ibid 375.
19 ibid 374.
20 *Miller v California*, 413 US 15 (1973), 35.
21 ibid 34.

in mind at all times, and intervention should be as limited as possible; moreover, in keeping with this, the measure of the intervention must be distanced as much as possible from continuously changing moral value judgements.[22]

In the social sense, the notion has also appeared in the argumentation of the various judgements that the free flow of ideas and thoughts (although not expressly used here, it is impossible not to notice the analogy with the free market) is indispensable to the common search for the truth and the viability of society.[23] Hence, irrespective of whether they are true or not, communications must be provided the broadest possible protection, as this ensures social existence based on respect for the value of freedom.

One can hardly ignore a sense of mission in the above, according to which the prevalence of the truth—be it of a general or a political nature—must be ensured at all costs, and the most efficient vehicle for this is unlimited competition. Whichever idea withstands the test of public speech and is able to get itself accepted by the majority of the people may be regarded as the truth of social and political development. The role of the law in this process is to ensure that the system of mechanisms is in place whereby this 'free marketplace' of ideas may be maintained and harmonised with other relevant values (eg government interests, external conditions, etc).

Ad 2. The other strategy of the foundation of the freedom of expression is quite different from the one described in the previous section as regards its loftiness. Logically, however, they are closely related. The rather complex 1969 *Red Lion Broadcasting* case explored whether the so-called fairness doctrine, on the basis of which the authority responsible for the utilisation of frequencies may prescribe that radio and television stations must provide all parties concerned with a fair possibility to present their opinions, conformed with the First Amendment. It provides a comprehensive overview of the problems of the freedom of expression and the argument appears that the purpose of the constitutional provisions ensuring the freedom of expression is actually the creation of a well-informed public.[24]

According to the SC, on the basis of the above, it is expressly 'the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experience.'[25] It is only in possession of such information that a community is able to decide upon its own issues. In the final analysis (although this was not stated by the court, but is clear from the wording), the ideal of democracy can only be realised if citizens possess real information. According to the court, in order to achieve the most comprehensive information of the citizens, freedom of expression needs to be protected not only from government intervention—and at this point the argument transcends the confines of the free marketplace of ideas—but also from private censorship of content.

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[22] The court argued that there exist no national standards, but only contemporary community standards, that may change from place to place. ibid 37.

[23] Eg *Hustler Magazine v Falwell*, 485 US 46 (1988) 51.

[24] *Red Lion Broadcasting Co, Inc etc et al v Federal Communications Commission et al / United States et al v Radio Television News Directors Associations et al*, 395 US 367 (1969), 393.

[25] ibid 390.

The requirement of an informed public thus provides the grounds for the justification of action against both governmental and private intervention into the freedom of expression.

In the eyes of the SC, therefore, a public well informed about the broadest possible set of issues is indispensable for the operation of democratic social processes, for only such a public is able to pass decisions for or against the various thoughts appearing in the free marketplace of ideas. Informing the public is thus a prerequisite of the operation of a free market that is capable of bringing the truth to the surface, ie it is in an instrumental relationship with its operation.

Ad 3. One of the earliest accepted instances of the limitation of the freedom of expression is with reference to a state of war. The opposition between the state of war and the 'normal' situation has been an important element of constitutional law thought since the institution of the ancient Roman dictatorship and so the limitations of rights based on this argument are—in general—acceptable to the constitutional law scholarship, too. During the military conflicts of the twentieth century, the SC of the United States has applied this system of arguments several times when assessing the expressions of opinions related to those conflicts.

In the 1919 *Schenck* case[26] the SC provided a precise formulation of the principle to be applied for resolving conflicts between states of war and the freedom of expression. In this case, a decision had to be passed on the constitutionality of a punishment imposed as a result of a process initiated because of a socialist flyer printed in 1917 that called the draft a form of despotism and contained passionate agitation against the war. The defendants had been found guilty and were convicted for distributing the flyers. That is, the court had to define where the limits of the freedom of expression lie in a state of war and whether the constitution protects the expression of anti-war sentiments. Holmes J provided a crystal clear answer to the above question:

> We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. ... When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[27]

Holmes J further elucidated this idea in his dissenting opinion in the *Abrams* case we have already cited. There, he expressly refers to the fact that [28] 'war opens dangers that do not exist at other times.' That is, even in his eyes, the subject of the debate is not whether in such circumstances a constitutional right may be limited, but only the exact definition of the conditions of such a limitation. According to his position, in this case the

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[26] *Schenck v United States*, 249 US 47 (1919).
[27] ibid 52.
[28] *Abrams* (n 14) 628.

measure is the 'present danger of immediate evil or an intent to bring it about'.[29] If this is the case, then the limitation of the freedom of expression is legitimate even according to Holmes J, who—as we have seen—regarded this right as a value in itself and argued for its broadest independence and freedom from any restriction.

In a case related to the Vietnam war, besides the exceptional nature of war situations, the other major element of the argument appeared as well: the interest of the nation. In the *O'Brien* case[30] O'Brien and three friends burned their draft cards (Selective Service registration certificates) in front of a mass of people and claimed, in their defence, that this act was meant to express their anti-war sentiments. For this act the lower courts convicted O'Brien of violating certain provisions of the relevant act. As such, the court had to decide whether this act—the burning of an important military certificate in the presence of others—may be regarded as the exercise of free speech and deserves, therefore, constitutional protection.

The SC declared this period to be one of 'national crisis', and claimed that 'the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency;'[31] therefore, the section providing for the indictability of acts of destruction of draft cards was not unconstitutional in itself. A further issue, and one which weakens the argumentation based on constitutional rights, is whether the act itself—the burning of a certificate—may be regarded as symbolic speech that is protected by the First Amendment. At this point the court noted that it cannot accept that any act qualifies, in itself, as such a symbolic expression, and even if O'Brien's act did, it is still questionable whether it deserved constitutional protection.[32] Finally the SC found the constitutional scruples to be unfounded and argued that, given the circumstances and the nature of the act, the 'performance' of O'Brien and his friends did not deserve constitutional protection.

These two examples, taken from historically very different epochs, clearly show that a state of war is one of the classic arguments on the basis of which the Constitutional Court allows the limitation of otherwise broadly interpreted freedom of speech, albeit only under precisely defined circumstances (the existence of clear and present danger and the constitutionality of the legal provision on which the limitation is based). Among the principles underlying this we may clearly identify the utilitarian notion according to which, in war situations, a stricter measure has to be applied against actions that endanger the primary interests of the nation in the interest of victory.

Ad 4. An argument on the limitation of the freedom of expression different in quality from the previous ones appeared in the practice of the Constitutional Court during the period between the two World Wars. In the already mentioned *Whitney* case, the plaintiff had been sentenced to imprisonment based on a conviction of criminal syndicalism for having played an active role in the California Communist Workers' Party. The aim of this

[29] ibid.
[30] *United States v O'Brien*, 391 US 367 (1968).
[31] ibid 381.
[32] ibid 376.

party, which had joined the Moscow based International via the American Communist Workers' Party, was the political organisation and unification of the working class and it expressly strove to achieve the dictatorship of the proletariat.

The defence disputed the constitutionality of the decision, both on the basis of the Fourteenth Amendment with respect to the generality and uncertainty of the formulation of the offence, and on the basis of the First Amendment. As for the freedom of expression, the court formulated the theoretical proposition that 'the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility,'[33] nor, furthermore does it give 'an unrestricted and unbridled license giving immunity for every possible use of language'.[34] That is, even though the fundamental right of the freedom of expression plays an extremely important role in the constitutional order and the operation of society, according to the reasoning of the decision it does, naturally, have its limits.

On the basis of their police power, the member states of the USA are free to decide whether they wish to punish those abusing this fundamental right. According to the reasoning of the court, this is conceivable under the following circumstances: in respect of utterances (i) that are inimical to the public welfare, (ii) that incite crime, (iii) that disturb the public peace, or (iv) that endanger the foundations of organised government and incite its unlawful overthrow.[35] It may be seen that public safety and public peace are the measures which the member states may apply to certain expressions in the light of this decision.

On the one hand, this decision is significant from the aspect of constitutional theory, as it declares that even the freedom of expression is not a wholly absolute right and may be limited on the basis of other, primarily community interests. On the other hand, it is also relevant from the aspect of constitutional law, since the SC left the application of the above general tenet to the States rather than setting up a unified, federal norm. Thus, the creation of the legal provisions that limit the freedom of speech on the basis of a public interest belongs to the police power[36] of the member states, therefore if such provisions are enacted then they may be understood as the expression of the public opinion and value commitments of the given State.

The federal level implementation of fundamental rights after World War II has gradually diminished the independent regulatory powers of the member states.[37] It may be regarded as part of this process that, from the 1950s onwards, the SC has discarded the above argument and has overruled as unconstitutional the punishment of any general type of expressions by the member states. That is, the *Whitney* formula has been repealed. The SC only regarded limitations to be acceptable if the given expression contained

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33 *Whitney v California* (n 17) 371.

34 ibid.

35 ibid.

36 As a starting point, see S Legarre, 'The Historical Background of the Police Power' (2007) 9 *University of Pennsylvania Journal of Constitutional Law* 745–96.

37 ibid.

direct incitement to illegal acts or if it was highly probable that it would result in such. On the basis of this argumentation the SC found unconstitutional an Ohio act, on the basis of which a Ku Klux Klan leader had been sentenced to a fine and imprisonment for subversion, as he had proposed that African-Americans be sent back to Africa and Jews to Israel, and had intended to avenge the government for the oppression of the whites.[38]

Ad 5. The *Red Lion Broadcasting* decision passed in 1969 is a fine illustration of the openness of the SC towards considering external circumstances and its resulting lack of dogmatism. In this case, the court had to decide whether the provision according to which the government organ responsible for allocating frequencies (the Federal Communications Commission) provides for certain content requirements towards the winning radio stations was constitutional or not. Central to these requirements was the so-called fairness doctrine, which provided that in matters of public interest all concerned parties must be given the chance to expound their opinions (under certain conditions). The Commission expressly provided that in the case of personal attacks during public debates or political notes and opinions, the above opportunity must always be provided.

It is especially noteworthy that the court essentially based its argument on a factual rather than a legal starting point, and deduced, in several steps, the constitutionality of the provisions on fair presentation from there. This starting point was the limited number of frequencies available for radio broadcasting, ie the scarcity of the resources essential to broadcasting. In the final analysis it is this factual issue that justifies the limitation of a fundamental right in the field of radio broadcasting. The court argued that, if the state were not to intervene on the basis of the public interest in the allocation of frequencies and regulate their utilisation, it would render radio broadcasting itself impossible, and the resulting chaos and cacophony would prevent the freedom of expression over the radio.

The court justified the constitutionality of the stricter than average content requirements in the field of radio broadcasting using a chain of arguments consisting of several steps. To start with, the court referred to the fact that the characteristics of the 'new' electronic media justify the differentiated application of the First Amendment, especially since only a small fraction of the existing frequencies can be used efficiently for the purpose of radio broadcasting. Here it should also be noted that a part of the available spectrum cannot be used for the purposes of the media as it is required in other fields (eg aviation, shipping, etc).

A further important point of fact is that, due to the scarcity of the frequencies, many more actors would like to broadcast radio programmes than is actually possible, and so it would be nonsensical to compare the right to broadcast with the individual rights enshrined in the First Amendment. It is worth noting that if—purely as a matter of speculation—we were to adopt a verbatim interpretation of the First Amendment, the system of concessions would qualify as illegal, and this would frustrate radio communication in its entirety; external circumstances cannot therefore be simply

[38] *Brandenburg v Ohio*, 395 US 444 (1969).

excluded from consideration. It is also important that the First Amendment does not grant anyone the right to monopolise a frequency and thereby to bar others from expressing their opinions.

In other words—and this is the crucial point of the decision—among these factual circumstances, the First Amendment actually provides the basis for the government's right to impose 'restrictions' upon frequency right holders while observing the general constitutional requirements of legitimate and serious interest, appropriately accurate regulation, and proportionality. The purpose of this is precisely to ensure the prevalence of the objectives of the First Amendment: to ensure that diverse opinions are featured in the media.[39] That is, when adjudging constitutionality, the interest of the audience rather than the interest of the frequency right holders is paramount, for it is only on the basis of this that the effective prevalence of the freedom of expression can be ensured.[40]

The court thus made clear its position that, among the special conditions of radio broadcasting, the standards applicable to the freedom of expression should be interpreted differently from the usual ones and should be adapted to the specific circumstances. The essence of this is that, given the scarcity of frequencies, only government-imposed restrictions are able to ensure the prevalence of the fundamental right, since, in the absence of government control the public interest would fall prey to the broadcasting monopoly. This monopoly would put an end to the free marketplace of ideas, resulting in devastating socio-political consequences.[41]

If, therefore, special circumstances are coupled with legitimate interests, even an extremely detailed government intervention into content issues is not necessarily contrary to the First Amendment. This is something that could be especially important for the legal consideration of the new state of affairs brought about by the explosive technological development of the media. That is, the SC maintained the possibility of assessing issues related to the freedom of expression in a manner different from the 'classic' test of constitutionality if this is required by the different physical and technical conditions and—obviously—always in keeping with the spirit of the First Amendment.

Ad 6. According to the practice of the SC, the final limit of the freedom of expression is causing clear and present danger or an express intent to do so. Although, at the time of the original conception of this formula, several different terms were used to define this limit,[42] by today the doctrine of clear and present danger has become prevalent.[43]

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[39] Curiously, in the case of the printed press the SC rejected the possibility of such restrictions based on the requirement of the diversity of opinions and referred to editorial freedom instead. Cf. *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).

[40] *Red Lion Broadcasting* (n 24) 390.

[41] ibid.

[42] Eg 'speech that produces or is intended to produce a clear and imminent danger' and 'the present danger of immediate evil or an intent to bring it about' (*Abrams*); 'words used ... are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent' (*Schenck*).

[43] On its origins, see A Koltay, 'Restriction of Hate Speech and the Clear and Present Danger Principle' in Koltay (n 15) 127–32.

The exposition of the formula as a fundamental principle is related to Holmes J, who had first referred to this possibility in his dissenting opinion in the *Abrams* case. In keeping with his perception, according to which the guarantee of the achievement of the public good is the free marketplace of ideas, Holmes J held that the freedom of expression could only be restricted under the strictest of conditions. If such conditions were met, however, he accepted such restriction without reservations. Clear and present danger to others or the intent to cause such danger was, in Holmes' eyes, the limit which, when reached, justifies the government's restriction of the fundamental right that is otherwise beyond all restriction.[44] This argument is of an individualistic nature, as it is meant to prevent direct harm or lethal danger to others.

The verdict passed in the *Schenck* case in 1919 used an example to cast light on how the above formula should be understood.

> But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[45]

According to the *Schenck* decision, therefore, this measure does not mean a universal and clearly defined limit, but only demands that the various expressions be assessed within their own, specific contexts. If an expression is capable of causing such clear and present danger (as in the theatre example), it deserves no constitutional protection. The most important consequence of this is that, if the expression in question is qualified by the criminal law provisions of the various member states, the constitutionality of these provisions may not be challenged on the basis of the freedom of expression granted by the constitution.

This 'final' test was further developed in the *Brandenburg* case in relation to the constitutionality of the conviction of a Ku Klux Klan leader. The argumentation of the court based the already crystallised doctrine on a new element, upholding the requirement of imminence. Instead of causing clear and present danger, the court spoke about lawless action and, in essence, defined the new measure as incitement to imminent lawless action.[46] It is an interesting question: to just what degree did this mean the creation of a new test; can we speak, for example, of a *Brandenburg* test instead of the clear and present danger doctrine?[47] Naturally, several different answers are possible, but it is important to take into account that unlawful acts, as they are always directed against a protected value, most probably cause clear and present danger as well—eg attempted manslaughter—therefore, even despite the differences between the two formulations, the

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[44] *Abrams* (n 14) 627.
[45] 249 US 52.
[46] *Brandenburg v Ohio* (n 38) 447.
[47] Cf. Koltay (n 15) 131–32.

Brandenburg decision does not appear to have replaced the basis of the previous practice. What could be more problematic is that mentioning lawless action probably decreases the scope of the restriction based on the previous formulation, as it is by no means certain that all instances of clear and present danger also involve a criminal act. To take the classic example, crying 'Fire!' in a theatre is not a crime. This problem becomes especially conspicuous if we recall the argument of Holmes J, according to whom the assessment of an act from this aspect should always take into consideration the specific circumstances.

Very interesting is the dissenting opinion of Douglas J, as he expressly proposed discarding the clear and present danger principle. According to him, ideas and action must be distinguished, and only the latter may be restricted. Ideas and their expression, however, cannot be subjected to government control, as these exclusively belong to the realm of the individual. Furthermore, maintaining this requirement leads to problems in legal argumentation, since the distinction between the various disputed expressions requires the creation of artificial legal categories. Such an artificial and overcomplicated solution is, for example, to assess cases from the constitutional aspect on the basis of the distinction between active and inactive members of the Communist Party, according to which the strength of their conviction can be decided (serious or uncertain). The position of Douglas J, which may appear to be rather radical at first sight, shows well the original problem that was already conspicuous in Holmes' formulation: this principle can only be applied on a case-by-case basis; it has no substance suitable for generalisation other than that an expression results in clear and present danger.

The values underlying the arguments

In the introduction to the paper I already noted that, following the identification of the major types of arguments related to the freedom of expression, the next step of the research is the identification of the values underlying these arguments.[48] In certain cases these values may appear in the text of a decision in a very direct manner (eg the truth as the basis of human life, *Abrams* case), while in other cases they operate indirectly (eg the protection of individuals, also the *Abrams* case);—nevertheless, they are clearly discernible. From the methodological aspect, it should be noted that the argumentation paradigms defining the limits of the freedom of expression are, in the sociology of values sense, equally as important as the paradigms providing the foundation of that freedom, for the fact that this fundamental right is regarded to be open to restriction on the basis of certain considerations also indicates a value, the prevalence of which is important in this area.

[48] RL Weaver's paper *The Press and Freedom of Expression* also included in the present volume examines the theoretical background and value-system of the freedom of the press from a similar aspect.

In my view, on the basis of the above argumentation paradigms, eight values may be clearly identified as underlying the practice of the SC related to the freedom of expression. This list is not exhaustive, and in all probability further values may be discerned; however, these eight are certainly the most significant in the given area.

The truth. The role of the truth as a fundamental value providing the sense of the freedom of expression is indisputable in the reasoning of the SC. This value is the final goal of constitutional regulation. The purpose of the freedom of expression is to ensure that its exercise leads to the prevalence of the truth, ie it is assumed that, in the course of social and political debates, if they are not distorted by any external circumstances and restrictions, the truth will 'surface' from among the many competing opinions, since its convincing power will vanquish all other opinions.

Social and political progress. Examining the argumentation of the court, we may also observe that, besides being the final goal of constitutional regulation, the truth is also in an instrumental relationship with other values. In an abstract manner, the ideal of political and social progress is also present in the arguments of the justices, and in respect of the prevalence of political truth, they expressly emphasise that this is a precondition to progress as well. That is, by ensuring the prevalence of the truth, the constitutional guarantees of the freedom of expression actually serve social and political progress. Only the truth may lead to the development of a society; several decisions reflect that the justices of the SC subscribed to this tenet.

Competition. The freedom of expression that may only be limited under very strict conditions creates the free marketplace of ideas and opinions, where they are in perfect competition with each other. This competition is a value in itself, because the convincing power and, thus, the truth of an idea is measurable only in an environment of free competition. The value role of free competition may be one of the important reasons for the strict and consistent abstinence from constitutional restrictions, as without it truth and progress both become illusory.

Information. Adequate information is fundamental to the operation of a democratic society, as only citizens equipped with adequate knowledge are able to decide about their lives on the merits. Information is also manifested as an independent value within the operation of the freedom of expression since, in theory, the constitutional guarantees also warrant the achievement of such an informed state. If necessary, in extraordinary situations this value could even serve as legitimation for government intervention, especially if such intervention is in the interest of this.

The public interest in general. Decisions related to the state of war pointed out that one of the inherent limitations of the freedom of expression is the interest of the community or, to put it differently, the interest of the nation. That is, during the exercise of this freedom, it must always be borne in mind that it cannot violate the fundamental interests of the community (the nation), such as the efficient and smooth operation of the military

draft mechanisms. If an expression that may be considered to be a statement of opinion goes against such a fundamental national interest, the constitutional guarantees are not applicable in every case.

Public peace. Albeit with lesser intensity, public peace still plays a role in the assessment of the problems related to expressions of opinion. If an expression were to jeopardise the bases of the social or political system, an argument in favour of restriction could be based on the values of public peace and, thus, stability. Furthermore, it is also clear that, within the SC's system of values, a distinction must be made between social progress and subversion of the bases of society. The latter is not entitled to constitutional protection, especially because it would jeopardise the exercise of the freedom of expression as well.

Adaptation. The SC clearly advocated that, while guaranteeing constitutional protection, external—technical and other—conditions must always be taken into account. If the external conditions radically differ from the traditional set of conditions of the exercise of the fundamental right (see, eg, the differences between the printed press and radio broadcasting), the prevalence of the fundamental right demands adaptation to these conditions; rigid and dogmatic solutions should be avoided.

The protection of individuals. Finally it should be noted that, underlying the argumentation of the SC, we may often discover the motive of the protection of individuals. The clear and present danger principle expressly posits the safety and protection of the individual as one of the bases of restriction. That is, danger to the individual justifies the restriction of the freedom of expression in all cases; however, the integration of particular, individual situations into a constitutional doctrine requiring a higher level of abstraction causes difficulty.

Conclusions, philosophical echoes

The above analysis supports the thoughts of András Koltay, according to which, in the philosophical sense, the freedom of expression as a fundamental right may be both coherently argued for and against from three main directions—the search for the truth, the service of democracy and the individualistic approach—but in practice we see the amalgamation of the values underlying these.[49] The above analysis has shown that these values do not influence the thinking of the judges as such; rather, they are interconnected at several points and presuppose each other's existence, and it is in this way that they exert their effect upon the judges' arguments. A good example of this could be the relationship between truth, progress, and competition. Without the prevalence of the truth, progress is impossible; without competition, however, the truth cannot surface

[49] A Koltay, *A szólásszabadság alapvonalai* (Századvég 2009) 43–47.

(according to this system of thought). It is therefore more apt to say that underlying the relevant arguments of the SC there is a distinct universe of values, the elements of which are mutually interconnected.

While maintaining the above, on the philosophical level it is nevertheless worthwhile to add one point to Koltay's argument. Analysing the practice of the SC specifically, it is conspicuous that the individualistic justification is given the most limited role in it, and even when it does play a role it only appears as a value providing the grounds for the constitutionality of a possible restriction. Although at first sight it may seem strange, the judicial practice of the USA is primarily based on the philosophical basis of the search for the truth and the service of democracy, in comparison with which the individualistic element only plays a relatively minor role in the arguments. That is, in the philosophical sense, the SC is primarily committed to the prevalence of the truth and mainly adopts philosophical assumptions based on the community principle; in comparison with these, individualistic considerations are secondary.

Finally, it is worthwhile to place the above identified base of values into a broader context. Rudolf Rezsőházy has reconstructed the development of European values and has categorised them through the eyes of a historian.[50] Taking as our starting point the analysis and categorisation of Rezsőházy, we may say that the system of values underlying the argumentation paradigms of the SC related to the freedom of expression originates from the seventeenth-nineteenth centuries, ie it is basically modern. According to Rezsőházy, the truth had become a generally accepted value in Europe with the advent of Christianity, while the central role of the individual started to gain ground in European public thought during the period of the Renaissance and the age of the Reformation. Naturally, these two values have remained integral to European public thinking since. Progress and competition have been part of our thinking since the seventeenth century;[51] the notion of democracy,[52] which cannot operate without informed citizens, is the product of the Age of Enlightenment, while community values, ensuring the public peace and governmental adaptation to external conditions are all part of the heritage of the socialist movements[53] of the nineteenth century. In summary, the decisions of the SC related to the freedom of expression all clearly reflect a modern and European set of values and so they can only be properly understood against the related philosophical background.

[50] R Rezsőházy, *Émergence de valeurs communes aux Européens à travers l'histoire* (L'Harmattan 2012) 31–211.

[51] ibid 99–109.

[52] ibid 118–25.

[53] ibid 164–66.