Restricting Freedom of Speech: An Analysis of Censorship Cases in Relation to Misinformation during the COVID-19 Crisis

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With the global predominance of social media, many argue that there is a newfound need for censorship to prevent the spread of misinformation. However, political censorship restricts one of our most fundamental rights. Through the analysis of four Supreme Court cases regarding the right to free speech — Schenck v. US (1919), New York Times Co. v. US (1971), Missouri v. Biden (2022), and Moody v. NetChoice, LLC (2022) — this paper serves to analyze whether censorship is ever necessary to uphold trust in institutions, or if censorship is antithetical to trust in government, with a special focus on the spread of COVID-related misinformation.

Introduction

In recent decades, America has become increasingly polarized across the political spectrum. Many analysts blame misinformation in social media for the public's inability to recognize the truth and lack of cooperative action. Through echo chambers of political discourse, social media companies target content that reinforces people's implicit biases.[211] In the early 2000's, entrepreneurs such as Mark Zuckerberg, co-founder of Meta (previously Facebook), held a "...naive conception of human psychology, little understanding of the intricacy of institutions, and no concern for external costs

[210] Brandeis University Undergraduate, Class of 2026.
[211] Del Vicario, "The Spreading of Misinformation Online," 2016, 554–559.

imposed on society."[212] As a result, social media entrepreneurs made irreversible impacts on the way humans interact with one another, and thus, the very fabric of democracy. Controversy over free speech is not a new trend in American politics. Since the early 20th century, the Supreme Court has been developing its stance on the right to free speech, especially when restricting that right becomes necessary to defend democracy. During the COVID-19 crisis, debates over misinformation reignited amongst both political and medical scholars, as a direct result of how conflict, confusion, and conspiracy theories that were circulated online heightened psychological distress and triggered actions based on panic and fear.[213] Although misinformation poses a threat to citizens' trust in institutions, political censorship is similarly unappealing due to its restriction of the fundamental right to free speech.

The First Amendment

Free speech in America is protected by the First Amendment in the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[214] Due to the opening phrase, "Congress shall make no law," the First Amendment initially only applied to federal laws. After the Civil War, the Reconstruction Amendments — the Thirteenth, Fourteenth, and Fifteenth Amendments — were passed and ratified to protect former slaves from discrimination and grant them civil rights. Using the Due Process Clause of the

[212] Haidt, "Why the Past 10 Years of American Life Have Been Uniquely Stupid," 2022.
[213] Nelson, "The Danger of Misinformation in the COVID-19 Crisis," 2022, 510-512.
[214] "U.S. Constitution: First Amendment."

Fourteenth Amendment, the Supreme Court began to incorporate the Bill of Rights to apply to state governments as well. The Due Process Clause enforces that no state shall "deprive any person of life, liberty, or property, without due process of law."[215] Beginning with *Gitlow v. New York* (1925), the Supreme Court began incorporating the First Amendment to encode free speech at the state level via the Due Process Clause. However, the right to free speech is not without limitation, as proven by lawsuits over slander and libel.

The Evolution of Supreme Court Rulings Regarding Freedom of Speech

Schenck v. US (1919)

In 1919, the landmark Supreme Court case *Schenck v. US* placed restrictions on the right to free speech.[216] The case began in 1917 when Congress passed the Espionage Act, prohibiting any interference with the World War I draft. A socialist named Charles Schenck disregarded the act and distributed pamphlets arguing that the draft coerced citizens into serving in the army, despite the Thirteenth Amendment prohibiting involuntary servitude. Because the pamphlets also promoted peaceful disobedience against the draft, Schenck was accused of conspiracy to violate the Espionage Act by hindering recruitment and encouraging insubordination in the military. The Supreme Court unanimously upheld the conviction of Schenck. In the majority opinion, Justice Oliver Wendel-Holmes formulated the clear and present danger test to enable the government to restrict free speech when the speech

[215] Chapman and Yoshino, "The Fourteenth Amendment Due Process Clause."
[216] Schenck v. United States.

creates a clear and present danger. Justice Wendel-Holmes presented two conditions that must be met: first, the speech must impose a substantive evil that may follow, and second, the speech must create a real, imminent threat. He famously compared dangerous speech to shouting "Fire!" in a crowded theater, which is not protected by the First Amendment.

The summer after the case was decided, Justice Wendel-Holmes was on a train with Judge Billings Learned Hand, a renowned jurist and judicial philosopher, who disagreed with the ruling of *Schenck*. Judge Learned Hand told Justice Wendel-Holmes that the clear and present danger test, although a useful assessment of dangerous speech, was misapplied in the case. Throughout the 1920s, the Supreme Court upheld many speech restrictions justified by the clear and present danger test, but Justice Wendel-Holmes along with Justice Louis D. Brandeis started to dissent from the restrictions of free speech, also justifying their reasoning through the clear and present danger test. Both sides using the same test to reach different results called into question the effectiveness of the test, especially considering that the creator of the test changed his stance.

It was not until 1969 that the Supreme Court finally revisited the *Schenck* ruling in the case *Brandenburg v. Ohio*. Brandenburg, a KKK leader, made a speech at a rally and was convicted under an Ohio criminal syndicalism law.[217] The Court held that the Ohio law violated Brandenburg's right to free speech. Some analysts claim this ruling overturned *Schenck v. US* (1919) by applying a new standard: speech can now be punished only if it is "likely" to produce "imminent, lawless action." However, another interpretation is that the Court reworded the Clear and Present Danger Test with a new realization of the potential application of *Schenck* that questions the very purpose of First Amendment speech

[217] Brandenburg v. Ohio.

protections. If the purpose is to protect individual rights, then the incentive for speech protection is to avoid restrictions on exercising individual thought. However, if the goal is to protect democracy, then it is important to note that democracy requires the ability to criticize the government, as it is the only form of government that can withstand strong dissent against itself.

Significance to the COVID-19 Crisis

Both cases remain relevant for creating the tests used in reviewing freedom of speech disputes. But how can we apply these tests to assess the danger of misinformation during the COVID-19 crisis? Falsehoods regarding COVID are ubiquitous. An ongoing research project conducted by Kaiser Family Foundation reports that 78 percent of US adults either believed or were unsure about at least one of eight false statements about the pandemic or vaccines. Figure 1 illustrates the percentages of people who have heard the false statements and believe it to be true or are unsure if it's true.[218]

[218] Lopes, et al, "KFF Vaccine Monitor: Media and Misinformation," 2021.

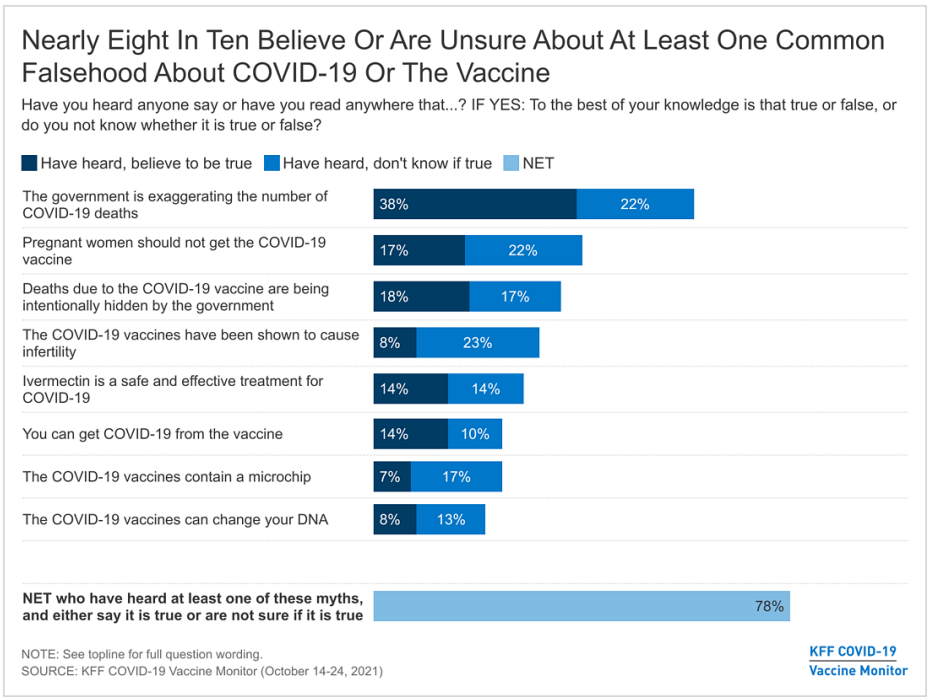

Figure 1

Likelihood to believe misinformation correlated significantly with participants' vaccination status and trusted news sources.[219] 64 percent of unvaccinated adults believed or were uncertain about four or more of the misconceptions about COVID-19. Furthermore, the group of people who hold four or more misconceptions and also trust sources like CNN, MSNBC, and NPR is relatively small at 11 percent. Relatively larger is the group of people who believe four or more misconceptions and trust media sources like One America News, Fox News, and Newsmax, at 37 percent, 36 percent, and 46 percent respectively. Circulating misinformation about the

[219] Lopes, et al, "KFF Vaccine Monitor: Media and Misinformation," 2021.

COVID vaccine prevented many people from taking necessary precautions to protect themselves and those around them. Earlier this year, researchers at Brown University and Microsoft AI Health estimated that of the over 641,000 COVID-19 deaths since January 1, 2021, nearly 319,000 COVID-19 deaths could have been avoided if all adults had been vaccinated.[220]

In this context, the spread of misinformation surrounding COVID-19 vaccines arguably posed a "real, imminent threat" of which a "substantive evil" followed. The tests conceived in both *Schenck v. US* (1919) and *Brandenburg v. Ohio* (1969) suggest that a threat to national safety is justification for censorship. But in exchange for the unyielding right to free speech, hundreds of thousands of innocent lives were lost during the COVID-19 crisis. Although the spread of misinformation clearly demonstrates the detrimental capabilities of the unrestricted right to free speech, cases regarding the censorship of the press provide more context as to why people are unwilling to compromise fundamental freedoms.

The Evolution of Supreme Court Rulings Regarding Freedom of the Press

New York Times Co. v. US (1971)

New York Times Co. v. US (1971) is another landmark Supreme Court case that interprets free speech, with specific focus on the freedom of the press.[221] The Nixon administration sued *The New York Times* when the government discovered they were planning to publish the leaked document, "Report of

[220] Simmons-Duffin and Nakajima, "This Is How Many Lives Could Have Been Saved with Covid Vaccinations in Each State," 2022.
[221] New York Times Company v. United States.

the Office of the Secretary of Defense Vietnam Task Force" – popularly known as "The Pentagon Papers." The act of stopping a publication before it is released to the public is known as prior restraint. In this scenario, the Supreme Court declared the government's use of prior restraint to be unjustified because the government must prove that the public release of information would cause inevitable, direct, and immediate danger to the country.

Once again, the Supreme Court utilized familiar rhetoric about when restricting First Amendment rights is acceptable. Within the 6-3 decision, the Court's majority splintered into six concurring opinions. Citing the clear and present danger test, Justice William J. Brenner Jr. concluded that prior restraint would be permissible in circumstances where there was sufficient harm posed to national security. Taking a more extreme position, Justice Hugo Black argued that "only a free and unrestrained press can effectively expose deception in government," and rejected any censorship of publications.[222]

Missouri v. Biden (2022)

In October 2020, three epidemiologists — Jayanta Bhattacharya, Sunetra Gupta, and Martin Kulldorff, of Stanford, Oxford, and Harvard Universities respectively — published their views about COVID-era lockdowns in a joint statement called the "Great Barrington Declaration."[223] They explained that lockdowns are not net beneficial and that resources should be directed to protecting vulnerable groups in society rather than shutting them down. In the declaration, the scientists attribute the lockdown for "lower childhood vaccination rates, worsening cardiovascular disease outcomes,

[222] Robertson, "New York Times Co. v. United States."
[223] Younes, "The U.S. Government's Vast New Privatized Censorship Regime," 2022.

fewer cancer screenings, and deteriorating mental health – leading to greater excess mortality in years to come, with the working class and younger members of society carrying the heaviest burden."[224] The document also advocated for reinstating in-person school and developing herd immunity until a vaccine was made available.

Bhattacharya, Gupta, and Kulldorff discovered that online platforms such as YouTube and Twitter were heavily censoring their scientific opinions from the public. Bhattacharya and Kulldorff are now plaintiffs in *Missouri v. Biden*, a case brought by the attorney generals of Missouri and Louisiana, as well as the New Civil Liberties Alliance (NCLA). The plaintiffs allege that the Biden administration and a number of federal agencies violated the First Amendment by coercing social media platforms into censoring critiques of the government's COVID policies and thereby turning private action into state action. In a concurring opinion last year, Justice Thomas articulated the Supreme Court's views: "[t]he government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly."[225] In other words, the government cannot direct social media companies to silence people if the Constitution prohibits the restriction of free speech. Nonetheless, it is worth considering whether the "Great Barrington Declaration" incited imminent, lawless action or whether Bhatttacharya, Gupta, and Kuldorff were simply exercising their right to critique government policy. Once again, there is a clear conflict between protecting individual rights and protecting democracy.

The Emerging Stance for Free Speech Online

[224] Kulldorff, et al, "Great Barrington Declaration and Petition," 2020.
[225] Younes, "The U.S. Government's Vast New Privatized Censorship Regime," 2022.

Debates over free speech and censorship law remain relevant, but with an added twist — social media. In 2018, data scientists from the Massachusetts Institute of Technology collected and analyzed 12 years of data from Twitter, starting at the platform's inception in 2006.[226] The data comprises approximately 126,000 stories tweeted by 3 million people more than 4.5 million times. Tweets containing false information were six times faster than truthful tweets to reach 1500 people on Twitter. They are also 70% more likely to be retweeted than truthful ones. To retweet is to repost or forward a message by another user. While the team reported that false news is propagated faster and wider for all forms of news, the problem was particularly apparent for political news. The implications of this phenomena are profound – political misinformation is spreading faster than truthful information, which places political institutions at risk of instability.

Moody v. NetChoice, LLC (2022)

Missouri v. Biden is not the only example of a censorship debate today. There are many major cases regarding censorship currently being considered. Earlier this year, an industry group by the name of NetChoice, whose members include Facebook and Instagram owner Meta Platforms Inc., Google parent Alphabet Inc., and Twitter Inc., challenged a Florida law that stops social media companies from restricting political speech. A federal appeals court blocked the law, but on September 21, 2022, Florida asked the Supreme Court to revive the law. The case, known as *Moody v. Net Choice, LLC*, is currently pending a petition.

The ruling came days after a different federal appeals court allowed a similar Texas law, known as House Bill 20, to take effect. House Bill 20 prohibits large social media

[226] Vosoughi, et al, "The Spread of True and False News Online," 2018.

companies from censoring or interfering with digital expression and has been challenged by NetChoice. The Fifth U.S. Circuit Court of Appeals permitted the bill to go into effect after lifting the block that had been imposed by a lower court. "Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say," stated Judge Andrew S. Oldham of the U.S. Court of Appeals for the Fifth Circuit."[227] The goal of the House Bill 20 is to limit political censorship by enabling users to sue social media platforms for removing their posts. This may mean that the current stance of the judiciary is leaning in favor of the unrestricted right to free speech.

Conclusion

As social media's role in global politics continues to grow exponentially, the Supreme Court's stance on censorship will likely continue to develop and solidify. While we retain our right to spread our opinions online, some will misuse their power by spreading information that exacerbates polarization. The implications of an unrestricted right to free speech will have unfathomable consequences on citizens' trust in institutions. However, censorship remains undesirable because of how the Supreme Court precedents have struggled to define "dangerous speech" and to uphold a consistent standard by which to limit it. Part of the responsibility lies with social media companies who need to implement better screening standards for viral posts that share inaccurate information. Then, with the influence that everyday users hold online today, either we need to be accountable for ensuring the content we post is truthful, or we need to be ready to sacrifice individual freedoms to prevent exacerbated political instability.

[227] McCabe, "A Federal Court Clears the Way for a Texas Social Media Law," 2022.

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