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DOES THE US SUPREME COURT ACKNOWLEDGE FREEDOM OF '*DISCRIMINATING EXPRESSIONS*'? NOT, BUT… *FROM CHAPLINSKY (1942), TO MASTERPIECE (2018), THE DEVELOPMENT OF THE SUPREME COURT'S FREE SPEECH CASE-LAW*

Sommario: 1. Introduction. – 2. No limitations v. limitations: theoretical grounds. – 3. Case law on the First Amendment. – 3.1. The issue at stake and the speech codes. – 3.2. Hate speech/crime legislation. – 3.3. Masterpiece. – 4. Concluding remarks.

1. Introduction

This article examines the U.S. Supreme Court's case law on freedom of speech from *Chaplinsky*[1] (1942) to *Masterpiece Cakeshop LTD* v. *Colorado Civil Rights Commission*[2] (2018). This last, and very recent case, regards a request for religious exemptions in a case involving same-sex partners[3], i.e., the attempt (*for some authors the necessity*) to balance freedom of expression and freedom of religion[4] in those cases involving individuals who might perceive someone else's behavior (or attitude) as '*sinful*'.

Masterpiece originated in 2012, when Charlie Craig and David Mullins were denied a wedding cake by Jack Phillips, the owner of Masterpiece Cakeshop. Phillips refusal was jus-

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[1] 315 U.S. 568 (1942), *Chaplinsky* v. *New Hampshire*.

[2] 584 U.S. (2018), *Masterpiece Cakeshop LTD* v. *Colorado Civil Rights Commission.*

[3] K. C. VELTE, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too*, in *Law & Inequality*, vol. 36, n.1, 2018, p.68; One of the first analysis of this case by an Italian author has been written by M.M. WINKLER, *What's in a cake? A note on Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, in *DPCE Online*, 2018, n. 4, p. 1235 ss.; A. SPERTI, *Libertà religiosa e divieto di discriminazione in base all'orientamento sessuale: alcune riflessioni a partire dalle pronunce sull'obiezione del pasticciere*, *in GenIUS, Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, n. 1, 2019.

[4] Supporting religious exemptions, R.T. ANDERSON, *Disagreement is not always discrimination: on Masterpiece Cakeshop and the Analogy to Interracial Marriage*, in *The Georgetown Journal of Law & Public Policy*, vol. 16, 2018, p. 123 ss.

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tified on the basis of his deep religious beliefs. He argued that the creation of a custom wedding cake was a form of art, and in doing so, he was also honoring God.

Thus, he claimed that being forced to use his own art to prepare a wedding cake for a same-sex couple would have not only violated his free exercise of religion, but mainly his freedom of speech. He claimed that cakes represented his artistic expression, similar to *pure speech*, hence deserving protection under the First Amendment

Indeed, not only in the United States, the introduction of same-sex marriage[5] (or civil partnership) has raised new legal issues in the very delicate sphere of freedom of expression and freedom of religion[6].

Nevertheless, the debate around the possibility to allow religious exemptions to oppose LGBT people's rights (*e.g. business owners who oppose same-sex marriage*) has shown, in the United States, a deep division in the legal doctrine. Legal scholars have revealed to be clearly divided on this issue, between '*those concerned with religious tradition*[7]' and '*those concerned with equal protection and anti-discrimination laws*[8]', in the frame of freedom of expression[9].

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[5] Recently, another similar case – involving a pastry shop – has been decided in the United Kingdom, namely *Lee v. Ashers Baking Company Ltd*, Supreme Court [2018] IRLR 1116. For an examination of this case, see A. SPERTI, *cit.*, 2019; A. HENDERSON, *Conscience and the Cake*, in *UK Human Rights Blog*, 15 October 2018; C. DE SANTIS, *Anche la Corte Suprema del Regno Unito si pronuncia a favore della libertà di coscienza dei pasticceri obiettori*, in *Diritti Comparati.it*, 12 November 2018; C. STOUGHTON, *Case Comment: Lee v Ashers Baking Company Ltd & Ors [2018] UKSC 49*, in *UK Supreme Court Blog*, 15 October 2018; G. ZAGO, *Lee v Ashers Baking Company Ltd And Others (Northern Ireland): la discussione sul bilanciamento tra tutela dell'orientamento sessuale e rispetto della libertà religiosa e d'opinione passa dai Muppets*, in *Jus Civile*, 2018, vol. 6, p. 865 ss; See, G. PUPPINCK, *Conscientious Objection and Human Rights: A Systematic Analysis*, Leiden, 2017; A. SCHUSTER, F. GRANDI, R. TONIATTI, *Focus: Coscienza, religione e non discriminazione*, in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, n.1, 2017.

[6] Another significant case has been decided in the United Kingdom in 2013, namely *Bull and another* v. *Hall*, [2013] UKSC 73, concerning a Christian hotel keeper refusing to offer a double-bedded room to a same-sex couple who entered in a civil partnership. In particular, the UK Supreme Court highlighted how "*to permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that*" (para. 37). Another case concerning religious objection to same-sex registered partners has been decided by the European Court of Human Rights in *Eweida et al*. v. *United Kingdom*. In this judgement, the Court upheld a British court decision denying a British civil servant's religious discrimination claim, arising out of the government's requiring that she register same-sex civil partnerships, in spite of her religious objections to doing so. [2013] ECHR 37. See, M. LIM and L. MELLING, *Inconvenience or Indignity - Religious Exemptions to Public Accommodations Laws*, in *Journal of Law and Policy*, vol. 22 n. 2, pp. 705-725; HALE, Baroness of Richmond, *Who guards the guardians*, in *Cambridge Journal of International and Comparative Law*, vol. 3, n. 1, pp.100-110, 2014; D. AMRAM, *Camera matrimoniale solo per coppie etero sposate: il caso Bull v. Hall deciso dalla U.K. Supreme Court*, in *www.articolo29.it*, last retrieved on 18/07/2018.

[7] See, R. T. ANDERSON, *Anderson, Disagreement is not always discrimination: on Masterpiece Cakeshop and the analogy to interracial marriage*, in *The Georgetown Journal of Law and Public Policy*, vol. 16, 213, 2018, pp. 123-145.

[8] J. M. OLESKE, *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, in *Harvard Civil Rights-Civil Liberties Law Review*, vol. 50, 2015, pp. 99-152.

[9] S. COLIVER, *Striking a Balance: Hate speech, Freedom of Expression and Non-discrimination*, University of Essex. Human Rights Centre, 1992, p. 33 ss.

Therefore, it is interesting to investigate the reasons brought by these two schools of thought, in particular to verify whether academic validation of religious exemptions is well grounded in this specific context.

Although almost every western Country prohibits hateful expressions directed at racial, religious, or ethnic group, the United States, by contrast, has developed a strong tradition of free speech that protects even the most offensive forms of expression[10].

In the American society, the First Amendment has always been celebrated as the protector of the most inestimable liberties of all citizens[11]. Freedom of expression is perceived as the foundation of democracy: an area of self-determination where governmental restrictions should be minimized[12].

According to this view, freedom of expression means that any ideas, all kinds of opinions and beliefs may be heard because only the people and not the government shall decide what is true and what is false.

The use of the term '*freedom of expression*' should be preferred over '*freedom of speech*', mainly because this fundamental right is not limited to verbal speech but it also subsumes any act of seeking, receiving and imparting information or ideas of all kinds.

'*Seeking-receiving-imparting*'. Thus, when an individual's freedom of expression is unlawfully restricted, the right of others to receive information and ideas is also violated. Consequently, it is important to consider this right in a dual perspective.

On one hand, no one should be arbitrarily limited or impeded in expressing his or her own thoughts. This is a right belonging to every single individual. On the other hand, freedom of expression also implies a collective right to receive any kind of information and have access to the ideas and beliefs expressed by others.

In its '*individual dimension*', freedom of expression goes further than the theoretical recognition of the right to speak or write. It also includes, and cannot be separated from, the right to use whatever medium is deemed appropriate to pass on ideas and have them reach as wide an audience as possible[13]. This is why "*making a cake*" (or refusing to do so) for a same-sex marriage is a form of expression.

In its '*social dimension*', freedom of expression means to share ideas and information, as well as the right to receive opinions and news from others. For an average citizen, it is just

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[10] In order to analyze the issue of freedom of expression and its possible (legitimate) limitations, a due reference must be given to WALDRON, *The Harm in Hate Speec*h, Harvard University Press, 2012; C. R. SUNSTEIN, *#Republic Divided Democracy in the Age of Social Media*, Princeton Univ Press, 2017; To deepen the analysis considering the American and the French legal systems, *see* G. POGGESCHI. *Ridere e deridere. La satira negli USA ed in Francia fra libertà individuale ed esigenze collettive*, in *www.giurcost.org*, last retrived 17 June 2019.

[11] As underlined by T. Garton Ash, freedom of speech is a prerequisite of any democratic society (STGD: what the author calls "STGD", namely Self, Truth, Government, Democracy). See T. GARTON ASH, *Free Speech: Ten Principles for a Connected World*, Yale Univ Press, 2017, p. 77 ss.

[12] S. VOLTERRA, *Libertà di espressione ed "espressioni odiose" nella società pluralista. I casi degli Usa e del Canada*, in, *Studi Parlamentari e di Politica Costituzionale*, n 134, Roma 2001, pp.75-80, p. 76.

[13] This is essence of the claim made by Phillips, the owner of Masterpiece Cakeshop, when describing his artistic expression as an act deserving First Amendment protection. See, Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017.

as important to know the opinions of others, or to have access to information generally, as it is the right to communicate his own opinions[14]. These two dimensions of the right to freedom of expression should be simultaneously guaranteed[15].

Despite the importance of protecting freedom of expression, several major international human rights declarations, as well as many countries in the western world outlaw certain kinds of racial and religious propaganda[16].

Justification for hate speech legislation includes claims that it might reduce the occurrence of hateful/harming expressions, which might, in turn, reduce or ameliorate hatred, contempt or violence towards specifically identifiable groups.

In opposition to such legislation, defenders of free speech argue that hateful expressions may be more productively countered trough the maintenance of principles ensuring the freest speech possible.

Undeniably, any regulation of hateful expressions comes immediately into conflict with the free speech principle. How is it possible to devise a policy (and thus a legislation) able to frame free speech, and, at the same time, defining hateful expressions precisely enough?

It might seem a paradox, but it is not.

Competing aims can be both realized by defining a proper '*balance*'. A balance between the necessity to restrain interference in the exercise of freedom of expression and the necessity to interfere, in order to prevent or moderate the harms of hateful expressions[17].

Hence, the debate should be focused on the boundaries of free speech.

Yet, there are many borderline cases, in which people who are otherwise genuinely committed to the core aspects of freedom of speech could disagree on its limitations: pornography; racist speech; religiously bigoted expressions; defamation of politicians or private per-

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14 Inter-American Court of Human Rights, *Advisory Opinion OC-5/85 of 13 November 1985*, Series A, No. 5, para. 70.

15 *Ibidem*, para. 71.

16 Indeed, while article 19 of the UDHR reads that "*everyone has the right to freedom of opinion and expression*", article 29, underlines that: "*in the exercise of* […] *rights and freedom*", [individuals are subject to limitations necessary] "*for the purpose of securing due recognition and respect for the rights and freedom of others*".

Article 18 and 19 of the 1966 ICCPR support freedom of speech, but Article 20 goes even further in limiting offensive expressions: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*" (The United States Senate ratified the International Covenant in 1992. attaching a "reservation" on Article 20: " *This article does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United State*s)

The ICERD calls for criminalization of any organization disseminating racial or religious propaganda and for making membership in such organizations a criminal offense.

Trying to achieve a common position concerning on hate speech and freedom of expressions related issues, the Council of Europe on 30 October 1997 at the 607th meeting of the Minister's Deputies has adopted Recommendation no. R (97) 20 in which the Council has expressed a clear position on hateful expressions: "*the principles set out hereafter apply to hate speech, in particular hate speech disseminated through the media. For the purposes of the application of these principles, the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".

17 S. COLIVER, *cit*, p. 20.

sons; incitement to violence; disclosure of military or commercial secrets, advertising of products such as alcohol or cigarettes or of gambling and prostitution[18]. All these examples might be regarded (according to each individual perspective) as requiring major or minor limitations. Even the most ardent civil libertarians are not committed to an unconditional defence of these type of public expressions[19], 'no matter what'.

Public debate in liberal democracies about free speech is usually more concerned with the scope of this freedom than with the issue on whether this right should be protected at all, because this is considered secured.

Legislation limiting free speech has often reached Supreme Courts' scrutiny since it is a matter concerning constitutional guarantees.

The function of courts, in constitutional cases, raises notoriously difficult questions. Free speech litigation is not an exception.

There are several possible approaches in the interpretation of constitutional guarantees.

The literal approach is of some serviceable use in the construction of detailed statutes, but it is of little assistance in elucidating the meaning of freedom of speech provisions, which are framed in broad, and general terms[20].

An alternative approach is to consider what the framers of the constitution intended[21].

Still, this method cannot easily be adopted in this specific context, given that it is rarely clear what the drafters of constitutional provisions intended. In addition, political and social circumstances have changed so radically that it would be absurd to be limited by the particular conceptions of a freedom elaborated by members of a constitutional assembly of other days[22].

However, while scholars may remain unsure on what should be the right approach, judges are required to interpret and define the scope of application of freedom of speech. Courts must decide whether the protection of *hate speech* directed at racial or religious

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[18] W. SADURSKI, *Freedom of Speech and Its Limits*, Springer Netherlands, 1999, p. 1.

[19] *Ibidem*.

[20] According to this theory of statutory interpretation, the interpreter should consider the ordinary meaning of the words composing legal provisions. In doing so, the interpreter is more similar to a reader, i.e. any reference to 'history' or 'socio-political evolutions' is deemed unnecessary since interpretation is strictly linked to the meaning a person could objectively and reasonably attribute to the words of the provision. See, A. BARAK, *Hermeneutics and Constitutional Interpretation*, in M. ROSENFELD (ed.), *Identity, Difference, and Legitimacy, Theoretical perspectives*, Duke University Press, London, 1994, p.253.

[21] In contrast with textualism, 'intentionalism' is a legal theory according to which the interpreter should also consider the legislature's intentions beyond the mere literal transposition of a rule, textualism opposes that it would be unreasonable to conceive a 'genuine collective intent' of representatives, and that considering legislative history as a tool for the interpretation of norms would offend the constitutionally mandated process of bicameralism. See, J.F. MANNING, *Textualism as a Nondelegation Doctrine*, in *Columbia Law Review*, vol. 97, n.3, 1997, pp.674-677. See also, J. F. MANNING, *Textualism and Legislative Intent*, in *Virginia Law Review*, vol. 91, 2005, pp.419-420; E. M. DAVIS, *The Newer Textualism: Justice Alito's statutory interpretation*, in *Harvard Journal of Law & Public Policy*, vol.30, n. 3, 2007, p.988

[22] As R. M. DWORKIN argues: "*constitutional texts should be viewed as embodying general moral and political concepts rather than specifics conceptions*", in *Taking Rights Seriously*, London, Duckworht, 1977, p. 132

groups is required by freedom of expression in the light of crucial moral arguments for the guarantee of that freedom, or alternatively, whether human dignity supports its limitation.

2. No limitations v. limitations: theoretical grounds

Historically the most durable argument for a free speech principle has been based on the importance of open discussion to discover the truth. Truth may be regarded as an autonomous and fundamental good, or its value may be supported by utilitarian considerations concerning the progress and the development of society.

Mill's truth argument put forward different possibilities, dependent on whether the expression at issue is possibly true or it is almost certainly false[23]. Prohibition of the former category of speech is, according to this theory, undesirable because it entails an unwarranted assumption of infallibility on the part of the state.

The traditional Millian justification, developed in the second chapter of '*On Liberty*' was subsequently associated with the "*marketplace of ideas*" slogan, and it is best known through the words of Justice Holmes: "*Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition* [...] *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*.[24]".

The *marketplace of ideas* theory has been enormously influential in the United States[25], and it explains why Courts often mistrust government intervention, even when it is meant to foster free speech[26].

Just as a liberal economists consider it is wrong to interfere with the operation of a free market in goods and services, so in Justice Holmes' view, it is equally undesirable to manipulate the market in ideas. The truth would emerge from a '*free trade in ideas*' or intellectual competition[27].

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[23] I. M. TEN CATE, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defense*, in *Yale Journal of Law and Humanities*, Vol. 22, issue 1, 2013, pp. 35-81, p.37.

[24] 250 U.S. 616, 630 (1919), *Abrams* v. *United States*, (Holmes, dissenting).

[25] An interesting analysis is given by Sunstein; see C. R. SUNSTEIN, *Democracy and the Problem of Free Speech*, New York, The Free Press, 1993.

[26] See, J. BLOCHER, *Institutions in the market place of ideas*, in *Duke Law Journal*, vol. 57, n. 4, 2008, pp. 821-889.

[27] Criticism can be made on the marketplace theory. First, the marketplace is not in practice open to everyone who wants to communicate her/his ideas. Some views are widely disseminated by the media, others hardly figure in public discussion. Differences in the availability of ideas have little to do with their truth. The marketplace

A second major theory of free speech conceives it as an integral aspect of each individual's right to self-development and fulfilment. Restrictions on what we are allowed to say and write, or (on some formulations of the theory) to hear and read, inhibit our personality and its growth[28]. A theory on freedom of speech that might be regarded as an intrinsic, independent good; alternatively, its exercise might be regarded as leading to the development of more reflective and mature individuals, therefore, benefiting society as a whole.

Another argument upheld by those who believe in the free speech principle without prior restraints, concerns citizens' participation in a democracy. This perspective arises from the postulate that everyone – including of course members of minority groups and parties – is entitled to participate in public discourse and debate. As a result, temporary political majorities can be formed[29].

This right is so fundamental that it cannot be surrendered to the powers of the elected majority, and it would be wrong for the majority to suppress the right of minorities to express their dissent.[30]

Thus, defamatory attacks on public officials, *hate speech* and extremist speech challenging the legitimacy of existing institutions must all be tolerated, because the State is not free to determine the boundaries of public discourse[31].

Focusing on the reasons why some legal scholars are persuaded that our society needs to contrast certain kinds of speech, it is of capital importance to verify how the 'act of speech' could be regarded.

Considering that *hate speech* may be conceived as a kind of behaviour some authors challenge the ordinary distinction between speech and conduct. Accordingly, it is necessary to integrate the speech-act theory in order to identify *speech* as a type of conduct.

Although it could be argued that this conception of speech renders expressive activity overly vulnerable to punitive and/or restrictive regulation, it is also true that locating speech policy within a capabilities-oriented approach overcomes this difficulty.

Thinking about what speech is, can help raising the central question on whether, and how, speech may be differentiated from 'acts'.

Historically, in the free speech scholarship, a sharp distinction has been made between speech, or expressive activity, on the one hand, and 'other acts' on the other.

A speech-conduct distinction is implicit in the free speech principle, and also the idea that speech ought to be accorded special immunity from government intervention.

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may not therefore provide a forum for the vigorous public debate that Mill and other proponents of free speech envisage. Finally, the argument assumes that readers and other recipients consider claims made in the marketplace rationally, determining whether their acceptance will lead to a better society or an improved lifestyle. That is surely too optimistic as assumption. See S. INGBER, *The Marketplace of Ideas: A Legitimizing Myth*, in *Duke Law Journal*, 1984, p. 15

[28] See T. CAMPBELL, *Rationales for Freedom of Communication*, in T. CAMPBELL and W. SADURSKI, *Freedom of Communication*, Aldershot, Dartmouth, 1994, p. 33.

[29] D. A. J. RICHARDS, *Free Speech and the Politics of Identity*, New York, 1999, p. 27.

[30] *Ibidem*, p. 24.

[31] *Ibidem*, p. 24.

Bracken argues that the philosophical foundation of the free speech principle lie in Cartesian philosophy, which rest on a mind/body dualism, the idea that the mind and the body are two very different substances, that there is a "*vast difference between them*[32]".

Applying this conceptualization of speech enables it to be conceived as integral to the mind, and separate from acts which are integral to the body. According to this argument, speech is integral to the mind and the mechanics which are capable to explaining bodily motions are incapable of explaining the "*creative aspect of language use*[33]", i.e., the human ability to develop new thoughts and create new meanings within the framework of already instituted and constituted patterns of speech.

These notions of speech have survived into centuries from critiques and endure, indeed dominate, in contemporary contributions to the debate concerning speech policy[34].

Defenders of an absolute free speech principle move, coherently, from asserting that speech can be distinguished from other areas of human conduct and activity and for this reason it cannot be coerced. Thus, to equate the uttering of offensive words with committing an act of violence would be "*falsely and mischievously conflating ideological dissidence with overt acts*[35]".

On the contrary, defenders of *hate speech* laws genuinely believe it is necessary to consider this issue from a different point of view, where speech is contemplated as all other human activities. Therefore, it is necessary to suppose that some limitations should be deemed as essential[36],.

Volterra[37]elaborating on *hate speech* has underlined how it infringes the common '*content neutrality principle*' because *hate speech* refers to situations where some people say something offensive and brutal and others are on the receiving end, without the possibility of answering appropriately[38].

3. Case law on the First Amendment

The First Amendment speaks in clear terms: "*Congress shall make no law* […] *abridging the freedom of speech or of the press*". The Supreme Court's interpretation of these

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[32] See H. M. BRACKEN, *Freedom of Speech: Words Are Not Deeds*, Westport, CN, 1994, p.253.

[33] See N. CHOMSKY, *Language and Mind*, New York, 1968, p. 63.

[34] See K. GELBER, *Speaking Back*, *The free speech versus hate speech debate*, University of South Wales, Amsterdam, 2002, p. 51.

[35] See E. BARENDT, *Free Speech in Australia*: *A Comparative Perspective*, Sydney Law Review, 1994, pp. 149-165.

[36]As Richard Delgado argued: "*it is possible to identify hate speech on the use of certain key-words, arguing that words such as 'nigger' and 'spic' are badges of degradation even when used between friends: these words have no other connotation*". See R. DELGADO, J. STEFANCIC, *Understanding Words That Wound*, Westview Press, New York, NY, 2004, p.24

[37] S. VOLTERRA, *cit.*, pp.75-80.

[38] See S. SHRIFFIN, *Dissent Justice, and the Meaning of America*, Princeton University Press, NJ, 1999 and also R. DELGADO, *Toward A Legal Realist View of the First Amendment*, in *Harvard Law Review*, vol. 113, 2000, p. 778.

guarantees has been both broader and narrower than a literal reading of the Amendment might suggest.

The United States First Amendment jurisprudence shows evidence that a variety of expressive activities have been conceived of as '*speech*'. Nevertheless, it has also upheld the idea that expressive activity can only be considered to be occasionally harmful[39].

Therefore, when an expressive activity creates a discrete and subsequent danger of "*some imminent, non-rebuttable, and very grave secular harm*[40]", it should be considered a harmful act.

In *Chaplinsky* v. *New Hampshire*[41] (1942), the Supreme Court noted that certain categories of speech were not protected by the First Amendment. Among these, there were what Court termed '*fighting words*', i.e., verbal provocations that amount to an invitation to fight and thus their very character pose an immediate threat to public order[42].

In subsequent cases, the Court construed '*fighting words*' narrowly.

Indeed, it is not enough for a speech to be offensive, or an invitation to dispute, or to provoke hostility. Only face to face personal insults enjoy no First Amendment protection.

In *Kunz* v. *New York*[43] (1951), Justice Robert Jackson noted that *"the vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests*[44]".

Conduct, as well as speech, can promote the ends of the First Amendment.

Demonstrations and picketing, by combining conduct with speech, often can be more effective than speech alone. Even conduct without speech (e.g. the denial to salute the flag, or the refusal to produce a wedding cake for a same-sex marriage) can be an eloquent form of expression. Accordingly, the Court has long recognized that symbolic expression is entitled to some First Amendment protection.

On the other hand, the Court has never ruled that mere presence of a communicative element immunizes conduct from regulation.

In each case, the Court must balance the claims of free expression against the pursuit of other governmental objectives.

Freedom of speech includes not only the right to express one's views but also the right not to be compelled to affirm beliefs that one does not share[45].

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[39] See D. RICHARDS, *Free Speech as Toleration*, in Free *Expression: Essays in Law and Philosophy*, Clarendon Press, Oxford, 1994, pp. 31-58.

[40] 249 U.S. 47 (1919), *Schenk* v. *United States*.

[41] 315 U.S. 568 (1942), *Chaplinsky* v. *New Hampshire*.

[42] The starting point in establishing when a speech is outlawed because it contains "fighting words" can thus refer to considerations of public order instead of other important interests that a society has to consider (as human dignity and the protection of minorities from discrimination) in order to live peacefully.

[43] 307 U.S. 290 (1951), *Kunz* v. *New York*.

[44] Those who opposed the Sedition Act on First Amendment grounds did not necessarily believe that prosecution for seditious libel was inconsistent with democratic government; the First Amendment imposed limitations only on Congress, and state legislatures remained free to punish the crime. See W. BERNS, *The First Amendment and the Future of American Democracy*, New York, Basic Books, 1977.

[45] However, in *Board of Regents of the University of Wisconsin* v. *Southworth* (2000), the Court ruled that students were not compelled to affirm views they disagreed with when they were required to pay a student

Thus, in *West Virginia Board of Education* v. *Barnette*[46] (1943), the Supreme Court held that Jehovah's Witness schoolchildren could not be required to salute the American flag, and in *Wooley* v. *Maynard*[47] (1977), it ruled that New Hampshire could not penalize residents who covered the slogan '*Live Free or Die*' on their license plates.

Religious convictions served in *Barnette* to exclude coercion: "*If there is any fixed star in our constitutional constellation, it is that no official, high or pretty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*[48]".

The Supreme Court has acknowledged that the First Amendment protects the right to join together with others to communicate one's view (what might be called a *right of expressive association*)[49].

However, government may have valid reasons unrelated to the suppression of speech, such as preventing discrimination, for regulating the membership policies of organizations.

The Supreme Court has confronted these competing concerns in three cases: *Roberts* v. *United States Jaycees*[50] (1984), *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*[51] (GLIB) (1995), and *Boy Scouts of America* v. *Dale*[52] (2000).

In *Roberts*, the Court ruled that Minnesota could compel the Jaycees, an all-male organization, to admit women as members. Although the Jaycees claimed that this invaded their rights of freedom of speech and association, the Supreme Court noted that they had failed to show that the admission of women would impose any serious burden on the organization's ability to convey its views and values.

Nevertheless, in *Hurley*, the Court unanimously upheld the right of the organization sponsoring Boston's St. Patrick's Day Parade to refuse to include a group of gay, lesbian, and bisexual marchers in the parade.

According to the Court "*The parade's overall message is distilled from the individual presentations along the way*" […] *and each unit's expression is perceived by spectators as a part of the whole* [thus], *requiring the inclusion of GLIB would alter the expression of the parade organizers and compel them to convey a message that they disapproved*[53]".

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fee used to support student organizations that took positions on controversial issues. Even if *Southworth*'s fees helped subsidize speech that he found objectionable, the held, the University's program of promoting extracurricular speech did not violate his First Amendment rights as long as its funding of student organizations was viewpoint-neutral, that is, as long as it was not based on the content of the opinions they were expressing

[46] 319 U.S. 624 (1943), *West Virginia Board of Education* v. *Barnette*.

[47] 430 U.S. 705 (1977), *Wooley* v. *Maynard*.

[48] 319 U.S. 624 (1943), *West Virginia Board of Education* v. *Barnette,* Justice Jackson, at 642.

[49] D. E. BERNSTEIN, *Expressive Association after Dale*, in *George Mason University School of Law*, 2005, working paper 33, p. 2; J. MAZZONE, *Freedom's Associations*, in *Washington Law Review*, vol. 77, 2002, p. 639; D. A. FARBER, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, in *Minnesota Law Review*, vol. 85, 2001 p. 1482.

[50] 468 U.S. 609 (1984), *Roberts* v. *United States Jaycees.*

[51] 515 U.S. 557 (1995), *Hurley* v. *Irish-American Gay Lesbian and Bisexual Group of Boston*.

[52] 530 U.S. 640 (2000), *Boy Scouts of America* v. *Dale*.

[53] 515 U.S. 557, (1995), *Hurley* v. *Irish-American Gay*, *Lesbian and Bisexual Group of Boston*, at 577.

Finally, in *Dale* a closely divided Court upheld the right of the Boy Scouts to exclude homosexuals from membership. Justices agreed on the applicable standard: "*The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints*[54]". However, Justices disagree on its application, disputing whether homosexual conduct was in fact inconsistent with the values that the Boy Scouts proclaimed and sought to instill.

In *United States* v. *O'Brien* (1986), the Court upheld O'Brien's conviction for burning his draft card to protest the Vietnam War.

Speaking for the Court, Chief Justice Earl Warren proposed a four-part test for determining when a government interest permits the regulation of expressive conduct[55]:

a) it should be within the constitutional power of the Government;

b) if should further an important or substantial governmental interest;

c) the governmental interest should be unrelated to the suppression of free expression;

d) *the incidental restriction of alleged First Amendment freedoms must not be greater than it is essential to the pursue of that interest*.

Therefore, government can regulate the non-speech element to achieve valid governmental ends[56].

The issue of what kind of expression is unprotected by the First Amendment has also arisen due to campus restrictions on racist and sexist expression.

One example is represented by the University of Michigan policy during the 80s. It prohibited "*any behavior, verbal, or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin ancestry, age, marital status, handicap or Vietnam-era veteran status*[57].

3.1. The issue at stake and the speech codes

The primary *rationale* underlying the speech codes was a revived version of the old '*fighting words doctrine*'. Although the 1942 *Chaplinsky* decision had not been formally reversed by the mid-1980s, its scope had been drastically narrowed by a series of decisions.

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[54] 530 U.S. 640, (2000), *Boy Scouts of America* v. *Dale*.

[55] 391 U.S. 367, (1968), *United States* v. *O'Brien*, at 337.

[56] A governmental regulation, to be valid, must be *viewpoint-neutral*, i.e., it must not regulate conduct as a means of restricting the expression of particular ideas. This requirement was decisive in *Texas* v. *Johnson* (1989), in which a sharply divided Court struck down the conviction of a political protestor who had violated Texas's flag-desecration statute by burning the American flag. According to the five-member majority, the flaw in the Texas law was that it permitted the use of the flag to show support for the nation and its institutions but prohibited its use to register dissent. Thus, because the ban on flag desecration was not viewpoint-neutral, it violated the First Amendment. 491 U.S. 397 (1989), *Texas* v. *Johnson*.

[57] 721 F. Supp. 852 (E.D. Mich. 1989), *Doe* v. *University of Michigan*,.

The speech code advocates attempted to breathe new life into the '*fighting words doctrine*' by reviving Justice Murphy's two-tiered analysis of the First Amendment[58]. As a number of scholars pointed out, American law was far less 'absolutist' on the First Amendment than civil libertarians were willing to admit. There were many forms of speech or expression that did not enjoy constitutional protection: bribery, fraud, criminal conspiracy, and some forms of libel[59].

One approach viewed *hate speech* as a form of assault. Delgado led the way on this point with a widely cited article arguing for encompassing *hate speech* within the tort of infliction of emotional distress[60].

Others went even further, arguing that racist speech was not really '*speech*' at all: it was not the expression of an idea, entitled to First Amendment protection, but an assault.

Lawrence argued that "*the invective is experienced as a blow, not as proffered idea. It is designed to end discussion, not initiate it; assaultive racist speech functions as a preemptive strike; once the blow is struck, a dialogue is unlikely to follow*[61]".

In an admittedly content-based distinction, Lawrence and others singled out racist speech as a special evil: "*Racist speech inflicts real harm, and* […] *this harm is far from trivial*[62]".

The harm is immediate and personal[63].

Hate speech assaults the dignity of the individual and causes feelings of inferiority and unworthiness[64].

The so called *campus hate speech codes* provoked an immediate response from the aclu (American Civil Liberties Union) and other free speech advocates[65].

Many saw the codes as the most serious threat to freedom of expression and to academic freedom since the worst years of the Cold War.

However, at the very beginning, the aclu was not entirely of one mind on this issue. A significant minority within the organization supported some limited measures to restrict racist speech on campus[66].

Fourteenth Amendment considerations weighed heavily on the minds of many members. The aclu had a strong organizational commitment to racial equality[67].

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[58] S. WALKER, *Hate Speech: The History of an American Controversy*, University of Nebraska Press, 1994, p. 137.

[59] K. GREENAWALT, *Speech, Crime, and the Uses of Language*, New York, Oxford University Press, 1989, p. 53.

[60] R. DELGADO, *Words That Wound*. See also the reply by MARJORIE HEINS, *Banning Words*: *A Comment on Words That Wound, Harvard Civil Rights*, Civil Liberties Law Review 18, 1983, pp. 583-592

[61] C. LAWRENCE, *If He Hollers Let Him Go*: *Regulating Racist Speech on Campus*, in *Duke Law School Journal*, vol. 431, 1990, p. 67.

[62] C.R. LAWRENCE III, *Acknowledging the Victim's Cry*, Academe, 1990, p.10.

[63] S. COLIVER, *cit.*, p. 23.

[64] D. KRETZMER, *Freedom of Speech and Racism*, Cardozo Law Review, 1987, pp. 445-513.

[65] See also R. M. O'NEIL, founding Director of the Thomas Jefferson Center for the Protection of Free Expression, and Professors of Law at University of Virginia, in *Point of View, The Chronicle of Higher Education*, University of Virginia Press, 1994, p. 52.

[66] S. WALKER, *cit.,* 1994, p. 91.

On April 1988, at Michigan University, the *Policy on Discrimination and Discriminatory Harassment of Students in the University Environment* prohibited any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. This included any express or implied threat to an individual's academic efforts, employment, and participation in University sponsored extra-curricular or personal safety.

A second section, with nearly identical wording, prohibited sexual advances, requests for sexual favors, or other stigmatizing behavior based on gender or sexual orientation.

There were two main aspects of this policy that immediately created alarm among civil libertarians.

First, it did not explicitly require that an offensive expression was directed at an individual. Second, it did not specifically exempt classroom situations.

In fall 1989, the University Office of Affirmative Action published an interpretative guide (*What Students Should Know about Discriminatory Harassment by Students in the University Environment*).

The policy was challenged by a graduate student in biopsychology who argued that it infringed on his freedom to teach[68].

On September 22, 1989, the federal district Court declared the policy unconstitutional on grounds of vagueness and over-breadth.

The first issue confronting the Court was whether the policy applied to classroom discussion. It found ample evidence in both the legislative history and its application showing that it did. It cited three instances where students had been disciplined or threatened with discipline under the policy for comments in class[69].

The ACLU's argument that the policy was unconstitutionally vague was accepted. The conclusion was that there was no consistency between the legislative histories of the policy, the record of its administration, and the interpretation offered in Court.

Citing the withdrawal of the explanatory guide and the "eleventh hour" suspension of the section on hostile environment, it was stated that: "*the University had no idea what the limits of the Policy were and* […] *was essentially making up the rules as it went along… several possible remedies for discriminatory and harassing behavior were available to the University* […] *what it could not do, and what this policy did, however, was not to prohibit certain speech because it disagreed with ideas or messages sought to be conveyed*[70]".

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[67] S. WALKER, *In Defense of American Liberties: A History of the ACLU*, New York, Oxford University Press, 1990. The record is also summarized by future ACLU president NADINE STROSSEN in *Regulating Racist Speech on Campus: A Modest Proposal*?, in *Duke Law Journal*, vol. 1990, pp. 551-553.

[68] According to the claimant, some of the theories, related to biologically based differences between races and genders could have prompted in class discussion that would have been perceived as violating the policy. The Michigan ACLU affiliate agreed to take the case.

[69] *Doe* v. *University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

[70] *Ibidem*.

Two years later, a federal district Court in Wisconsin ruled that the University of Wisconsin code, again, violated the First Amendment.

The *Policy and Guidelines on Racist and Discriminatory Conduct* covered racist or discriminatory comments, epithets or other expressive behavior directed at an individual, where those comments, demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals, or create an intimidating, hostile or demeaning environment for education, or other university-related activities.

The Wisconsin policy was much clearer and more narrowly drafted than Michigan's in several respects, and thus, more likely to survive a First Amendment challenge.

First, it explicitly applied only to direct attacks on an individual. Second, the policy itself included illustrative examples, i.e., calling someone an offensive name, placing demeaning material in someone's living quarters or workplace, destroying property, and so forth.

Most important, it exempted classroom situations. i.e., a student would have not been in violation of the code if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group.

The University of Wisconsin also published an explanatory pamphlet with additional examples. This included two classroom situations. In one, a male student expresses the view that women were 'by nature better equipped to be a mother and should not be employed in upper-level management positions'. The university's brochure explained that this was not covered by the policy because it involved an expression of opinion, contains no epithets, and was not directed to a particular individual[71].

In an other example, a faculty member stated that certain ethnic groups seemed to be genetically predisposed to alcoholism. This was also not covered because the policy did not apply to faculty members.

Thus, Wisconsin students had a much clearer picture of what kinds of behavior were forbidden and which were not.

Nevertheless, the Federal district Court found the University of Wisconsin policy unconstitutional[72].

The Court rejected the university's argument that the policy properly covered only '*fighting words*' as defined in *Chaplinsky*.

The Court also rejected the university's arguments based on the two most important new rationales for prohibiting *hate speech*. It rejected the argument that the University had a compelling interest under the Fourteenth Amendment in increasing the diversity of the student body, noting that the university had offered no evidence that it previously was not providing education on equal terms.

Finally, the University's policy was found to be unconstitutionally vague. It was not clear whether it was sufficient for the offending speaker to merely intend to demean the listener (without necessarily accomplishing that end) or whether the words had to actually do

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[71] S. WALKER, *cit.,* 1994, p. 55.
[72] 774 F. Supp. 1163 (E.D. Wis. 1991), *UWM Post* v. *Board of Regents of the University of Wisconsin.*

so. Along the lines of the decision in the *Michigan* case, the Court cited the inconsistency between the language of the rule and the cases adjudicated to date.

The *Michigan* and *Wisconsin* decisions appeared to doom most of the remaining campus speech codes.

Two federal district Courts had reaffirmed the principle of uninhibited free speech, without content-based restriction.

Moreover, they had rejected the new arguments that the prohibition of racist speech was necessary to fulfill the mandate of the Fourteenth Amendment.

3.2. Hate speech/crime legislation

The St. Paul cross-burning case arose in response to the same rise in racist acts that spawned the campus speech codes[73].

The St. Paul Bias-Motivated Crimes Ordinance read: "*all behavior on public or private property or symbol, or object, or appellation or graffiti that arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender is unlawful*". The ordinance specifically mentioned "*a burning cross or Nazi swastika*" as examples of such symbols or objects.

The law extended very broadly, covering the mere display of symbols, with no requirement that they be directed toward a specific individual, be intended to harass that person, or be likely to incite a breach of the peace. The prohibition of displays on private property clearly limited what people could do in their own front yards[74].

There was considerable uncertainty among court watchers about how the Justices would rule. This was not the Warren Court, with its commitment to uninhibited speech.

The Burger and Rehnquist Courts had found sufficient justification to limit First Amendment rights in a number of special contexts: high school newspapers, the military, and prisons[75].

In these situations the Court had been willing to defer to the expressed needs of administrative officials. On the other hand, it had sustained free speech rights in some cases

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[73] S. WALKER, *cit.,* 1994, p. 36.

[74] Nine months before the oral argument, Los Angeles police officers had savagely beaten King, a black man. A videotape of the beating was broadcast innumerable times, offering unprecedented visual evidence of a seemingly unnecessary act of policy brutality. The decision in the cross-burning case came a month after the acquittal of four police officers accused in the beating. The verdict sparked one of the worst riots in American history.For black Americans, the verdict compounded the message of the original King beating: that they could expect no justice in the American legal system. A Supreme Court decision overturning the cross-burning conviction, coming on the heels of the two campus speech code decisions, could reinforce that perception. S. WALKER, *cit.,* 1994, p. 77.

[75] See HERMAN SCHWARTZ, *The Burger Years: Rights and Wrongs in the Supreme Court*, ed. Viking, New York, 1987; also, DAVID SAVAGE, *Turning Right: The Making of the Rehnquist Supreme Court*, ed. Wiley, New York, 1992.

concerning very offensive forms of expression that involved public speech about public figures or issues[76]. Most relevant were the two flag-burning cases of 1990 and 1991.

The crucial factor in those decisions was that Justice Scalia and Kennedy, two of the most conservative members of the Court, had agreed that flag burning[77] was a protected form of expression under the First Amendment.

In addition, in *Hustler*[78], the Court had overturned a libel awarded against Hustler magazine for a parody attacking Moral Majority leader Rev. Jerry Falwell. The parody was grossly obscene or hilariously funny, depending on one's political perspective. Offensive or not, the Court had ruled that it was fair comment on a public figure[79].

The St. Paul case itself involved a relatively low level of violence. A group of teenagers, including Robert Viktora, put together a crudely made cross and burned it on the front lawn of a black family who lived across the street.

There was no mistaking the meaning of the burning cross, the traditional symbol of the Ku Klux Klan. It was a racist event, and in the context of similar events across the country, the matter had to be taken seriously.

Viktora was charged in Juvenile Court under the Bias-Motivated Crimes Ordinance. Because he was a juvenile at the time of the original action, he was referred to as *R.A.V*[80].

In what many regarded as a surprising decision, the Supreme Court declared the St. Paul ordinance unconstitutional.

The law represented a prohibition on expression based on its content and, Justice Scalia wrote: "*that is precisely what the First Amendment forbids*[81]".

The decision was unanimous, but the Justices disagreed sharply over the rationale. The most surprising aspect of the division of opinion was that the more conservative Justices were in the majority, striking down the ordinance on broader grounds than the more moderate Justices[82]. Scalia, widely regarded as the most conservative of all, wrote the majority opinion.

The St. Paul ordinance was unconstitutional on its face because it prohibited only certain kinds of speech based on their content. It covered *fighting words* related to race, color, creed, or gender but not similar words related to, for example, political affiliation, union membership, or homosexuality.

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[76] In the *New York Times Co*. v. *Sullivan* 376 U.S. 254 (1964) case the Supreme Court decided that proof of malice was required for articles dealing with the official conduct of an elected official.

[77] 496 U.S. 310 (1990), *United States* v. *Eichman*; 491 U.S. 397 (1989) *Texas* v. *Johnson*.

[78] 485 U.S. 46 (1988), *Hustler* v. *Falwell.*

[79] In *Hustler,* Justices affirmed: "…*The fact that a society may find speech offensive is not a sufficient reason for suppressing it*…". See, R. SMOLLA, *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*, St. Martin Press, New York, 1988.

[80] 505 U.S. 377 (1992), *R.A.V*. v. *St. Paul*.

[81] 505 U.S. 377 (1992), *R.A.V*. v. *St. Paul,* Justice Scalia delivering the opinion of the Court*,* Part I-A.

[82] See, G. POGGESCHI. *Ridere e deridere, cit*, p. 177 ss.

Even worse, Scalia argued, the ordinance discriminated among particular viewpoints[83]. The advocate of racial or religious tolerance could use many forms of invective, but that speaker's opponent could not.

Four Justices agreed that the ordinance was unconstitutional, but for different reasons. Justice White, O'Connor, Blackmum, and Stevens were generally regarded as the more moderate members of the Rehnquist Court. They argued that the law was unconstitutional because of its breadth. This particular ordinance went too far, they argued, but a prohibition on fighting words that did not involve the exchange of ideas and were used only to provoke violence or to inflict injury was compatible with the First Amendment[84].

There was a surprising reversal of roles in this split.

The more conservative Justices offered the most sweeping, doctrinaire defense of free speech. The moderates, who wanted to preserve some limited basis for restricting hate speech, criticized this approach as arid, doctrinaire and mischievous.

From the prospective of the history of the *hate speech* issue, *R.A.V*. v. *St. Paul* did not mark the end of an era. Rather, it reaffirmed an American tradition that had developed over the previous half century.

On the issue of *hate speech*, that tradition afforded broad First Amendment protection for offensive and even hateful forms of expression.

The depth and strength of that tradition were dramatized in that a unanimous Supreme Court struck down the St. Paul ordinance.

The *Mitchell*[85] case has been a second opportunity for the Supreme Court to face hate crime laws in order to frame their constitutionality on the light of the First Amendment.

This case regarded Todd Mitchell, who was alleged to have beaten a white youth. The normal limit for this crime was two years imprisonment, but the maximum sentence was raised to four years because *Mitchell*[86] had selected his target based on race.

In a jury trial in the Circuit Court for Kenosha Country, *Mitchell* was convicted of aggravated battery. The Wisconsin statute allowed such an increase whenever it was shown that the defendant, "[…] *intentionally selects the person against whom the crime* […] *is committed* […] *because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person*[87]".

Mitchell appealed the decision of the Wisconsin Circuit Court, alleging that the Wisconsin statute unconstitutionally infringed his right on the light of the First Amendment.

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[83] *Ibidem*.

[84] 505 U.S. 377 (1992), *R.A.V*. v. *St. Paul,* Justice White, with whom Justice Blackmun and Justice O'Connor join, and with whom Justice Stevens joins except as to Part I-A, concurring in the judgment.

[85] 508 U.S. 47 (1993), *Wisconsin* v. *Mitchell*.

[86] The respondent, Todd Mitchell, was with a group of other black individuals in an apartment complex in Kenosha, Wisconsin. Members of this group were discussing the film *Mississippi Burning*; in particular, a scene in which a white man beat a young black boy who was praying. The group moved outside the apartment complex, and, according to briefs filed in lower courts, Mitchell asked the group, "Do you all feel hyped up to move on some white people?" After this, Mitchell noticed a young white boy on the opposite side of the street. At this point, Mitchell and the group approached the white youth, beat him severely, and stole his shoes; the beating rendered the boy unconscious, and he was comatose for four days. *Wisconsin* v. *Mitchell* (92-515), 508 U.S. 47 (1993).

[87] Wisconsin Statute, 939.645*, Penalty: crimes committed against certain people or property.*

The Wisconsin Court of Appeals rejected the appeal but the Wisconsin Supreme Court reversed the decision and, relying primarily on *R.A.V.*, held that the enhancement violated the First Amendment and thus was unconstitutional.

The United States Supreme Court in a unanimous opinion authored by the Chief Justice reached the opposite conclusion and therefore reversed the lower court, holding that enhancement did not violate the First Amendment.

Relying upon authority from several lines of precedent, the Court reasoned that the use of evidence of motive is and has long been constitutionally allowed in various fields, including the determination if the proper sentence for criminal conduct[88].

As it clearly appears, the Court this time didn't adopt content neutral analysis, indeed, it moved forward from the *R.A.V.* decision that struck down St. Paul's ordinance few years before.

It would appear that the reasoning of *R.A.V*. compels the conclusion that the First Amendment forbids this form of viewpoint discrimination[89].

There can be no doubts that the statutes under consideration in both cases were in fact content-based, but the Court, in *Mitchell*, instead of reaffirming its precedent opinion, has preferred to bypass the problem.

As Size and Britton have argued, a possible simple answer is that Mitchell is not a speech case at all[90].

Justices of the Supreme Court seem to distinguish their decision properly on this point: while in *R.A.V.* limitations on free speech infringed the First Amendment by proscribing a class of fighting words deemed particularly serious by the city, "*that contain… messages of 'bias motivated' hatred*[91]…", in *Mitchell*, the Wisconsin statute enhanced punishment for actions carried out on the basis of racial ideologies pursuing and enhancing only the actions and not the expressions[92].

Mitchell and R.A.V were actually both expressive conduct cases.

Nevertheless, by comparing them, it can be seen that the most important inquiry – whenever a First Amendment case has been identified as involving expressive conduct – is whether the government legislation under scrutiny is directed at the expressive component of the conduct.

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[88] 508 U.S. 47 (1993), *Wisconsin* v. *Mitchell*.

[89] See R. R. RIGGS, *Punishing the Politically Incorrect Offender Through "Bias Motive" Enhancement: Compelling Necessity or First Amendment Folly?*, in *Ohio Northern University Law Review*, vol. 21, 1995, p. 945.

[90] See G.. SIZE and G. R. BRITTON, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, in *Ohio Northern University Law Review*, vol. 21, 1995, p.929.

[91] *R.A.V*. v. *St Paul*, 505 U.S. 377, (1992).

[92] As Justices argued, "[…] *Moreover, the Wisconsin statute singles out for enhancement bias inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest* […] *The State's desire to redress these perceived harms provides an adequate explanation for its penalty enhancement provision over and above mere disagreement with offenders' beliefs or biases*". 508 U.S. 47 (1993), *Wisconsin* v. *Mitchell*.

Following the Court's reasoning, in *Mitchell*, the legislation under attack was a general law regulating the non-expressive component of conduct and the restriction on free expression was only incidental.

Wisconsin enacted a statute which enhanced the maximum penalty for a criminal offense whenever the defendant intentionally selects the person against whom the crime is committed basing this choice on racist ideology.

Thus, following this deduction there wasn't a challenge to the First Amendment although it is impossible to say that hate crime laws don't express a point of view.

Justice Rehnquist wrote for the Court: "[…] *But the fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by discriminatory point of view more severely than the same conduct engaged in for some other reason of for no reason at all* […][93]."

In *Mitchell,* after the *R.A.V*. case, the United States Supreme Court has shown to have a contradictory position on First Amendment guarantees. A disputable distinction between speech and conduct, though *hate speech* is often the '*conduct phase*' just before the action against the victim chosen because of his/her status.

3.3. Masterpiece

When Craig and Mullins married in Massachusetts, Colorado did not yet legally recognized their same-sex marriage. Indeed, their wedding was prior to the ruling *Obergefel et all v. Hodges*[94], legalizing gay marriage[95].

Nevertheless, the couple decided to celebrate their union and asked Phillips – the owner of Masterpiece Cakeshop, a bakery in Lakewood, Colorado – to produce a wedding cake[96].

The owner immediately refused to make the couple a custom wedding cake, arguing he felt that according to his religious belief this was not acceptable[97].

He justified himself by affirming that producing cake was his 'art' through which he honored God[98].

Thus, Craig and Mullins consequently filed a charge of discrimination with the Colorado Civil Rights Division, the administrative agency, which is responsible for enforcing the

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[93] *Mitchell* v. *Wisconsin,* 508 U.S. 47, (1993).

[94] 576 U.S. ___ (2015), *Obergefell et all* v. *Hodges.*

[95] M. MCLEAN QUICK, *Masterpieces or Simply Wedding Cakes? Exploring the Boundaries of Freedom of Speech through United States Supreme Court Case Masterpiece Cakeshop v. Colorado Civil Rights Commission*, in *University of New Hampshire Scholars' Repository*, 2018, p. 7.

[96] Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop* v. Colorado Civil Rights Commission. Roberts Court. August 31, 2017, at. 8.

[97] *Ibidem*.

[98] *Ibidem*.

State's antidiscrimination laws[99] across a multitude of sectors, including public accommodation[100].

The Colorado Civil Rights Division clearly decided in favor of the applicants, by issuing a formal complaint and notice of hearing[101]. The administrative Judge ruled against Phillips, rejecting his free speech argument, but it recognized that the First Amendment applies to '*nonverbal mediums of expression such as art*[102]'.

Therefore, Masterpiece Cakeshop appealed to the Colorado Civil Rights Commission, which was (is) in charge of reviewing Colorado Civil Rights Division' cases.

The Commission reached the same conclusion of the Office of Administrative Court, ordering Masterpiece Cakeshop to produce custom wedding cake for both homosexual and heterosexual celebrations[103]. The Commission also ordered all Masterpiece Cakeshop employees to undergo CADA compliance training.

In addition, the Commission ordered Phillips to submit quarterly compliance reports for two years[104].

In *Masterpiece*[105], the Supreme Court has accurately avoided to engage with the limits of free speech[106]. As underlined by Sperti, the Supreme Court has engaged the case using a *minimalist* approach[107].

Justice Kennedy, delivering the opinion of the Court has underlined how this case has presented "*difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment*[108]".

In this case, the balance between freedom of expression and freedom of religion was at stake, thus the Court was expected to engage with the limits of these fundamental free-

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[99] The Colorado's Anti Discrimination Act (CADA) reads: "*It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of a disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation*."

[100] The charge claimed that Jack Phillips had violated the public accommodations provision of Colorado's Anti-Discrimination Act because his refusal to make them a custom wedding cake constituted discrimination on the basis of sexual-orientation. Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*. Roberts Court. August 31, 2017, at 11.

[101] In Colorado, such hearings are conducted by the Colorado Office of Administrative Courts (OAC) before an administrative law judge.

[102] Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*. Roberts Court. August 31, 2017, at 11.

[103] Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*. Roberts Court. August 31, 2017, at 12.

[104] Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*. Roberts Court. August 31, 2017, at 13.

[105] 584 U.S. ___ 2018, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*.

[106] A. SPERTI, *Libertà religiosa e divieto di discriminazione: la Corte Suprema decide a favore del pasticciere "obiettore*", in *www.articolo29.it*, 2018.

[107] A. SPERTI, cit., 2019, p. 7.

[108] 584 U.S. ___ 2018, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission,* Justice Kennedy, delivering the opinion of the Court, p. 2.

doms, considering the CADA, i.e. a Statute forbidding discrimination, also on the ground of sexual orientation.

Instead, the Supreme Court has preferred not to deep in this specific aspect – *i.e. the admissibility of religious exemption in the context of sexual orientation* – focusing *only* on procedural aspects.

According to Court, "*the neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection*[109]".

Furthermore, the Court considered unequal the treatment reserved by the Colorado Court of Appeal to Phillips, considering that no condemn was issue to other three bakeries who declined to make cakes objecting that the product would literally displaying an offending message on the cake.

In other words, the Colorado's Anti Discrimination Act has not been investigated in order to evaluate whether it furthered an important or substantial governmental interest[110], or whether the incidental restriction of alleged First Amendment freedoms was not greater than it is essential to the pursue that interest[111].

By focusing only on procedural aspects – i.e. the supposedly non-neutral behavior of some members of the Colorado Civil Right Commission while hearing the case – the Court has not clarified whether religious exemption could be allowed or not in future case[112].

In addition, considering cases involving "displayed offensive message on the cake" the same as cases regarding the refusal to produce a wedding cake, the Court has failed to acknowledge a deep difference in terms of discriminating behaviors.

Indeed, "[T]*here was no evidence that [other] bakeries based their decisions on religion* [whereas Phillips] *discriminated on the basis of sexual orientation*[113]."

As suggested by Winkler, "*while the Court clearly affirmed that religious freedom deserves protection, it remains disputable that this freedom comes with the freedom to discriminate based on the customer's sexual orientation*[114]".

4. Concluding remarks

The Supreme Court has always been seriously committed to the protection of First Amendment guarantees.

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[109] 584 U.S. ___ 2018, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission,* Justice Kennedy, delivering the opinion of the Court, p. 12.

[110] 391 U.S. 367, (1968), *United States* v. *O'Brien*.

[111] 391 U.S. 367, (1968), *United States* v. *O'Brien.*

[112] A. SPERTI, *cit.,* 2018.

[113] 584 U.S. ___ 2018, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission,* Justice Ginsburg and Sotomayor dissenting opinion, p. 8.

[114] M.M. WINKLER, *What's in a cake?, cit*., 2018, p.1239.

If, on one hand, in *Chaplinsky* v. *New Hampshire*[115] the Court established there were certain words, i.e. '*fighting words*', not deserving First Amendment shelter, on the other, Justices have rarely adopted the '*fighting words*' approach to condemn or restrict *hate speech* or hateful expression, in subsequent cases.

The Court has repeatedly upheld that it is not enough for speech to be offensive, or invite to dispute or provoke hostility.

Only face-to-face personal insults enjoy no First Amendment protection.

Therefore, judgements regarding the campus speech codes, have denied that limitations on racist expressions were a proper remedy to improve peaceful cohabitation o different cultures.

In *R.A.V*. v. *City of St. Paul*[116] the Court declared the St. Paul ordinance (prohibiting racist behaviours) unconstitutional because the law represented a prohibition of freedom of expression based on its contents (not on a specific a precise conduct), and because it prohibited only certain kind of speech, i.e., the St. Paul ordinance was unconstitutional only because it was not based on a plurality of viewpoints[117].

Justices have shown not to be akin on the idea of limiting the free speech principle in order to protect potential victims of *hate speech*, or discriminating behaviour (such as refusing to provide a wedding cake to a same-sex couple).

Nevertheless, Justices should consider '*all the tools of racism*' before approaching cases involving discrimination[118].

In *Masterpiece*, the Court has left the 'door open'. It has not provided a clear answer concerning the limits on freedom of (*artistic*) expression, and the limits on the possibility to claim religious exemptions when providing public services to a specific social group.

Nevertheless, by arguing that "*That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all*[119]", the position of perpetrators of discrimination and victims is equalized, in the light of neutrality.

If State legislation is neutral when facing discrimination, the outcome it is not neutral.

As suggested by Poggeschi, how can a democratic system tolerate those who do not tolerate tolerance[120]? Is this possible without compromising the rights of minorities, (in the present case, sexual minorities)? We might not just rely on the *free market of ideas*, consid-

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[115] *Chaplinsky* v. *New Hampshire* 315 U.S 568 (1942).

[116] *R.A.V*. v. *St. Paul*, 505 U.S. 377 (1992).

[117] See M. H. FREEDMAN, *Group Defamation and Freedom of Speech, The Relation Between Language and Violence*, Greenwood Press, New York, 1995, p. 263.

[118] M MATSUDA, *Public Response to Racist Speech*: *Considering the Victim's Story*, Michigan Law Review, vol. 87, 1989, p. 2334.

[119] 584 U.S. ___ 2018, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, Justice Gorsuch concurring opinion, p. 2.

[120] G. POGGESCHI. *Ridere e deridere*, *cit.*, p. 206.

ering that when there are no rules, the stronger (the majority) will always prevail or even oppress minorities[121].

If the one emphasizes neutrality – *stressing it too far* – in cases involving discrimination, neutrality itself vanishes.

[121] C. R. SUNSTEIN, *Democracy and the Problem of Free Speech*, *cit*., xvii.