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CONSTITUTIONAL LAW AROUND THE GLOBE: FUNDAMENTAL RIGHTS, THE FREEDOM OF SPEECH AND HATE SPEECH IN THE UNITED STATES

DIREITO CONSTITUCIONAL AO REDOR DO GLOBO: DIREITOS FUNDAMENTAIS, LIBERDADE DE EXPRESSÃO E DISCURSO DE ÓDIO NOS ESTADOS UNIDOS

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Abstract

This paper exploring the Freedom of Speech in the United States Constitutional Law is part of the series “Constitutional Law Around the Globe”. This chapter of the series focuses on “Fundamental Rights and Freedom of Speech” in contemporary democracies. First in the row, this paper analyzes the Freedom of Speech in the First Amendment to the United States Constitution and how it has been shaped by the Supreme and lower courts over time, especially on the so-called hate speech. A final paper will approach the legal systems composing the series in a comparative perspective. The *methodology* used is consultation of references (books, papers and judicial decisions).
Keywords: Constitution of the United States; First Amendment; Fundamental Rights; Freedom of Speech; United States Supreme Court.

Resumo

Este artigo, analisando a Liberdade de Expressão no Direito Constitucional dos Estados Unidos, faz parte da série “Direito Constitucional ao Redor do Globo”. Esta parte da série tem por foco “Direitos Fundamentais e a Liberdade de Expressão” em democracias da atualidade. Primeiro de vários, este artigo analisa a Liberdade de Expressão na Primeira Emenda à Constituição dos Estados Unidos e como ela tem sido delineada pela Suprema Corte e tribunais inferiores ao longo do tempo, especialmente no que diz respeito ao denominado discurso de ódio. Um artigo final abordará os sistemas jurídicos componentes da série em uma perspectiva comparada. A metodologia utilizada é a consulta a

referências (livros, artigos científicos e decisões judiciais).
Palavras-chave: Constituição dos Estados Unidos; Direitos Fundamentais; Liberdade de Expressão; Primeira Emenda; Suprema Corte dos Estados Unidos.

1. INITIAL CONSIDERATIONS

This paper exploring the Freedom of Speech in a comparative perspective is part of a series named “Constitutional Law Around the Globe”. This chapter of the series focuses on Fundamental Rights and their interpretation and enforcement by courts. In other words, the aim is to scrutinize how courts shape Constitutional and Fundamental Rights in jurisdictions around the world.

First in the row, this paper focuses on Freedom of Speech in the United States and will be followed by others exploring the theme in other legal systems, culminating with the analysis of the Freedom of Speech in Brazilian Constitutional Law in a comparative perspective with the other systems composing the chapter.

This topic is particularly fascinating in our times because courts have been playing a decisive role in shaping constitutional and fundamental rights in a variety of democracies. From the 20th century on (in the U.S., since the 19th century), courts have gained power in deciding constitutional and even political cases, such as in South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.[1]

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Equator in 1996; Bolivia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in rise.[2]

Certainly, the notion of a Constitution comprises the interpretation and enforcement of rights. Therefore, a constitution is not only a solemn declaration of rights. In fact, the content of a Constitution derives also from the actual interpretation and enforcement by a specific institution. In modern democracies, this role of interpreting and enforcing constitutional provisions are courts that end up shaping constitutional rights.[3]

[1] KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts. Judicial Roles in Global Perspective**. New York. Cambridge University Press, 2013.
[2] COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. New York. Cambridge University Press, 2010.
[3] ROUSSEAU, Dominique. **Droit du contentieux constitutionnel**. Paris. Montchrestien, 2010.

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In parallel, the use of new interpretative constitutional methods has made possible the change in meaning of constitutional norms, with no need to rewrite the text by means of constitutional amendments[4]. This is a reality in many jurisdictions, including the United States and Brazil.

In this broad context, Supreme Courts (and also the lower courts and judges) have been playing a very important role in the democratic process. This has led to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, freedom of speech, equal clauses, among many others.

Included in the First Amendment to the U.S. Constitution, the freedom of speech and of the press consists of the words "Congress shall make no law...abridging the freedom of speech, or of the press."[5] Free speech right is the guarantor of the other rights, permitting open political debate and challenges to government authority.[6]

For more than a century since its enactment, the Free Speech Clause was little used in the United States. This *status quo* shifted when government repression at the time of World War I triggered many cases based on the freedom of speech. Since then the Supreme and lower Courts have developed a body of First Amendment jurisprudence protecting speech. During some difficult times – the era of McCarthyism in the 1950s is a prime example –, it was somehow weakened. Nevertheless, freedom of speech in the United States is known to be broader than in any other jurisdiction.[7]

The *problem* under scrutiny is how Fundamental Rights are shaped by courts in a set of democratic jurisdictions in comparative perspective. Freedom of speech is deemed a Fundamental Constitutional Right in many democracies. However, its actual content varies from one legal system to another depending on how it is shaped by courts.

The *aim* of the chapter Fundamental Rights of the Series Constitutional Law Around the Globe is to analyze how Fundamental Rights are shaped in democracies in

[4] BONAVIDES, Paulo. **Curso de Direito Constitucional**. São Paulo. Malheiros. 2007.
[5] United States of America. U.S. Constitution. 1st Amendment. Available at https://www.law.cornell.edu/constitution/first_amendment. Access on May, 27th 2020.
[6] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fitfth Edition. New York. Oxford University Press, 2018.
[7] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fitfth Edition. New York. Oxford University Press, 2018.

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a comparative perspective. This will shed light on their content in order to compare the different legal systems.

The *hypothesis* of the series is that Fundamental and Constitutional Rights in many democracies are shaped by courts and their content considerably varies from jurisdiction to jurisdiction. Understanding those differences and nuances allows the comprehension of Fundamental Rights in democracies around the world.

The *methodology* used is consultation of references (books, papers and judicial decisions).

2. FREEDOM OF SPEECH AND THE FIRST AMENDMENT

The original text of the United States Constitution had no Bill of Rights. The Bill of Rights was adopted to make clear that the new national government was not constitutionally allowed to infringe the rights of the people. It is constituted by the first ten amendments to the Constitution.

Actually, Sections 9 and 10 of Article 1 of the Constitution set forth limitations on the federal and state governments, respectively. For instance, the prohibition of enacting *ex post facto* laws (laws criminalizing conduct after it has occurred) or bills of attainder (legislative acts finding particular individuals guilty of crime). However, It contains no protection for free speech or freedom of the press.[8]

Included in the First Amendment to the Constitution, the Freedom of Speech and of the Press consists of the words “Congress shall make no law...abridging the freedom of speech, or of the press.”[9] Free speech right is the guarantor of the other rights, permitting open political debate and challenges to government authority.[10]

For more than a century since its enactment, the Free Speech Clause was little used. This changed when government repression at the time of World War I triggered many cases based on the freedom of speech. Since then the Supreme Court has developed a body of First Amendment jurisprudence protecting speech. During some difficult times – the era of McCarthyism in the 1950s is a prime example –, it was somehow weakened. Nevertheless, freedom of speech in the United States is known to

[8] DORF, Michael C.; MORRISON, Trevor W. **The Oxford Introductions to U.S. Law. Constitutional Law.** New York. Oxford University Press, 2010.
[9] United States of America. U.S. Constitution. 1st Amendment. Available at https://www.law.cornell.edu/constitution/first_amendment. Access on May, 27th 2020.
[10] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fitfth Edition. New York. Oxford University Press, 2018.

be broader than in any other jurisdiction.[11]

The First Amendment's text regarding to the freedom of speech is particularly unambiguous and clear. The words "Congress," "no law", "abridging" or "speech" are pretty unequivocal and require no deeper knowledge to be understood. The imperative is simple, straightforward, complete, and absolute.[12] However, in practice, several problems of interpretation arise.

In its enforcement, freedom of speech could not be absolute and limits are considered by courts. Imagine the following counterexamples: a person knowingly and falsely shouting "fire!" in a crowded theater for the perverse joy of anticipating the spectacle of others being trampled to death as the panicked crowd surges toward the theater exit; the mere oral statement of one person offering to pay $5,000 for the murder of the offer's spouse; a Congressman's bribe solicitation; an interstate manufacturer's deliberately false and misleading commercial advertisements; a witness committing perjury in the course of a trial; a statement made to the president that he will be shot if he fails to veto a particular bill.[13]

In the U.S., the free speech doctrine distinguishes among categories of speech. The Supreme Court considered some areas as unprotected by the freedom of speech, such as defamation, obscenity, and fighting words, blackmail, child pornography, where the harm of the speech outweighs the value of permitting free expression.

Freedom of speech is strongly based on the marketplace of ideas. According to it, the more speech is free, the more ideas can appear and circulate with evident gains to society. However, the marketplace approach may be too narrow because it attends only to instrumental effects of free speech. Another doctrine contends that freedom of speech has an independent value linked to dignity and development of individuals as such. Free participation in public discourse, in accordance with this doctrine, potentially values every persons' speeches and ideas.[14]

Others have argued that free speech is essential as a check on government power, because it sheds light on abuses of state power and its eventual occupants.

[11] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fitfth Edition. New York. Oxford University Press, 2018.
[12] ALSTYNE, William Van Alstyne. A Graphic Review of the Free Speech Clause. **California Law Review**, Berkeley, vol. 70, no. 1, pp. 107-150, Jan., 1982.
[13] ALSTYNE, William Van Alstyne. A Graphic Review of the Free Speech Clause. **California Law Review**, Berkeley, vol. 70, no. 1, pp. 107-150, Jan., 1982.
[14] F FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fifth Edition. New York. Oxford University Press, 2018.

Besides, free speech, allowing the free flow of ideas and opinions, is a means of preventing a government from entrenching itself. It can be also conceived as a prevention from violence in political dissent, allowing it to be manifested rather by words.[15]

On the other hand, it is also broadly accepted that if government is in many situations not allowed to regulate content of speech, it can regulate time, place and manner of speeches. For instance, is a person allowed to turn on her loudspeaker at midnight in a residential neighborhood to express her views on whatever issue? Can a group parade in the middle of street during rush time to protest traffic policies? [16] There seems to be a broad consensus that government may sometimes limit the freedom of speech in order to prevent disturbance of others, violence or other grave harm. The question is when.[17]

In the landmark decision of *New York Times v. Sullivan*[18], 1964, the Court decided that libelous speech is in fact partly protected. According to the decision, a plaintiff in a defamation lawsuit must not only prove the normal elements of defamation, but also that the statement was made with "actual malice". It means that the defendant had the conscience that the statement was false or recklessly disregarded if it was or not true.

In *R.A.V. v. City of St. Paul*, 1992[19], deciding a case that involved a cross burning, one of the principles held is that so-called "hate speech" is not to be proscribed. Even hateful messages may not be censored by the government, unless they inflict actual danger of harm of violence.

In fact, freedom of speech has been limited in a considerable share of cases, such as child pornography, commercial speech, fighting words and incitement to riot.[20] Next, we will analyze four cases in order to better delineate the contours of limits posed on the freedom of speech in the United States.

[15] REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. **California Law Review**, Berkeley/Cal, n. 82, p. 341/388, 2009.
[16] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fifth Edition. New York. Oxford University Press, 2018.
[17] DORF, Michael C.; MORRISON, Trevor W. T**he Oxford Introductions to U.S. Law. Constitutional Law**. New York. Oxford University Press, 2010.
[18] United States of America. 376 U.S. 254 (1964).
[19] United States of America. 505 U.S. 377 (1992).
[20] SHARMA, Pankaj. Hate Speech Laws: Walking the First Amendment Fence. **Howard Scroll: The Social Justice Review**, Arlington, vol. 1, no. 2, p. 130-147, 1992-1993.

3. VIOLENT AND HATE SPEECH IN COURTS. SOME LANDMARK CASES.

The justification most commonly given for laws restricting or even banning violent speech is that hate speech has a deleterious effect on the behavior of others, especially if they are minors. Lying on that rationale, many courts ruling for restrictions on violent speech have given attention to jurisprudence on speech that incites violence.[21]

In many cases it is quite hard the task imposed to U.S. Courts in general and to the Supreme Court in particular to rule on freedom of speech cases. They have to seek reconciliation of the bedrock principle underlying the First Amendment (that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable[22]) with the limits imposed to the freedom of speech in order to protect people from hate and violence.

In order to understand the contours of the U.S. jurisprudence on hate speech, we should analyze a set of cases decided on the First Amendment grounds.

3.1. BEAUHARNAIS V. ILLINOIS (1952) [23]

Justice Frankfurter delivered the opinion of the Court. The petitioner was convicted upon information in the Municipal Court of Chicago of violating 224a of the Illinois Criminal Code, Ill. Rev. Stat., 1949, c. 38, Div. 1, 471. He was fined $200. The section provides:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

Beauharnais was president of the White Circle League. In a meeting on January 6, 1950, he passed out bundles of lithographs in question, together with other literature, to volunteers for distribution on downtown Chicago streets. The material urged the Mayor and City Council of Chicago “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.”

[21] REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. **California Law Review**, Berkeley/Cal, n. 82, p. 341/388, 2009.
[22] BARRET, Paul. **Year in the Life of the Supreme Court**. Durham. Duke University Press, 1995.
[23] United States of America. 343 U.S. 250 (1952).

The Supreme Court found no warrant in the Constitution for denying to Illinois the power to pass the law under attack. The Supreme Court considered the special circumstance that the State of Illinois had a historical experience of racism and that racist words have caused riots and violence throughout the State.

This decision opened a breach to consider that some kinds of hate speech are not to be protected by the First Amendment. Thus, the Court ruled that a State regulation on racist speech to maintain peace and order means no contempt of the Free Speech Clause.

3.2. R.A.V. v. CITY OF ST. PAUL (1992)[24]

Justice Scalia delivered the opinion of the Court. In June 21, 1990, the petitioner and other teenagers assembled a crudely made cross by taping together broken chair legs. Afterwards, they burned the cross inside the fenced yard of a black family that lived across the street. The city of St. Paul charged the petitioner on a Crime Ordinance, St. Paul, Minn., Legis. Code 292.02 (1990), which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Court considered that the First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed. Thus, content-based regulations are presumptively invalid.

Nonetheless, some restrictions upon the content of speech in a few areas are permitted. The justification is that in some cases the social value derived from speech towards truth is clearly outweighed by the social interest in order and morality. Thus, the First Amendment does not authorize contempt of these limitations.

Therefore, the Supreme Court considered that some areas of speech, such as obscenity, defamation etc. can be regulated consistently with the First Amendment. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government, for instance.

Applying these principles to the St. Paul ordinance, the Court ruled it facially

[24] United States of America. 505 U.S. 377 (1992).

unconstitutional, because, according to the understanding espoused, the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. It considered that St. Paul has no authority to license one side of a debate to “fight freestyle”, while requiring the other to follow strict rules.

The Court also considered that St. Paul has not singled out an especially offensive mode of expression, but rather proscribed words that contain racial, gender, or religious intolerance messages. The Court considered it a selection of ideas to be proscribed, what is not allowed by the Freedom of Speech Clause.

3.3. VIRGINIA V. BLACK (2003)[25]

Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which The Chief Justice, Justice Stevens, and Justice Breyer join.

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia, which about thirty people attended. The gathering happened on a private property with the permission of the owner. Black was charged of burning a cross with the intent of intimidating a person or group of persons, in violation of §18.2-423:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

In this case the Court considered whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. The Court concluded that a State may ban cross burning carried out with the intent to intimidate.

However, the Court considered that the provision in the Virginia statute treats any cross burning as *prima facie* evidence of intent to intimidate renders. The Court considered that although the burning of a cross usually intends to inflict on the recipients a message of fear for their lives, it does not inevitably convey intimidation. Because of that, the statute was ruled unconstitutional.

The Court stated that the protections afforded by the First Amendment are not

[25] United States of America. 538 U.S. 343 (2003).

absolute. Therefore, restrictions upon the content of speech in a few limited areas are permitted. The Court also reaffirmed that in R.A.V. *v*. City of St. Paul it held that a local ordinance that proscribed “certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” was unconstitutional. This content-based discrimination was esteemed unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects."

The Court clarifies that in R.A.V. it did not hold that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, it ruled that some types of content discrimination did not violate the First Amendment. It noted then that it would be constitutional to ban only a particular type of threat.

The Court considered that the first amendment permits Virginia to outlaw cross burnings done with the intent to intimidate. The reason is that burning a cross is a strong form of intimidation. It considered that a ban on cross burning carried out with the intent to intimidate is fully consistent with the holding in R.A.V. and is proscribable under the First Amendment.

3.4. DOE V. UNIVERSITY OF MICHIGAN (1989)[26]

The University of Michigan at Ann Arbor adopted a “Policy on Discrimination and Discriminatory Harassment of Students in the University Environment” in order to curb rising racial intolerance and harassment on campus. The Policy prohibited individuals from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status.

The Court considered that the Policy swept within its scope protected areas of speech under the First Amendment. Therefore, the District Court granted John Doe's a permanent injunction as to those parts of the Policy restricting speech activity, while denied the injunction as to the Policy's regulation of physical conduct, although the University had responded that the Policy had never been applied to speech protected by the First Amendment.

The Court made a distinction between the First Amendment protection of “pure

[26] United States of America. 721 F. Supp. 852 (E.D. Mich. 1989)

speech" and "mere conduct", concluding that mere conduct in their most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and therefore are punishable by state and federal criminal and civil statutes. As a consequence, actual acts of discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes.

The District Court considered that the University was not allowed to establish a policy that would end up prohibiting certain speech because its content was not aligned to messages sought to be conveyed. As the District Court stated, "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers…"

FINAL CONSIDERATIONS

As it was asserted in the introduction of this paper, this text is part of a series of papers that analyzes Constitutional and Fundamental Rights around the globe specially focusing on how Supreme and lower Courts shape them in contemporary democracies.

This is the first paper of the series and sheds light on how courts in the United States, specially the U.S. Supreme Court, over time shaped the Freedom of Speech and the so-called "hate speech" entrenched in the First Amendment of the U.S. Constitution. At the end of the series, a final paper will compare most important issues among the systems under scrutiny.

This text asserted that the original text of the United States Constitution had no Bill of Rights. The Bill of Rights was later adopted to make clear that the new national government was not constitutionally allowed to infringe the rights of the people. It is constituted by the first ten amendments to the Constitution.

Included in the First Amendment, the freedom of speech and of the press consists of the words "Congress shall make no law...abridging the freedom of speech, or of the press."[27] Free speech right is the guarantor of the other rights, permitting open political debate and challenges to government authority.[28]

For more than a century since its enactment, the Free Speech clause was little

[27] United States of America. U.S. Constitution. 1st Amendment. Available at https://www.law.cornell.edu/constitution/first_amendment. Access on May, 27th 2020.
[28] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fitfth Edition. New York: Oxford University Press, 2018.

used. This changed when government repression at the time of World War I triggered many cases based on the freedom of speech. Since then the Supreme and lower Courts in the U.S. have developed a body of First Amendment jurisprudence protecting speech.

The First Amendment's text regarding to the freedom of speech is particularly unambiguous and clear. The words "Congress," "no law", "abridging" or "speech" are pretty unequivocal and require no deeper knowledge to be understood. The imperative is simple, straightforward, complete, and absolute.[29] However, several problems of interpretation arise.

In its enforcement, Freedom of Speech could not be absolute and limits are considered by courts. Therefore, the U.S. Free Speech Doctrine distinguishes among categories of speech. The Supreme Court considered some areas as unprotected by the freedom of speech, such as defamation, obscenity, and fighting words, blackmail, child pornography, where the harm of the speech outweighs the value of permitting free expression.

The Freedom of Speech doctrine asserts that government is in many situations not allowed to regulate content of speech. However, it can regulate time, place and manner of speeches, as well as speeches that promote hate and violence.

Some landmarked cases were presented in order to show aspects of limitations on hate speech in the United States.

In Beauharnais v. Illinois (1952), the Supreme Court held constitutional a state regulation of Illinois on racist speech to maintain peace and order, considering that some kinds of hate speech are not to be protected by the First Amendment, especially when the speech is capable of inflicting fear and violence.

In R.A.V. v. City of St. Paul (1992), the Court ruled that the First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed. Thus, content-based regulations are presumptively invalid. Nonetheless, some restrictions upon the content of speech in a few areas are permitted. The justification is that in some cases the social value derived from speech towards truth is clearly outweighed by the social interest in order and morality. Thus, the First Amendment does not authorize contempt of these limitations.

In Virginia v. Black (2003), the Supreme Court considered whether the

[29] ALSTYNE, William Van Alstyne. A Graphic Review of the Free Speech Clause. **California Law Review**, Berkeley, vol. 70, n. 1, pp. 107-150, Jan., 1982.

Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. The Court concluded that a State may ban cross burning carried out with the intent to intimidate.

In Doe v. University of Michigan (1989)**,** the District Court of Michigan made a distinction between the First Amendment protection of “pure speech” and “mere conduct”, concluding that mere conduct in their most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and therefore are punishable by state and federal criminal and civil statutes. As a consequence, actual acts of discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the Constitution and both state and federal statutes. However, the District Court also concluded the University was not allowed to establish a policy that would end up prohibiting certain speech because its content was not aligned to messages sought to be conveyed.

The justification most commonly given for laws restricting or even banning violent speech is that hate speech has a deleterious effect on the behavior of others, especially if they are minors. Lying on that rationale, many court’s ruling for restrictions on violent speech have given attention to jurisprudence on speech that incites violence.[30]

In many cases it is quite hard the task imposed to U.S. Courts in general and to the Supreme Court in particular to rule on freedom of speech cases. They have to seek reconciliation of the bedrock principle underlying the First Amendment that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable[31] with the limits imposed to the freedom of speech in order to protect people from hate and violence.

In the United States, freedom of speech is known to be broader than in any other jurisdiction.[32] The decisions under scrutiny in this paper, specially focusing on “hate speech”, seem to confirm that in landmark decisions judicial review has been exercised in order to avoid as much as possible interference of government on the freedom of speech.

In spite of that, it can be clearly noticed that there is a concern in the United

[30] REYNOLDS, Michael. Depictions of the Pig Roast: Restricting Violent Speech without Burning the House. **California Law Revie**w, Berkeley/Cal, n. 82, p. 341/388, 2009.
[31] BARRET, Paul. **Year in the Life of the Supreme Court**. Durham. Duke University Press, 1995.
[32] FEINMAN, Jay M. Law 101. **Everything you need to know about American Law**. Fifth Edition. New York: Oxford University Press, 2018.

States Constitutional Law on stablishing red lines that freedom of speech may not cross. Indeed, the Supreme Court has set limits to this fundamental right regarding time, place and manner. Therefore, some restrictions are imposed by the Supreme Court, especially in the field of hate speech.

In this specific field, in a set of landmark cases the Supreme Court has displayed a clear concern on restricting hate speech without damaging the core of the constitutional protection. Thus, the Supreme Court of the United States has disapproved of speech that excludes or promotes violence or hatred against individuals or groups, in accordance to its constitutional task.

Thus, the role of the Supreme Court of the United States regarding the so-called hate speech has been to balance the healthy exercise of judicial review with the deference to the majoritarian branches of government and to the states legislatures on the interpretation of freedom of speech.

Certainly this constitutional tension has gained an important hint of drama in social network times. In the digital environment people have been manifesting opinion and thought more intensely than ever and improper speech, fake news and hate speech have risen special concerns. Therefore, many jurisdictions have enacted legislation and courts have been called to decide on such special cases. However, this will be the subject of upcoming papers.

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