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Offers they can't refuse: a (negative) assessment of the impact on business and society at-large of the recent fortune of anti-discrimination laws and policies

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Abstract

The article considers the relationship and balance between freedom of economic initiative and obligations deriving from anti-discrimination laws. After providing a theoretical framework of the problem of the limits to contractual autonomy arising from the horizontal application of fundamental rights (*Drittwirkung*), the work focuses on its most recent developments, especially in case law, from a comparative perspective. It identifies the paradoxes and logical inconsistencies that characterise the traditional approaches, and puts forward an alternative conceptual framework.

Offers they can't refuse: a (negative) assessment of the impact on business and society at-large of the recent fortune of anti-discrimination laws and policies

1. The reference context: the horizontal application of fundamental rights

Anti-discrimination law has progressively broadened the scope of protection limited to certain categories individuals, both through legislation and case law. This path towards what Italian legal philosopher Norberto Bobbio called 'the age of rights'[1] is generally welcomed by observers. In this paper, however, I consider certain problematic aspects of this trend, with particular reference to freedom of contract and economic initiative[2].

Like any expansion of positive freedoms[3], anti-discrimination laws do not only expand the scope of rights: although this goes often unseen, they also restrict other rights and freedoms. The problem to be addressed is therefore how to define the balance between the freedom to do business and the right not to be discriminated against, and to assess what really happens. In other words, the discussion follows two levels. On a prescriptive level, it discusses the possibility of reconciling the protection of economic freedom and the promotion of anti-discrimination, and the public policy options available to implement this reconciliation (see § 2). From the analytical viewpoint, I consider how certain relevant legal systems have concretely balanced the freedoms and rights under consideration (§ 3). I will then devote an in-depth examination to an apparently new field -- the sharing economy -- in order to verify if and to what extent what I propose to define as *discrimination 2.0* poses new issues and if this, in turn, requires a new regulatory framework (§ 4). Section 5 concludes by comparing the level of what should be with that of what is, and outlining the possible future evolution of the discipline in this field.

Before embarking on the discussion from a theoretical point of view, it is worth mentioning that the prohibitions of discrimination to relations between private individuals is the result of the doctrine of

[1] N. Bobbio, *The Age of Rights*, Polity, Cambridge, 1991 (1990).

[2] See in Italian literature, among others, B. Cecchini, *Discriminazione contrattuale e tutela della persona*, Giappichelli, Torino, 2016; G. Carapezza Figlia, *Il divieto di discriminazione quale limite all'autonomia contrattuale*, 61(6) *Riv. Dir. Civ.* 1387 (2015), as well as Id., *Divieto di discriminazione e autonomia contrattuale*, ESI, Napoli, 2013; D. Maffeis, *Offerta al pubblico e divieto di discriminazione*, Giuffrè, Milano, 2007.

[3] In opposition to natural rights: see K. Campbell, *Legal Rights*, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), available at https://plato.stanford.edu/archives/win2017/entries/legal-rights/ (last accessed 21 May 2021).

Drittwirkung, i.e. the horizontal application of fundamental rights[4]. It was theorised for the first time in a comprehensive manner by German case law, in a famous case (*Lüth*), which affirmed the legitimacy of a film boycott initiative on the assumption that the boycotter's freedom of expression also applied to his relations with the authors of the film[5]. The doctrine of *Drittwirkung* has since evolved profoundly: on one hand, it has progressively extended its scope of application to an ever wider range of situations, involving in particular the relations between private individuals beyond the freedom of expression[6]. Moreover, it has influenced the European Court of Justice in developing the (different) theory of the horizontal direct effect of general principles of European law[7]. Due to an intrinsic institutional limitation, there has been less room for development in the European Court of Human Rights[8].

However, relatively little attention has been devoted to analysing the link between such a wide horizontal application of certain fundamental rights and economic rights, in particular with the freedom to conduct a business, currently guaranteed by Article 16 of the Nice Charter 16. In the case law of the Court of Justice of the EU (CJEU) the term *Drittwirkung* appears, apart from a slightly higher number of references in certain opinions of Advocates General, only once and quite marginally[9]. More generally, the effects of this decision on the freedom to conduct a business are absent. In a similar vein, the *Handbook on European non-discrimination law* of the European Union Agency for Fundamental Rights (FRA), the Court of Justice of the European Union, and the Council of Europe[10] do not mention the freedom of economic initiative.

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[4] M. Borowski, *Drittwirkung*, in R. Grote, F. Lachenmann, R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (last updated February 2018), available at https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e700 (last accessed 21 May 2021); see also, among many, the now classic study by A. Clapham (1993). *Human Rights in the Private Sphere*, OUP, Oxford, 1993.

[5] BVerfGE 7, 198 - *Lüth*.

[6] See, among many others, several essays in A. Sajó, R. Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism*, Eleven, Utrecht, 2005; as well as M. Florczak-Wątor, *Horizontal Dimension of Constitutional Social Rights*, 9(5) *International Journal of Law and Political Sciences* 1386 (2015).

[7] On this topic, see, among many others, M. De Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law*, 18 *Maastricht Journal of European and Comparative Law* 109 (2011); P. Cabral, R. Neves, *General Principles of EU Law and Horizontal Direct Effect*, 17(3) *European Public Law* 437 (2011). The main subject of these writings is the case *Seda Kücükdeveci v. Swedex GmbH & Co. KG (C-555/07*, 19 January 2010), which together with the earlier case *Werner Mangold v. Rüdiger Helm (C-144/04*, 22 November 2005) is the main case involving the horizontal application of the principle of equality and non-discrimination.

[8] See on this subject M. Florczak-Wątor, *The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State*, 17(2) *Int'l and Comp. L. Rev.* 39 (2017), as well as the bibliography referred to therein.

[9] Judgment of the Court of 21 May 1985, *Commission of the European Communities v. Federal Republic of Germany*, C-248/83.

[10] Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_it.pdf, last accessed 25 May 2021.

On the other hand, an excellent study by the same Agency on freedom of enterprise[11] does not even mention *Drittwirkung* or the horizontal direct effect of fundamental rights (although it does mention anti-discrimination law).

There seems to be no particular connection between the two areas, and it is the intention of this paper to contribute to filling what appears to be an important theoretical gap with considerable practical repercussions.

2. The theoretical problem of the limits to economic freedom arising from anti-discrimination law

The narrative that accompanies anti-discrimination law also in regard to private individuals tends to overlook the effects of these rules on contractual and business freedom. For example, ever since the Treaty of Amsterdam gave it specific powers to fight discrimination, the European Union, with Council Directive 2000/43/EC of 29 June 2000 implemented the principle of equal treatment between persons irrespective of racial or ethnic origin[12] and established the nullity of contractual clauses contrary to the principle of equal treatment. Article 14(b) stipulated that "any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended".

Neither Directive 2000/43, nor the directives that later took up this clause almost without a change in 2000 and 2006[13], addresses the issue of its impact on freedom of contract and enterprise. Admittedly, the issue had emerged in Council Directive 2004/113/EC of 13 December 2004, which applies the principle of equal treatment between men and women to the enjoyment and supply of goods and services[14]. Recital 14 stated that "All individuals enjoy the freedom to contract, including

[11] FRA, *Freedom to conduct a business: exploring the dimensions of a fundamental right*, 2015, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf, last accessed 25 May 2021.

[12] OJ L 180, 19/07/2000, pp. 22-26.

[13] Respectively Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2/12/2000, pp. 16-22, Article 16(b); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23-36, Article 23(b). The only notable reference is a fleeting mention in the former to the freedom of association of churches and other religious organisations.

[14] OJ L 373, 21.12.2004, pp. 37-43. In addition to the provisions quoted immediately afterwards in the text, Article 13(b) of this Directive also takes up – substantially without a change – the above-mentioned provision on the nullity of discriminatory contractual terms.

the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner". On this basis, Article 3(2) stated that "This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex".

In this way, the general freedom of contract was recognised, as well as the tendency that subjective reasons that may induce an economic operator to prefer to conclude a contract with one partner rather than another should not be questioned. However, it was also stipulated that freedom of contract must give way when the choice is based on the gender of the person excluded from a contractual relationship. Thus, there was no balancing act, but the prohibition of discrimination prevailed in all cases, to the detriment of freedom of contract.

Along the same lines, there was the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[15], which provided for stating, this time only in the recitals, that "All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction", as well as specifying that "This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity"[16].

Although the United States has never adopted the Continental Europe terminology, it has mostly adopted a similar legislation. Even in the US legislation there is no trace of a thorough reflection on the effects of anti-discrimination legislation on freedom of contract and business[17]. After all, the Civil Rights Act of 1964 states that consumer preferences are not a legitimate basis for discrimination, or a clear sign of the political choice to let the reasons of equality prevail over those

[15] COM/2008/0426 final.

[16] It also includes the provision on the nullity of discriminatory contractual clauses.

[17] The legal scholarship, however, is far more substantial: beyond Epstein's own writings, including the 1992 seminal book quoted in footnote 19 (and, on the opposite side, his many critics, including the one also quoted in footnote 19), see, among many others, D. E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 *N.C. L. Rev.* 223 (2003), based on several chapters of Id., *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws*, Cato Institute, Washington, D.C., 2003; Id., *Only One Place of Redress. African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*, Duke University Press, Durham, 2011 (see also the review of the same book by D.M. Douglas, *Contract Rights and Civil Rights*, 100(6) *Michigan L. Rev.* 1541 (2002)); H. Collins, *The Vanishing Freedom To Choose A Contractual Partner*, 76(2) *Law and Contemporary Problems* 71 (2013). From the opposite perspective see, among many, J.S. Brubaker, *A Realistic Critique of Freedom of Contract in Labor Law Negotiations: Creating More Optimal and Just Outcomes*, 5(1) *Wash. U. Jur. Rev.* 107 (2012); D.P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16(1) *Yale Human Rights & Development L. J. 51* (2013).

of economic freedom. Thus, Section 201 clearly stated that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, colour, religion, or national origin", and section 701 declared it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin". Therefore, even in the United States, since 1964, the legislator seems to have made a clear choice that sacrifices the freedom of contract and enterprise and protect categories more vulnerable to discrimination[18].

Yet, it seems possible to make certain fundamental objections to the line of thought that has inspired the widespread emergence of anti-discrimination law. In an important work that was much criticised at the time and unjustly placed on the fringes of contemporary debate[19], Richard Epstein listed several objections with regard to labour relations by arguing that a free-market context can remedy discrimination more effectively than coercive intervention[20]; and respect individual freedom while doing so.

In a system free from coercive interference, there are no regulatory barriers to entry, firms do not enjoy rents, monopolistic situations are very rare and, in any case, unstable. Inefficient choices can involve high costs. Discrimination may generate losses and competitors wise enough to accept all talents win. Similarly, the victims to discrimination will find employers willing to compensate them adequately for the added value they generate[21].

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[18] According to some authors, however, these categories must be extended by interpretation: thus, for example, with reference to "*immigration status*", D.P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16(1) *Yale Human Rights & Development L.J. 51* (2013).

[19] R.E. Epstein, *Forbidden Grounds. The Case against Employment Discrimination Laws*, Harvard University Press, Cambridge, 1992. For a debate between the same author and a well-known critic, see R.A. Epstein, E. Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 *S. Cal. Interdisc. L.J.* 349 (1993), continued in R.A. Epstein, *A False Sense of Social Reality: A Response to Erwin Chemerinsky*, and E. Chemerinsky, *Professor Epstein's Strange Sense of Social Reality: Of Course, All Laws Prohibiting Employment Discrimination Should Not Be Repealed*, *Southern California Interdisciplinary L. J.*, 445 and 453 (1993), respectively. A strong critique from both a philosophical and economic perspective can be found in S.A. Besson, *Discrimination and Freedom of Contract: Philosophical and Economic Foundations of the Law against Racial Discrimination in Employment*, 3 *Int'l J. of Discrimination and the Law* 269 (1999).

[20] On the other hand, it remains the case that many discriminations do not derive from the market, i.e., from the free choices of economic operators, but from the choices of the legislator, who entrenches the prejudices of an often minoritarian part of the population. This is evident from studies such as the powerful R. Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Liveright Publishing, New York, 2017.

[21] Tony Blair was not so far from this approach when he coined the call to "hire your best employer". This conclusion is also confirmed by the studies of G.S. Becker, The *Economics of Discrimination,* The University of Chicago Press, Chicago, 1971[2] (1957). See also A. Moran, *Black Capitalists Used Markets to Fight Racism*, in *Liberty Nation*, 23 August 2018, available at https://www.libertynation.com/black-capitalists-used-markets-to-fight-racism/, as well as

In addition, there are even more eminently theoretical and ideological considerations in the methodological tradition of the Austrian school of economics[22]. First of all, the fact that the power to exclude is an ineliminable component of the right to property, thus denying it implies an irremediable compromise of the latter[23]: after all, anyone who is against the discriminatory conduct of an enterprise can contribute to modifying its behaviour in the many ways that respect the principle of freedom available, starting with not buying its goods or services[24].

Furthermore, it can be noted that "Laws that interfere with the natural association of people simply exacerbate animosities and harmful discrimination" and that "Laws that prohibit discrimination are inherently discriminatory when applied to only one side of a prospective or existing association"[25]; or that any economic system cannot function without discrimination, i.e. without the possibility of choosing among scarce resources. Without choice, the efficient use of productive factors gives way to disorder and chaos[26]. Finally, anti-discrimination laws are paradoxically an advantage for the

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Bartleby, *Companies can appeal to workers and consumers with liberal messages*, *The Economist* online, 24 January 2019, available at https://www.economist.com/business/2019/01/26/companies-can-appeal-to-workers-and-consumers-with-liberal-messages, and L.H. Rockwell Jr, *The Economics of Discrimination*, 12 July 2003, available at https://www.lewrockwell.com/2003/07/lew-rockwell/the-economics-of-discrimination/; see also the Sears affair: B. Hunter, *When Sears Used the Market to Combat Jim Crow*, FEE.org, 19 October 2018, available at https://fee.org/articles/when-sears-used-the-market-to-combat-jim-crow/ (for all links contained in this note: last accessed 26 May 2021).

[22] In addition to the writings quoted in the following notes, see. L.H. Rockwell Jr., *Repeal '64*, 13(5) *The Free Market* (1995). On the difference between the Austrian and the neoclassical (and in particular the Chicago school) approaches, see J.T. Salerno, *The Market Isn't a Schoolmarm: The Austrian School versus Chicago*, Mises Wire, 12 October 2018, available at https://mises.org/wire/market-isnt-schoolmarm-austrian-school-versus-chicago, last accessed 26 May 2021, who critically quotes the seminal article by G.J. Stigler, G.S. Becker, De Gustibus Non Est Disputandum, 67(2) *The American Economic Review* 76 (1977).

[23] See R. McMaken, *"Discrimination" Isn't About Religion, It's About Private Property*, Mises Daily, 2 April 2015, available at https://mises.org/library/discrimination-isnt-about-religion-its-about-private-property, last accessed 26 May 2021; L.M. Vance, *The Right to Discriminate Is a Basic Property Right*, Mises Wire, 24 March 2017, available at https://mises.org/wire/right-discriminate-basic-property-right, last accessed 26 May 2021; but see also R.J. Barro, *So You Want to Hire the Beautiful. Well, Why Not?*, in *Business Week*, 16 March 1998 (on the subject of the latter article, see L. Tietje, S. Cresap, *Is Lookism Unjust?: The Ethics of Aesthetics and Public Policy Implications*, 19(2) *J. Libertarian Studies* 31 (2005)).

[24] See also R.M. Ebeling, *Markets, Not Government, Improve Race Relations*, Mises Wire, 5 September 2017, https://mises.org/wire/markets-not-government-improve-race-relations, last accessed 26 May 2021; B. O'Neill, *Inflating Away Our Human Rights*, Mises Daily, 14 December 2009, https://mises.org/library/inflating-away-our-human-rights, last accessed 26 May 2021.

[25] L.E. Carabini, *Liberty, Dicta & Force: Why Liberty Brings Out the Best in People and How Government Brings Out the Worst*, Mises Institute, Auburn, 2018, Chapter 5. On the subject of freedom of association, see the words of D. R. Henderson, *The Joy of Freedom: An Economist's Odyssey*, Prentice Hall, Hoboken, 2001, p. 89: "Freedom of association applies to not just employees, but also to employers. Just as you and I should be free to work, or not to work, for anyone we wish, so employers should be free to hire, or not to hire, anyone they choose. There should be no legal privileges; freedom of association applies to all". See also, by the aforementioned R.A. Epstein, *Two Conceptions of Civil Rights*, 8(2) *Social Philosophy and Policy* 39 (1991), as well as *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, in Law & Liberty, 2 January 2016, available at https://lawliberty.org/forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation, last accessed 26 May 2021.

[26] See W. Block, *The Case for Discrimination*, Ludwig von Mises Institute, Auburn, 2010.

entrepreneurs who would discriminate, because they prevent them from damaging themselves with their choices motivated by unjustified prejudices[27].

In the end, all anti-discriminatory constraints severely limit contractual and entrepreneurial freedom (and, correspondingly, freedom of association). Indeed, strong theoretical and empirical arguments have emerged in literature claiming that economic freedom must prevail over egalitarian requirements. Let us now consider how operational rules meet this principle.

3. Recent significant case law on the intersection between anti-discrimination law and economic freedoms

Let us turn our attention to how the set of provisions mentioned above is applied in practice by case law, and start our analysis from Europe. A first case where economic freedom is taken into account and even seems to prevail is *Achbita*[28]. Here, the CJEU ruled that "the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief" (although it might constitute indirect discrimination). The Court expressly states that "An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers".

On the contrary, the European Court of Human Rights a few years earlier in the case of *Eweida and Chaplin v. the United Kingdom*[29] (quoted, however, in an unconvincing manner in *Achbita*) seemed to go in the opposite direction. In *Eweida*, the Strasbourg Court had found that the United Kingdom had violated the religious freedom of a Christian employee of British Airways. The company had not allowed her to wear a cross on her work uniform, putting her on unpaid leave until an agreement was reached (the UK courts had rejected the case brought by the woman to obtain payment of the

[27] See J. Newman, *Discrimination Against Discrimination: Why We Don't Need Anti-Discrimination Laws*, Mises Wire, 26 July 2016, available at https://mises.org/wire/discrimination-against-discrimination-why-we-dont-need-anti-discrimination-laws, last accessed 26 May 2021. On the difficulty of estimating the costs of quotas, see M. Levin, *Quotas and the Bottom Line*, 16(5) *The Free Market* (1998).

[28] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, C-157/15, 14 March 2017.

[29] 15 January 2013, n°. 48420/10, 59842/10, 51671/10, and 36516/10.

salary lost during that period). In this case, therefore, the freedom of enterprise seems to succumb to the desire not to discriminate on the basis of religious faith[30].

The decision taken in *Achbita* is also contrary to the conclusion reached by the CJEU itself in *NH v. Associazione Avvocatura per i diritti LGBTI - Rete Lenford*[31]. Here, the Luxembourg judges stated instead that "statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned" violated the prohibition of discrimination in recruitment established by EU law, which must prevail in this case over freedom of expression, "provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical". This judgment does not contain any reference to Article 16 of the Nice Charter, nor a discussion of the possible repercussions of its conclusions on freedom of contract. By contrast, the link was held to be not merely hypothetical even though the statements were made in a radio interview in a very irreverent and provocative broadcast. As a result, the lawyer who uttered these words lost the case in Italy, against an association of lawyers supporting LGBTI rights[32].

It is interesting to compare the CJEU decision in the *Associazione Avvocatura per i diritti LGBTI* case with the ruling of the German Federal Constitutional Court in the so-called *hotel ban* case, i.e. a direct appeal for constitutionality against a hotel owner who denied access to a politician from the far-right NPD party[33]. Based also on a decision just over a year earlier on a so-called *stadium ban*[34] – where limits had been set to the horizontal applicability of fundamental rights with regard to the exclusion of a football fan from access to a stadium – the German courts excluded that the plaintiff had a right to access the hotel that had informed him that it did not want to receive him.

In the balancing act between property and freedom of economic initiative (expressly mentioned), on one hand, and the horizontal application of freedom of thought in the light of the principle of equality, on the other, the Federal Constitutional Court somewhat surprisingly gave preference to the former. This was also based on the consideration that the appellant had the possibility of going

[30] For certain observations on the two cases compared see, among many, J.H.H. Weiler, *Je Suis Achbita!*, 15(4) *International Journal of Constitutional Law* 879 (2017).

[31] C-507/18, 23 April 2020.

[32] Rete Lenford, *La Cassazione rigetta il ricorso di Taormina*, 16 December 2020, available at https://www.retelenford.it/news/diritti-lgbti-in-italia/4124/, last accessed 26 May 2021.

[33] BVG, Order of 27 August 2019, 1 BvR 879/12.

[34] BVG, Order of 11 April 2018, 1 BvR 3080/09.

to other hotels. Clearly, the appellant did not belong to a protected category, so the question remains whether the case would have been decided in the same way if he belonged to a minority group[35].

Let us now consider the most relevant American cases on the subject. In recent years, they have mainly dealt with cases in which officers refused provide services related to unions or marriages between homosexuals. As will be seen, the courts have largely tended to qualify these behaviours as illegitimate. These were regarded as "offers (of money) that (the businesses concerned) cannot refuse".

I will now follow a chronological order and limit myself to cases where there has been some form of interaction with the U.S. Supreme Court, even if only in the form of a denial of certiorari or even a decision to not consider the case at all, or where there was at least a ruling by a state Supreme Court.

Before moving on, however, I would like to recall a American case which is not included in the list of cases concerning wedding vendors, but which has close similarities: it is *Stormans, Inc. v. Wiesman. Wiesman* concerned the Washington State regulation imposing a twofold obligation on all pharmacies in that State. One regarded the obligation to stock and sell emergency contraceptives. Moreover; if any of the pharmacists employed personally objects to selling these products due to his/her their religious convictions, at least one other pharmacist should have been available to sell them.

The Stormans family, who owned a supermarket and pharmacy (Ralph's Thriftway), along with several other pharmacists, challenged the legality of this regulation in court. The District Court held that it did indeed violate the plaintiffs' religious freedom, which is protected by the First Amendment[36]. However, the Court of Appeals for the Ninth Circuit overturned the decision[37], upholding the regulation despite the plaintiffs' willingness to name other pharmacies available to sell emergency contraceptives, and the existence of more than 30 such pharmacies within five miles. The pharmacists applied for certiorari to the U.S. Supreme Court, but the Supreme Court

[35] The German case can be compared with an important Czech case, where a hotel owner had introduced a policy that Russian citizens would only be accepted in his hotel if they signed a declaration condemning the Russian annexation of Crimea in 2014. After such conduct had been deemed discriminatory by the administrative authorities and the Supreme Administrative Court of that state, the Czech Constitutional Court overturned the judgment, stating that nationality was not a protected category and relying among other things on the existence of similar alternative accommodation nearby for Russian citizens unwilling to sign such statements: judgment of 30 April 2019, see https://www.usoud.cz/fileadmin/user_upload/Vedouci_OVVP/Agenda_de_Portavoz/2-3212-18.pdf, last accessed 3 June 2021.

[36] 854 F. Supp. 2d 925 (findings of fact and conclusions of law); *Stormans Inc.* v. *Selecky*, 844 F. Supp. 2d 1172 (WD Wash. 2012) (opinion granting injunction).

[37] 794 F. 3d 1064 (2015).

rejected it, despite a dissent signed by Alito and concurred in by Chief Justice Roberts and Thomas[38], who called for much stronger protection of religious freedom.

Looking at the main cases involving wedding vendors, the first case[39] is *Elane Photography, LLC v. Willock.* On the basis of her religious beliefs, a photographer refused to provide services at Mrs. Willock's same-sex civil union ceremony. Invoking a New Mexico law that prohibits companies from refusing to render services on the basis of sexual orientation discrimination, Willock appealed to the state's Human Rights Commission, arguing that the photographer should be subject to the same rules as hotels and restaurants[40]. The commission ruled in her favour, and Elane Huguenin's appeal was rejected by every court in the state, most recently the Supreme Court[41]. Since the U.S. Supreme Court did not agree to review the case[42], the state Supreme Court ruling became final[43].
In June 2018, the most famous of these judgments came from the U.S. Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[44] . It concerned a bakery in Colorado whose owner, Jack Phillips, had refused, on the basis of his religious convictions, to make a wedding cake for a homosexual marriage. The marriage would have been celebrated in a US State where same-sex marriages were legal, while in Colorado they were not. The bride and groom sued Mr. Phillips before the State Civil Rights Commission, which obtained from an administrative court a sentence condemning him to make cakes for homosexual weddings and to reorganise his business so as to comply with the ban on discrimination based on sexual orientation.

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[38] 579 U. S. ____ (2016), Alito, J., dissenting.

[39] Before the recent wave of new cases, there was a case that ended with a settlement, dating 2003-2004, concerning a refusal to print invitations to a same-sex wedding in Canada by a printing company (Starfish Creative Invitations) in Seattle, Washington State. The defence of the discriminated bride and groom was taken on by the ACLU, on whose site one can find news of the settlement agreement that closed the case: ACLU, *Following ACLU Intervention, Refusal to Print Invitations to Same-Sex Wedding Ends with Apology and Agreement not to Discriminate*, 12 February 2004, available at https://www.aclu.org/press-releases/following-aclu-intervention-refusal-print-invites-same-sex-wedding-ends-apology-and, last accessed 26 May 2021. Another noteworthy case is that of the Görtz Haus Gallery, an art gallery and restaurant in Grimes, Iowa, whose Mennonite owners were sued for discrimination by a homosexual couple who had been denied the use of their premises for the celebration of their marriage. The two had to accept an agreement that involved the payment of a sum of money and, above all, a commitment not to discriminate in future concessions of their premises. On this basis, they had to choose between accepting to host homosexual marriages, or not hosting marriages (even heterosexual) at all. Having opted for the second alternative, favouring their faith, they were soon forced to close their business: see G. Rodgers, *Struggling Görtz Haus to close without wedding business*, Des Moines Register, 22 June 2015.

[40] See the reconstruction by E. Volokh, I. Shapiro, D. Carpenter, G. Latner, *Elane Photography v. Willock*, Cato Institute, 13 December 2013, available at https://www.cato.org/legal-briefs/elane-photography-v-willock, last accessed 26 May 2021.

[41] 309 P.3d 53 (NM 2013).

[42] 134 S. Ct. 1787 (2014).

[43] A similar case (involving video-makers), decided in the opposite manner by the United States Court of Appeals for the Eighth Circuit, arose in *Telescope Media Group v. Lucero*, 936 F. 3d 740 (2019).

[44] 584 U.S. ___ (2018).

Phillips appealed the decision to the Colorado Court of Appeals, which ruled against him, and the Supreme Court of Colorado did not grant certiorari. However, the case was admitted by the U.S. Supreme Court, which overturned the state ruling in a 7-2 decision, including liberal Justices Kagan and Breyer. It should be noted, however, that the decision was based on the fact that the Court had found in the case file the existence of hostile treatment by the Commission towards Mr. Phillips' religious beliefs, consisting of strong statements such as the comparison to slavery and the Holocaust, and questionable references to cases about same-sex marriage. This was sufficient for the judges of the Supreme Court to reverse the decision of the State judges.

The Court, therefore, did not answer the thorny question of the relationship between anti-discrimination law on one hand, and freedom of expression, religious freedom and economic freedom on the other. Furthermore, it avoided taking a stand on whether or not the making of a (personalised) wedding cake was a form of speech; unsurprisingly, the decision was welcomed by the groups that had defended the couple and argued that discrimination is not adequately protected by the First Amendment[45].

A few weeks after *Masterpiece Cakeshop*, the U.S. Supreme Court decided on the *Arlene's Flowers Inc. v. Washington* case. The dispute brought together three different cases. Once again, it regarded a refusal to provide services for a same-sex wedding on the basis of religious objections: Barronelle Stutzman, owner of Arlene's Flowers, had refused to provide flowers for the wedding of a same-sex couple.

Ms. Stutzman lost her case in the state of Washington, where the Supreme Court unanimously held that her choice did not constitute a form of speech – protected as such by the First Amendment – but rather discrimination, prohibited by Washington state law[46]. Upon hearing the case, the U.S. Supreme Court simply granted certiorari, vacating the earlier ruling and remanding the case "to the Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop*"[47]. However, a year later, the Supreme Court of Washington again unanimously ruled in favour of the couple[48], essentially holding that Ms. Stutzman's was conduct and not speech, that there was no evidence of anti-religious bias against her in this case[49], and that anti-discrimination legislation did

[45] NAACP, *Supreme Court Reaffirms Core Anti-Discrimination Principles in Masterpiece Cakeshop Case*, 4 June 2018. Justice Kennedy wrote, on the matter, that if one were to generalise the possibility of refusing service to homosexuals solely on the basis of their sexual orientation, it would generate against them "a community-wide stigma inconsistent with the history and dynamics of civil rights laws".

[46] 389 P.3d 543 (Wash. 2017).

[47] 138 S. Ct. 2671 (2018).

[48] 441 P.3d 1203 (Wash. 2019).

[49] The Court, however, gave a restrictive interpretation of *Masterpiece Cakeshop*, arguing that the neutrality obligation it established applied only to *adjudicatory bodies*, whereas in the present case the alleged prejudice was in the hands of

not conflict with freedom of speech, association, or religion. Ms. Stutzman filed a new petition for writ of certiorari to the U.S. Supreme Court[50], which this time denied certiorari with a 6-3 decision[51].

A few days after the Washington Supreme Court's new ruling, the U.S. Supreme Court decided to grant certiorari, vacating the judgment and remanding the case for further consideration in light of *Masterpiece Cakeshop*, in a case from Oregon, *Klein v. Oregon Bureau of Labor and Industries.* This case also stemmed from the refusal by the owners of a bakery, Mr. and Mrs. Klein, to bake wedding cakes for same-sex weddings due to their religious beliefs.

The homosexual couple complained to the Oregon's Bureau of Labor and Industries about unjustified discrimination against them. This led to the imposition of a $135,000 fine on Mr. and Mrs. Klein by an administrative court. The high amount was presumably also due to the fact that Mr. and Mrs. Klein had published the original complaint on Facebook, thus making known the identities of the two brides, who were then targeted online with death threats[52].

The decision of this court was later confirmed by the Oregon's Bureau of Labor and Industries, which essentially prohibited the Kleins from advertising any intention to discriminate in their business. The Oregon Court of Appeals dismissed the Kleins' appeal, confirming the penalty and its amount, also on the grounds that the Kleins' refusal was not an act of speech and therefore the strong First Amendment guarantees against compulsory speech did not apply. The Oregon Supreme Court refused to reconsider the case, while the U.S. Supreme Court sent the case back to the Court of Appeals, where it has been pending since January 2020[53].

Dating back to September 2019, however, we find an Arizona Supreme Court ruling with a different perspective, in *Brush & Nib Studio, LC v. City of Phoenix.* Joanna Duka and Breanna Koski, the two owners of a studio that designs handicrafts, and prints customised wedding

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the Attorney General of the State of Washington, thus *Masterpiece Cakeshop* would not have been applicable in this case. For a critique of this reading of U.S. Supreme Court precedent, see *Washington Supreme Court Limits* Masterpiece Cakeshop *to the Context of Adjudications*, 133 *Harv. L. Rev.* 731 (2019).

[50] The full appeal is available at this link: https://adfmedialegalfiles.blob.core.windows.net/files/ArlenesFlowersCertPetition2.pdf, last accessed 26 May 2021.

[51] See https://www.supremecourt.gov/orders/courtorders/070221zor_4gc5.pdf, last accessed 3 July 2021.

[52] It should also be added that a fundraising campaign in support of Christian bakery crowdfunding was soon banned by the well-known GoFundMe platform, as well as another in support of the Stutzman florist, which was at the centre of a similar affair as the one mentioned above: on the occasion of these campaigns, the GoFundMe website modified its *terms of service* by adding the campaigns it considered "discriminatory" among those not allowed on its platform: cf. A. Ohlheiser, *After GoFundMe shuts down Christian bakery crowdfunding, it bans 'discriminatory' campaigns*, in *Washington Post*, 1 May 2015.

[53] This case and *Masterpiece Cakeshop* differ in fact from a UK case concerning a refusal, again based on religious objections, to bake a cake with the explicit message "*Support Gay Marriage*": in this case, *Lee (Respondent) v. Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)*, [2018] UKSC 49, the UK Supreme Court unanimously held the refusal to be lawful.

invitations and other anniversary-related artwork, decided to pre-emptively challenge an ordinance of the City of Phoenix, Arizona, that prohibited them (under penalty of fines and even imprisonment[54]) from discriminating in their choice of contractors, and consequently to refuse to perform their work for any future same-sex marriage for which their services were required (as well as to publicly display their religious beliefs on which such refusal would be based).

Their firm, Brush & Nib, lost both in the first instance[55] and on appeal[56], being held to be subject to the rules (considered legitimate) prohibiting discrimination in places of public accommodation, without the possibility of invoking the First Amendment. Yet, the Arizona Supreme Court overturned the two previous decisions and ruled in favour of the plaintiffs, albeit by a narrow 4-3 majority[57]. In the end, it prevailed that, in this case, the main activity in which the plaintiffs were involved (and only that activity), namely the handwriting of invitations celebrating an imminent marriage, must necessarily be considered a form of expression, protected as such by the First Amendment and therefore prevailing over the need to combat discrimination[58].

While there is some dispute as to the applicability of this ruling (not least because of the hypothetical nature of the dispute[59]), or to what other situations it applies (the order itself remains in effect), the Arizona Supreme Court decision makes clear that "Our holding today is limited to Plaintiffs' creation of one product: custom wedding invitations that are materially similar to the

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[54] The decision to impose a criminal penalty, including a prison sentence, even if it is an alternative to a fine, on "anyone who denies a person or a group of persons a service offered and intended for the public on account of their race, ethnicity, religion or sexual orientation" was also recently made by Switzerland, with an amendment to the Military Penal Code that was approved in a popular referendum on 9 February 2020: see https://www.admin.ch/gov/it/pagina-iniziale/documentazione/votazioni/20200209/divieto-della-discriminazione-basata-sull-orientamento-sessuale.html, last accessed 4 June 2021.

[55] The judgment is available at https://adfmedialegalfiles.blob.core.windows.net/files/BrushNibRuling.pdf, last accessed 26 May 2021.

[56] The judgment is available at https://adfmedialegalfiles.blob.core.windows.net/files/BrushNibAppellateOpinion.pdf, last accessed 26 May 2021. This judgment was published only four days after *Masterpiece Cakeshop,* but it already took the latter into account by specifying that, in this case, there was no evidence of prejudice against the applicants.

[57] 448 P.3d 890 (Ariz. 2019).

[58] This case therefore appeared less divisive in the libertarian community itself, bringing back to the same positions legal scholars and centres who had dissented in *Masterpiece Cakeshop*, for example. Eugene Volokh and his (homosexual) colleague Dale Carpenter, authors of an amicus brief of the Cato Institute in support of Brush & Nib (while in *Masterpiece Cakeshop the* Cato Institute had supported the reasons of the baker, and the two lawyers those of the discriminated couple, believing that the preparation of a cake was not an expressive activity that involved the application of the First Amendment). In an impromptu commentary on the ruling, Carpenter wrote: "those whose very calling is to put pen to paper should not be required – on pain of government-imposed fines, jail, or loss of their livelihoods – to speak in violation of their consciences" (D. Carpenter, *Free speech for thee and for me*, in The Volokh Conspiracy, 16 September 2019, available at https://reason.com/volokh/2019/09/16/free-speech-for-thee-and-for-me/, last accessed 26 May 2021). The *Brush & Nib* case *is* quite similar to the Irish case of Beulah Print and Design, which refused to print invitations for a same-sex wedding: this company was consequently ordered by the Workplace Relations Commission (WRC) to pay €2,500 to the gay groom who had requested the service: see G. Deegan, *Firm told to pay gay man €2,500 over refusal to print civil ceremony invites*, *The Irish Times*, 8 February 2019.

[59] See P. Bender, *Comment on Brush & Nib Studio v. City of Phoenix*, *Arizona State Law Journal*, 2 October 2019.

invitations contained in the record. [...] Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status"[60]. This is in line with the U.S. Supreme Court's decision e.g. in *Jaycees*. In *Jaycees* (a state's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services [...] plainly serves compelling state interests of the highest order")[61] and reaffirmed in *Hurley* (prohibitions against discrimination in access to public places "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments")[62] (but indirect confirmation also comes from cases such as *Hobby Lobby*, where the Court stated that the affirmation of the illegality of the contraceptive mandate at the head of private corporations did not provide any protection to possible discrimination in the workplace more or less conveniently motivated on the basis of religious beliefs[63]).

The decision also provides guidance on when conduct should be classified as speech[64]: drawing on its own precedent[65], the Arizona Supreme Court essentially identifies three possible categories: so-

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[60] §§ 112-113.

[61] 468 U.S. at 624.

[62] 515 U.S. at 572. The Court cites some of its precedents in support: *New York State Club Assn., Inc.* v. *City of New York,* 487 U.S. 1, 11-16 (1988) (unanimously upholding the extension of anti-discrimination prohibitions to a number of social clubs that had a number of ties to the outside world that did not make them "distinctly private", including the participation of outsiders in club events and the financing of clubs, as well as their pursuit of a business activity such as hosting public dining events); *United States Jaycees,* 468 U.S. 609 (in which a unanimous 7-0 decision ruled that Minnesota legislation which, in order to prevent discrimination in access to the economy, required the Jaycees' business group to include women in its membership, did not violate the associational freedom of this organisation); and *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, *at* 258-262 (1964) (which unanimously upheld the legality of prohibitions on racial discrimination in hotels and motels, based on the Constitution's Commerce Clause). The latter case is discussed by the Court in *Brush & Nib* together with Newman *v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (D. S.C. 1966), aff'd in part and rev'd in part on other grounds, 377 F.2d 433 (4th Cir. 1967), aff'd as modified on other grounds, 390 U.S. 400 (1968) (*per curiam*), explaining that there was no conflict between these cases and his own decision: "Those cases did not involve compelled speech, but rather business owners who refused to serve African-Americans based solely on their race, a practice Plaintiffs expressly condemn, and that our holding clearly neither permits nor condones".

On the other hand, it is worth pointing out that *Hurley* is also quoted by the Arizona Supreme Court as a case in which "the Supreme Court rejected any suggestion that a public accommodations law could justify compelling speech" (§ 107: as the U.S. Supreme Court wrote in that case, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government" 515 U. S. at 579), a sign of a certain ambiguity inherent in this series of cases, to which I will return in the concluding paragraph (*Hurley* is a case in which the Supreme Court unanimously affirmed the right of a private group, commissioned by the mayor of Boston to organise the celebrations of St. Patrick's Day and Evacuation Day, to exclude from the parade a group of homosexual activists who wanted to participate with their banner).

[63] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

[64] On this subject, see extensively C. Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 *Emory L. J.* 241 (2015).

[65] *Coleman v. City of Mesa*, 284 P.3d 863 (2012): this is a case in which the products made by a tattoo studio were held to be "expressive activity" (see below in the text) and therefore "protected free speech" (p. 355), as did the U.S. Supreme Court in *Brown* with regard to video games (564 U.S. at 790), and this with regard to both the finished product and the creative process. In *Coleman*, the Arizona court also made clear that the "degree of First Amendment protection

called "purely expressive activity", or "pure speech", which falls under the strong protection of the First Amendment; so-called "non-expressive business activities"[66], which do not generally enjoy such protection; and finally, the intermediate category of "conduct that is 'sufficiently imbued with elements of communication'"[67]. In order to determine whether the conduct in question "contains an expressive element", it is necessary to refer to the two-part test established by the U.S. Supreme Court and commonly known as the "Spence-Johnson test": "(1) whether the speaker intends to convey a "particularized message," and (2) the "likelihood [is] great" that a reasonable third-party observer would understand the message"[68].

From these premises, it follows that "A business does not forfeit the protections of the First Amendment because it sells its speech for profit"[69]. Nevertheless, "simply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities. Like other organizations and associations, no business "is likely ever to be exclusively engaged in expressive activities," and even the most expressive business will be engaged in non-expressive business activities[70].

Finally, one month after the Arizona case, the Kentucky Supreme Court issued its ruling in *Baker v. Hands On Originals*, concerning a printer who had refused to print t-shirts requested by an LGBTQ association for the annual Pride Celebration in Lexington-Fayette County, Kentucky. While the

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is not diminished merely because the [protected expression] is sold rather than given away" 230 Ariz. at 360 ¶ 31 (alteration in original) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988))" (a case concerning a city's discretion to grant space to private publishers to place their newsracks). In *Brush & Nib, the* Court also referred to a number of U.S. Supreme Court precedents consistent with this statement: "Likewise, the Supreme Court stressed in *Riley* that "a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak" 487 U.S. at 801; see also *Hurley* [quoted here, a few notes above], 515 U.S. at 573-74 (1988) (stating the right to autonomy of speech and freedom from compelled speech is "enjoyed by business corporations generally", including "professional publishers"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding that motion picture companies that operate for profit are "a form of expression whose liberty is safeguarded by the First Amendment")".

[66] Italics added.

[67] The courts recall *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recalling in turn *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

[68] *Spence*, 418 U.S. *at* 410-11; *Johnson*, 491 U.S. at 404.

[69] § 66. Follows the passage quoted above in footnote 65.

[70] § 67. The reference is to the above-mentioned judgment (footnotes 61-62) "*Roberts v. U.S. Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring in part and in the judgment)", quoted earlier in the text. The decision further references case law: "[t]hus, for example, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385-88, 390-91 (1973), the Supreme Court held that while the First Amendment protected the content of articles published by a newspaper, it did not protect the newspaper's facilitation of illegal hiring practices by publishing gender-specific employment advertisements. See also *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698-99, 705-06 & n.3 (1986) (holding that adult bookstore owner, who allowed prostitution to be solicited on his business premises, was engaged in "'nonspeech' conduct" that "manifest[ed] absolutely no element of protected expression," and stating that "First Amendment values may not be invoked by merely linking the words 'sex' and 'books'"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (stating that while law firms may engage in free speech and freedom of association, there is no free speech protection to engage in discriminatory employment practices)" (cf., with regard to the latter case, the aforementioned *Taormina* case).

Kentucky Court of Appeals had ruled that the county ordinance prohibiting gender-based discrimination by places of public accommodation violated the owner's freedom of expression (for one judge, also his religious freedom), the Supreme Court of that state did not overturn the ordinance, and simply stated that it did not apply to groups such as the one that had promoted the case (Gay and Lesbian Services Organization, which therefore lacked *standing*), but only to individuals.

Considered as a whole, in my opinion the cases of the wedding vendors can also be compared to a Polish case of a boycott of a company by another company[71]: following homophobic statements on Facebook by a politician and owner of a beer company, Marek Jakubiak, a beer house in Warsaw run by LGBT activists announced its decision to stop selling that brand, and also carried out the demonstrative action of spilling the contents of some bottles in the street. The boycott by the café owners was sanctioned, both in the first instance and on appeal: the judges decided to limit the freedom of enterprise and expression of thought of the latter, favouring the position of the brewer, who they considered to be unlawfully harmed[72].

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[71] In turn, Poland has also had an important case on the issue of refusing to serve homosexuals: the employee of a printing house (not the owner) was fined for refusing to print posters for an LGBT group, and the conviction was upheld by the Supreme Court, but the Constitutional Court later declared the provision on which the conviction was based unconstitutional (cf. Reuters, *Poland rules in favour of printer convicted over refusing LGBT posters*, 26 June 2019, available at https://www.reuters.com/article/poland-lgbt-constitution-idUSL8N23X4D4, last accessed 3 June 2021). This was followed by a huge wave of boycotts of LGBT people by local communities in a territory that in total occupies about a third of Poland, also driven by a pro-government magazine, which started to distribute stickers aimed at making an area that had declared itself LGBT-free recognisable; in turn, this initiative gave rise to a court case, which is currently pending, as well as a precautionary decision by the district court of Warsaw to order the newspaper to stop distributing the stickers, with a decision on the merits of the case pending (but the newspaper continued the campaign by simply changing the text to the Polish equivalent of the "LGBT Ideology-Free" zone): cf. K. Knight, *Polish Court Rebukes "LGBT-Free Zone" Stickers*, Human Rights Watch, 1 August 2019, available at https://www.hrw.org/news/2019/08/01/polish-court-rebukes-lgbt-free-zone-stickers, last accessed 3 June 2021.

[72] Polish Helsinki Foundation for Human Rights, *Bottoms Up: Poland Beer Boycott 'Unlawful'*, in Liberties, 6 April 2018, available at https://www.liberties.eu/en/stories/bottoms-up-poland-beer-boycott-unlawful-sn-21757/40372, last accessed 3 June 2021. On the subject of boycotts, one area worth mentioning is the so-called *Anti-BDS* laws, i.e. laws aimed at countering the Boycott, Divestment, and Sanctions movement against Israel: typically, these laws aim to regulate the allocation of public funds so that they do not reach entities that boycott Israel, and there is an open debate as to whether or not this is compatible with the First Amendment (an issue of controlling the work of public entities so that it is not discriminatory also arose in the lawsuit filed by five Texan citizens, on the basis of a law specifically enacted to protect the members and supporters of religious organisations from retaliation (Senate Bill 1978), against the city of San Antonio because of the decision of the city council to exclude the well-known fast food chain Chick-fil-A from the possibility of opening a restaurant in the airport of that city, as a reaction against the positions expressed in the past by its owners against the rights of LGBT people and in particular homosexual marriage. However, the application was rejected, most recently by the Fourth Court of Appeals of Texas, due to the non-retroactivity of the quoted law on which it was based: No. 04-20-00071-CV, 19 August 2020; see also *Garcetti v. Ceballos*, 547 U.S. 410 (2006), for an affirmation of the lawfulness of restrictions on the expression of one's thoughts by public employees in the work context).

Finally, it is also worth mentioning the campaign undertaken in June 2020 against Facebook by large companies including Coca Cola, Verizon, Amazon, Unilever, and Patagonia, consisting in the decision to suspend advertising on the social network in order to push it to remove more offensive content. Facebook was deemed to be deliberately inactive on this front, in order to increase its traffic for profit (a move that contributed to greater interventionism on the part of Facebook, with the consequent questions of whether or not it was exempt from editorial liability in light of the well-known Section 230 – on the topic, see in the concluding paragraph); a similar initiative was taken in April 2021 by

Finally, three more cases from 2020 deserve attention, one concerning business-to-business relationships, and two others employment relationships. The first, *Comcast Corp. v. National Association of African American-Owned Media et al.*[73], concerned a dispute between an African American entrepreneur's (Byron Allen) television production company and the Comcast network. Allen had been unable to reach an agreement with Comcast to include his channels in Comcast's offerings, and had filed a lawsuit claiming that he had been discriminated against because he was African American.

After having lost in the first instance, Allen won in the Ninth Circuit Court, which in parallel upheld a decision in his favour in a similar case against the Charter company. In these two decisions, the Ninth Circuit Court held that the First Amendment does not give networks absolute editorial discretion in choosing which channels to offer, since they cannot make these decisions in a discriminatory manner.

The U.S. Supreme Court, however, unanimously reversed the decision in *Comcast* (the *Charter* case went its own way and was not consolidated), narrowing the scope of anti-discrimination law by affirming the principle that the burden was on the plaintiff to prove that racial considerations were the only reason why a particular agreement was not reached ("but-for test")[74].

As mentioned earlier, the other two 2020 cases relate to employment law[75]. The first, *Bostock v. Clayton County, Georgia*[76] , was consolidated with *Altitude Express, Inc. v. Zarda* and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.* Mr. Bostock, an

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a number of Premier League football clubs and FIFA to protest against insufficient activity by major social media outlets against the dissemination of racist posts.

By contrast, with regard to the emerging cryptocurrency sector, it was Facebook, Google, and Twitter that imposed restrictions on advertising investments in this area: they were in turn sued in a class action in Australia, which is currently ongoing (see https://www.jpbliberty.com/crypto-ad-ban-case, last accessed 8 June 2021).

[73] 589 U.S. ___ (2020).

[74] This case can be likened to *Manhattan Community Access Corp. v. Halleck*, 587 U.S. ___ (2019), in which the U.S. Supreme Court ruled that a private network operating public access television channels is not a "*state actor*" and therefore not subject to the restrictions that the First Amendment imposes on the government, but instead has discretionary editorial choices in granting or not granting space to certain programmes and producers. Also on the subject of access regulation in the field of television programmes, one may finally recall the (different) case *Baltic Media Alliance Ltd v. Lietuvos radijo ir televizijos komisija*, C-622/17, 4 July 2019, where the Court of Justice of the EU held that it did not constitute an infringement of European law for the Lithuanian television market regulator to impose on a television programme distribution company to make available a channel predominantly intended for the Russian-speaking minority only in premium packages, on the basis of an alleged public policy reason, i.e. the programming of content deemed to incite hatred against the Baltic States (the decision was thus aimed singularly at protecting against possible discrimination against the majority, by a minority descended from past rulers).

[75] With regard to defining the scope of the employer's obligations to respect the identity of employees, a relevant issue is also that of the personal pronouns chosen by employees: see T. Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns,* 26 *Wm. & Mary Bill of Rts. J.* 219 (2017).

[76] 590 U.S. ___ (2020).

administrative employee who had promoted a *gay softball league* at work, complained that he had been fired by Clayton County because of his homosexual orientation; Mr. Zarda, a skydiving instructor (who later died in a tragic *base jumping* accident, so the case was continued by his heirs), was similar: he complained that he had been dismissed from Altitude Express because of his homosexual orientation, which was revealed to a client to make her feel more comfortable. Another case regards Ms. Aimee Stephens had been dismissed from her job by the Harris Funeral Homes group shortly after she sent notice of her impending sex change (she also died before the decision was made and her case was continued by her heirs).

The Supreme Court addressed the question whether the prohibition of discrimination in employment relationships "because of sex" contained in Title VII of the *Civil Rights Act of 1964* includes discrimination on the basis of sexual orientation and gender identity. By a majority of 6-3, the Supreme Court ruled in the affirmative, thus extending protection from discrimination to homosexual and transgender people. The majority opinion was written by originalist Justice Gorsuch and concurred in by Chief Justice Roberts, who were joined by the four progressive justices in service at the time. The opinion was based on interpretative considerations and did not address the legitimacy of legislation. The task of the justices was to interpret, rather than subject to constitutional review[77].

The last case to be mentioned is *Our Lady of Guadalupe School v. Morrissey-Berru*, consolidated with *St. James School v. Biel*[78] . In both cases, Catholic school teachers had had their contracts not renewed and claimed they had been discriminated against on the grounds of age and disability,

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[77] The *Bostock* case was then the subject of one of the executive orders of Joe Biden's first day as President, which extended its scope by expressly guaranteeing transsexuals protection from discrimination in some areas, including the housing sector (*Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 20 January 2021); also with regard to the housing sector, the Department of Justice under the new President Biden dropped the appeal in the case *Massachusetts Fair Housing Center v. HUD*, thus leaving in place a preliminary injunction that had postponed the application of new, more restrictive rules, desired by the previous Trump administration, which would have made it more difficult to bring actions against discrimination, and in particular those based on the assertion of a disparate impact of only apparently neutral rules (a possibility that the Supreme Court recognised as being granted by the *Fair Housing Act* in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 576 U.S. 519 (2015)).

On the subject of discrimination in labour relations, mention should also be made of the case of *Stacey Macken v. BNP Paribas London Branch* (2208142/2017 & 2205586/2018, 30 August 2019), in which the Employment Tribunal of London held that BNP Paribas had discriminated against the plaintiff by, among other things, paying her less than a male colleague of equal rank (an issue already the subject of the historic case brought, and successfully settled, by Betsy Wade, who recently passed away, and six other female colleagues against the New York Times). Lastly, we would like to mention the bill called the *"BE HEARD" Act*, presented in the previous legislature and openly supported by the current President Biden: it would considerably broaden the scope of anti-discrimination law with regard to small businesses, among other things by removing the limit on punitive and compensatory damages and as a consequence greatly increasing the bill for legal fees (cf. H. Bader, *This Proposed Law Would Flood Small-Business Employers with Ruinous Lawsuits*, in FEE.org, 3 August 2020, available at https://fee.org/articles/this-proposed-law-would-flood-small-business-employers-with-ruinous-lawsuits/, last accessed 7 June 2021).

[78] 591 U.S. ___ (2020).

respectively[79]. The Court referred to its own precedent of eight years earlier, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*[80], in which it had unanimously ruled on the so-called ministerial exception, i.e. the fact that the protection of religious freedom in the First Amendment prevented the government from interfering with how religious congregations chose their "ministers".

In his *opinion* in *Hosanna-Tabor*, Chief Justice Roberts stated that four elements were relevant to determine whether a person qualified as a minister of a church: "the formal title given […] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church".

In the *Our Lady of Guadalupe* cases, the question arose as to whether teachers with some religious duties in educating students (such as teaching religion, and worshipping and praying with the children), but whose primary role was not religious teaching, should fall within the ministerial exception. With a 7-2 majority, the Court ruled in the affirmative, holding that this exception should also apply to persons who were not religious leaders but who had nevertheless assumed a contractual obligation to promote the Catholic faith in all areas related to their teaching[81]. The result was a significant reduction in the scope of anti-discrimination law with regard to religious

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[79] In the area of disability discrimination, *Gil v. Winn-Dixie Stores* (No. 17-13467, 11th Cir. April 7, 2021) and *Robles v. Domino's Pizza, LLC,* 913 F.3d 898 (9th Cir. Jan. 15, 2019), in which two Circuit Courts of Appeals ruled in opposite ways the question of whether or not websites equate to a place of public accommodation, and thus required to be accessible by blind persons based on the *Americans with Disabilities Act* (ADA). The 9th Circuit court had given a positive response, in a case – still pending – in which the U.S. Supreme Court has since denied Domino's Pizza's request for certiorari on the decision (140 S. Ct. 122 (2019), *Domino's Pizza v. Robles*, 7 October 2019); the 11th Circuit court has more recently ruled otherwise. A similar issue was also at the heart of an only seemingly trivial class-action lawsuit that was filed with the District Court of the Eastern District of New York in January 2020 by a deaf man against the popular website Pornhub for discrimination, due to the alleged lack of subtitles in many videos, which ended with a settlement between the parties (*Suris v. Mindgeek Holdings Sarl et al.*).

[80] 565 U.S. 171 (2012).

[81] The case is therefore different from the one (worthy of mention, however) involving the famous Italian university professor Franco Cordero, who in the early 1970s was excluded from teaching at the Catholic University of Milan, where he was employed, after publishing a book that was not appreciated by the hierarchies. Cordero challenged the withdrawal of his teaching authorisation by the Sacred Congregation for Catholic Education before the Council of State, which raised a question of legitimacy before the Italian Constitutional Court of the provision of the Concordat between Italy and the Catholic Church that made the authorisation necessary. However, the Italian Constitutional Court then gave precedence to the Catholic university's freedom of religion and association and held that the question was not well-founded (judgment No. 195 of 29 December 1972). Associational freedom also prevailed before the American Supreme Court, in the case *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where the exclusion of a scout leader from his organisation because of his coming out as a gay man was considered legitimate. A final case worthy of mention is the practice, which became widespread in 2016, of some American football players kneeling during the national anthem, as a sign of protest against racism: with regard to this practice, there was much debate as to whether it was a constitutionally protected form of expression, or whether the NFL, the private association organising the tournament, could legitimately prohibit it (cf. J. Miltimore, *Law Professor: Stop Saying Football Players Have a 'Constitutional Right' to Kneel During the National Anthem. They Don't*, in *Intellectual Takeout*, 26 September 2017, available at https://www.intellectualtakeout.org/article/law-professor-stop-saying-football-players-have-constitutional-right-kneel-during-national/, last accessed 7 June 2021).

organisations, although some questions remained open, such as whether churches could give weight to extracurricular conduct that was not in line with the school's religious teachings[82].

In conclusion, an opposite story to those just mentioned comes from Poland. During the 2019 day against homophobia and transphobia, the Polish branch of the Swedish multinational Ikea published an article on its intranet supporting the LGBT battle, instructing employees to adopt a series of LGBT-friendly behaviours towards customers belonging to the LGBT community. One employee commented on the article in a very critical way, quoting passages from the Bible that strongly condemned homosexuality. After he refused to delete the comment, he was fired. In this case, therefore, the dismissal was not against a member of a protected category, as is typically the case with homosexuals, but against a person who expressed discriminatory views against members of the homosexual community. Two legal proceedings were opened, one civil against Ikea to challenge the dismissal[83], and one criminal against the Ikea manager responsible for the decision[84]. The cases are currently pending[85].

[82] Such an issue was, for example, at the heart of the case *IR v. JQ*, C-68/17, 11 September 2018, in which the Court of Justice of the EU ruled on the reviewability of the dismissal of a divorced Catholic doctor who had remarried by a hospital run as a corporation by a Catholic organisation. This judgment is in line with the judgment of the same Court of Luxembourg in *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.* C-414/16, 17 April 2018, which had also restricted the scope of freedom of choice of its employees by a religious institution only to cases in which the request to adhere to the beliefs of that organisation had a close connection with the tasks to be carried out (not so, obviously, in the present case, in which a woman with no religious affiliation had had her application rejected for a position in which she would have had to perform research, curiously enough precisely on anti-discrimination law): for a unitary comment on these two cases, cf. A. Colombi Ciacchi, *The Direct Horizontal Effect of EU Fundamental Rights*, 15(2) *Eur. Const. L. R.* 294 (2019); see also E. Frantziou, *The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle*, 22 *Cambridge Yearbook of European Legal Studies* 208 (2020).

On the subject of religious freedom, mention should also be made of the recent judgment of the U.S. Supreme Court in the case of *Fulton v. City of Philadelphia*, 593 U.S. ___ (2000), in which the judges unanimously ruled that the decision of the City of Philadelphia to stop contracting with a Catholic foster care agency, Catholic Social Services, because of the latter's refusal to include homosexual couples among those eligible for providing foster care, was unlawful on the grounds of violation of religious freedom.

[83] D. Avery, *Ikea Sued By Worker Fired for Posting Anti-Gay Bible Quotes, Attacking 'Promotion of Homosexuality'*, in *Newsweek*, 8 July 2019.

[84] A. Wądołowska, *Prosecutors charge IKEA manager in Poland who fired employee for homophobic messages*, in *Notes from Poland*, 28 May 2020, available at https://notesfrompoland.com/2020/05/28/prosecutors-charge-ikea-manager-in-poland-who-fired-employee-for-homophobic-messages/, last accessed 4 June 2021.

[85] The case can be likened to *Maya Forstater v. CGD Europe and others*, in which the Employment Tribunal in London (2200909/2019, 18 December 2019) held that the non-renewal of a tax and public policy researcher's consultancy contract at a think tank was justified for having published a series of tweets critical of a proposed law to allow people to choose their gender.

4. Discrimination 2.0: the (only apparent) novelty of situations generated by new technologies (in particular: sharing economy, online speech, artificial intelligence)

The framework outlined in the previous paragraph outlines the different limits encountered by businesses or private organisations in exercising a refusal on the basis of the convictions of their owners and directors: be it to perform a certain service (the cases of the wedding vendors), or to enter into contractual relations with another organisation (*Comcast*), or to hire (*Associazione Avvocatura per i diritti LGBTI*) or maintain an employment relationship with an employee (*Bostock*, *Our Lady of Guadalupe*) or to accept certain modes of performance from the latter (*Achbita*).

Many cases are recent or very recent, showing how the subject is evolving in many jurisdictions, but they do not have to do with new technologies. At the present time, though, the technological revolution has raised many issues that are intertwined with the outlined legal and jurisprudential framework. I refer, in particular, to certain (attempted) 'refusals' or otherwise controversial choices by businesses to perform a certain service, in the context of the sharing economy, online speech, and artificial intelligence.

It seems appropriate to argue that despite the disruptive impact of the advent of new technologies on business and on the lives of citizens, many of the problems they raise are not radically new, or at least do not necessarily require new rules, since the existing ones can also be validly applied to the new realities[86]. However, it seems possible to detect a double novelty, which requires some additional comments.

On one hand, the advent of new technologies has *quantitatively* multiplied the opportunities for interaction, and thus the number of contractual relationships (sharing economy), the opportunities to express one's thoughts (online speech), the tools for a generalised and automated application of discriminatory criteria, for instance in labour relations (artificial intelligence).

In the past, properties were rented only for longer periods (and hotels were perhaps too expensive), and there were well-known cases of adamant preclusion to rent properties to members of certain categories. Yet, in many cases law and commercial practice offered tools to overcome distrust, such

[86] See R. de Caria, *Old Is Sometimes Better: The Case for Using Existing Law to Face the Challenges of the Digital Age*, 4(2) *Cambridge L. R.* 68 (2019) (after all, already in 1876 the US Supreme Court, in a famous case concerning public utilities, wrote that "[p]roperty [...] become[s] clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large": *Munn v. Illinois*, 94 U.S. 113, 126 (1876)). Oppositely, in *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 *Stan. L. Rev. Online* 121, 123 (2015), M. Todisco speaks of a "soft spot of the law" with reference to the status of Airbnb users. It must be said that the first cases concerning the same internet law are by now in turn old: think of the well-known *LICRA v. Yahoo!* case of 2000, originating from the request of two French Jewish associations to order the American multinational to stop the auctions of Nazi memorabilia on its website.

as references, guarantees, security deposits: these had a cost in terms of time and money, but precisely for long periods were still efficient because of the reduction in transaction costs that they allowed. With Airbnb bursting on the scene, many of these mechanisms are not immediately applicable: e.g., reputational ranking tools are not entirely suitable to replace letters of reference. Therefore, not only are the opportunities for discrimination multiplying, but even the remedies devised in practice are not necessarily transferable sic et simpliciter to the new reality of very short-term rentals.

Similarly, the world of social media has led to an explosion in the number of opportunities for anyone to express their opinion, and consequently the possible instances of discriminatory thinking, both by social media users and by the social media themselves, with the consequent need, moreover, for the latter to rely on artificial intelligence mechanisms, in the impossibility to carry out human control over the large number of profiles and expressions hosted by the same.

Finally, artificial intelligence makes it possible to discriminate automatically and universally: this applies to tools to control online speech, as well as algorithms used in the automated selection of staff to be hired or, for example, in the assignment of tasks to riders in home delivery companies.

But the new technologies also bring about profound changes on a *qualitative* level, stemming from one fact in particular, namely the intermediation of platforms. The relationship no longer takes place directly between landlord (possibly through a real estate agency) and tenant, but passes through a platform with its terms and conditions. Thus, the social media offer space and then possibly censor discriminatory expressions of thought potentially prohibited by law, or simply unwelcome. As for artificial intelligence, certain discriminatory considerations are automatically reproduced when included in algorithms, whereas they can be mitigated or nuanced more carefully if compared with the choices made by humans.

This double order of novelty is reflected in some significant case law. The first case to be remembered is an attempt to promote a class action by Gregory Selden, an African American to whom a home owner refused to rent his flat because it was no longer available. However, Selden was then told that the accommodation was available when he submitted a similar application, for the same dates, with two different fictitious profiles in which he had assumed a Caucasian identity.

This case, which turns out to be just one example of a trend towards discrimination by many other hosts of Airbnb and the like[87] – on which much literature has begun to focus[88] – is particularly interesting because Mr. Selden sued not the allegedly racist host, but the platform directly, claiming that its terms and conditions made discrimination easier, proving the point I made earlier that platform intermediation raises new issues.

In this case, however, a clause in the terms and conditions – i.e., the one that provides for the obligation to refer disputes with the platform to arbitration – paralysed Mr. Selden's initiative: the *United States District Court for the District of Columbia* considered it valid and ordered that his case be brought under that procedure[89]. This left open some very interesting and crucial questions: what role do the general terms and conditions of platforms play in regulating events such as these? Can platforms legitimately impose the horizontal application of anti-discrimination law in contractual relations between the two parties that come into contact through them? Or conversely: can they legitimately not impose such application, leaving their users free to discriminate? It is no coincidence that in this case the lawsuit was filed against Airbnb, not against the individual racist owner who would probably be exposed to liability himself[90]: a clear sign that the platform's involvement is direct.

As for online speech, similar issues arise in relation to cases of discrimination (or non-discrimination): can social media exercise a form of private censorship on user-generated content? By contrast, can they legitimately not exercise it, or are they required to do so? In general, this is a very broad field, which deserves consideration in a more general discourse. Here, I will limit myself to some brief comments on the so-called net neutrality and to the analysis of an interesting Italian case (with strong links to certain American decisions).

When dealing with contractual discrimination in relation to the Internet, it is necessary to make at least a reference to the question of whether service providers may apply differentiated conditions to their customers. Of course, the willingness of some providers or their customers to pay a premium

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[87] See B. Edelman, M. Luca, D. Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9(2) *Am. Econ. J.: Applied Econ.* 1 (2017); F. Gouveia, T. Nilsson, N. Berggren, *'Two Gentlemen Sharing': Rental Discrimination of Same-Sex Couples in Portugal*, IFN Working Paper No. 1318 (2020), available at https://ssrn.com/abstract=3538197, last accessed 7 June 2021; see also R. Fisman, M. Luca, *Fixing Discrimination in Online Marketplaces*, *Harvard Business Review*, December 2016.

[88] Cf. N. Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83(2) *Brooklyn L. Rev.* 613 (2018); N. Schoenbaum, *Intimacy and Equality in the Sharing Economy*, in N.M. Davidson, M. Finck, J.J. Infranca, *The Cambridge Handbook of the Law of the Sharing Economy*, Cambridge University Press, Cambridge, 2018, 459-470; D. Smith, *Renting Diversity: Airbnb as the Modern Form of Housing Discrimination*, 67(3) *DePaul L. Rev.* 581 (2018).

[89] *Selden v. Airbnb, Inc.*, 2016 WL 6476934 (D.C.D. Nov. 1, 2016).

[90] As is indeed the case for traditional leases: see e.g. the judgment of the Augsburg District Court of December 2019 (Az: 20 C 2566/19), which condemned to monetary compensation for discrimination a landlord who intended to rent only to Germans.

service in order to have their contents conveyed more quickly plays an important role. Clearly, this kind of discrimination has nothing to do with those aimed at a specific group of people which I have discussed so far, and are dealt with by anti-discrimination law. Nevertheless, the issue of net neutrality is relevant to our discussion because it also relates to a limitation of contractual autonomy aimed at pursuing equal treatment between a disadvantaged group and another with greater possibilities.

In an extensive and decades-long debate, it is worth mentioning the *Mozilla v. FCC* case, in which a number of US states and internet companies challenged the Federal Communications Commission's decision, in line with the political agenda pursued by the Trump administration, to withdraw the rules, up to that moment in force, imposing net neutrality. In a *per curiam* decision, the United States Court of Appeals for the District of Columbia Circuit ruled that Supreme Court precedent *Brand X* required it to recognise the communications agency's authority to abolish the net neutrality requirement at the federal level, while recognising the right of individual states and local authorities to (re)impose such a requirement[91].

The *Brand X*[92] precedent is of interest, in that the Supreme Court acknowledged that it was within the FCC's margin of discretion, which the courts had to follow, to classify cable internet service providers as an "information service" rather than a "telecommunications service". As a result, they were not subject to the non-discrimination and "must-carry" rules imposed on telecommunications companies as common carriers. The division of the Court was anomalous and crossed the typical ideological lines: the majority opinion of the Court was written by the conservative Justice Thomas and was joined, among others, by the liberal Justice Breyer. But the conservative Justice Scalia, the liberal Justice Souter and the liberal champion Ginsburg dissented. This case thus appears to be a clear testimony of how the subject lends itself to unexpected ideological alliances and divisions, a fact that is being reproduced more and more often, as I will observe below.

When considering the issue of discrimination in relation to online speech, the most emerging concern is that of the power of platforms to exclude certain content or certain producers of that content en bloc[93]. The subject is vast, but here I would like to focus on an Italian case that

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[91] No. 18-1051 (D.C. Cir.).

[92] *National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545* U.S. 967 (2005).

[93] On the identity of the underlying issue between the wedding vendor cases and the question of whether platforms can be treated as 'public square', see R. McMaken, *Ann Coulter Comes Out in Favor of Anti-Discrimination Laws*, *Mises Wire*, 25 August 2018, available at https://mises.org/wire/ann-coulter-comes-out-favor-anti-discrimination-laws, last accessed 3 June 2021: "The Masterpiece Cake Shop case is a perfect illustration of how calling for government-enforced 'free speech' on social media platforms is the same thing as demanding that baker Jack Phillips bake cakes containing certain messages".

concerned the exclusion from Facebook of an extreme right-wing political group, Casapound, and of the personal page of its administrator.

Confirming its own previous pre-court single judge decision[94], the Court of Rome in its collegiate composition[95] ordered Facebook to reactivate the profiles in question: "if the position of the provider is ascribable to the freedom of enterprise [...], that of the user is ascribable, in the face of objections relating to the opinions expressed on the platform, to the freedom of manifestation of thought [...] and, in the face of objections relating to the nature and purposes of the association, to the [freedom of association] and therefore to values that in the constitutional hierarchy are certainly placed at a higher level. It must be concluded that the contractual discipline cannot lawfully consider as a cause of termination of the relationship manifestations of thought protected by [the Constitution], nor allow the exclusion of associations [equally] protected by [it]"[96].

In other words, since the freedoms of expression and association are superior to the freedom of economic initiative[97], and since it appears that Casapound has not crossed the boundaries of legality, the principle of non-discrimination and the horizontal application of fundamental rights (although not expressly mentioned) impose a restriction on Facebook's ability to exclude undesirable profiles (but not in violation of any positive law). Hence, the door is open to a paradoxical expansion of the opportunities for expression for highly controversial movements to which Facebook was no longer willing to make itself available.

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[94] Court of Rome, business department, ordinance issued on 12 December 2019, available at https://images.go.wolterskluwer.com/Web/WoltersKluwer/%7B5f015ef5-9468-4470-b03f-f31a3a744d28%7D_tribunale-roma-sezione-impresa-ordinanza-12-dicembre-2019.pdf, last accessed 26 May 2021.

[95] Court of Rome, ordinance issued on 29 April 2020, available at https://www.accademiaitalianaprivacy.it/ordinanza_casapound.pdf, last accessed 26 May 2021.

[96] The analogous case of the political group Forza Nuova has been decided differently by the Court of Rome, department of civil rights and immigration rights (order of 23 February 2020): in this case, the Italian judges held that Facebook was even obliged to intervene (along the same lines, see: Court of Trieste, 27 November 2020, according to which it is necessary to "take into due account the position of guarantee that Facebook concretely assumes in managing the pages, and its duty to remove unlawful content published by third parties by exercising its power of management: it is a scheme of possible liability due to a position. In case of inaction, therefore, there could also be criminal liability of the manager, given that the administrator of a Facebook page stores the user's information and can be equated with the host provider under Article 14 of Directive 2000/31/EC"). In a somewhat intermediate position there is, instead, the Court of Siena ordinance issued on 19 January 2019, according to which Facebook, as a private entity, could legitimately remove a user for the dissemination of similar extreme right-wing messages deemed to be in violation of the platform policies: according to the judges of Siena, Facebook cannot "seriously be compared to a public entity in providing a service, albeit of undoubted social importance and socially widespread, however purely private"; on the other hand, the fundamental rights that the plaintiff believed to have been violated are instead "certainly freely exercisable in different contexts, public and, however, suitable for the broadest expression of one's personality".

[97] C. von Bar, *Ole Lando Memorial Lecture: Contract Law and Human Dignity. Second Ole Lando Memorial Lecture, Vienna 2020*, 28(6) *ERPL* 1195 (2020). On a similar wavelength, M. Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 *Yale Journal of Law & Technology* 278 (2019).

This is one of the paradoxes I will consider in the concluding paragraph. It relates to the one arising from a ruling such as the *Packingham* case, in which the US Supreme Court unanimously (8-0, without Justice Gorsuch's intervention) declared illegitimate a North Carolina law prohibiting access to social media for convicted sex offenders en bloc[98]. In this case, the exclusion by the social media was imposed by law, so the question of whether they could exclude the subject in question voluntarily remains unresolved. Yet, the Court's affirmation that social media are now comparable to public places seems to require a negative conclusion, with the paradoxical consequence that the limitations to the freedom to conduct business based on non-discrimination requirements end up favouring subjects who certainly do not enjoy the favours of the promoters of anti-discrimination legislation.

Finally, let us consider the operation of anti-discrimination prohibitions in the context of artificial intelligence[99]. In this context, I would like to draw attention to another Italian case and to two new regulations, one American and one European, both already approved but not yet in force as I write, and still under discussion. Both the judicial decision and the legislation relate to labour relations[100]. The Italian case is the historic order of 31 December 2020 of the Court of Bologna, which opposed certain trade unions and the delivery company Deliveroo[101] . For the first time in Europe[102], a judge has established the discriminatory nature of the algorithm (called Frank) used by one of these companies to distribute deliveries among its riders, since it penalised, for subsequent deliveries, even those who were unavailable due to illness or to strike. The contractual freedom of the platform

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[98] 582 U.S. ___ (2017).

[99] In itself, a topic that has already been debated for several years: see, as early as fifteen years ago, E. Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 *Yale Journal of Law & Technology* 188 (2006). The relevance of the topic has already led, among other things, to the creation of an Algorithmic Justice League, https://www.ajl.org/, last accessed 9 June 2021.

[100] I would like to point out that the potential discriminatory use of artificial intelligence also arises with regard to the moderation of online speech itself: see Cambridge Consultants, *Use of AI in Online Content Moderation,* 2019, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf, last accessed 3 June 2021. But also when applied to the real estate market and the sharing economy in this context, artificial intelligence has given rise to a number of issues, which have led to the opening of several cases against Facebook for having allegedly devised its algorithms in such a way that the targeting of ads (in the field of real estate, but also with regard to job offers and credit) could also be calibrated on the basis of discriminatory criteria: five cases brought between 2016 and 2018 were closed with a settlement in March 2019 (see https://www.courthousenews.com/wp-content/uploads/2019/03/Facebook-joint_statement.pdf, last accessed 7 June 2021); a few days later, the U.S. Department of Housing and Urban Development brought forward an action to contest Facebook for violation of anti-discrimination law in real estate ads for sale or lease (*U.S. Dep't of Housing and Urban Development v. Facebook*, HUD ALJ, FHEO No. 01-18-0323-8, available at https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf, last accessed 7 June 2021); in August 2019, a further case along the same lines, *Vargas v. Facebook, Inc.* was brought (where in January 2021, however, the judge ordered the plaintiffs to provide more details, on pain of dismissal of the case).

[101] Court of Bologna, labour department, ordinance issued on 31 December 2020, available at http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf, last accessed 27 May 2021.

[102] At least according to the triumphant declarations of the trade unions: see *"L'algoritmo di Deliveroo è discriminatorio": sentenza del Tribunale di Bologna*, *La Repubblica*, 2 January 2021.

was thus expressly restricted, and the judge ordered it to modify the algorithm so as to avoid its discriminatory effects.

This is also the aim of the new local law of the city of New York, which will come into force in 2022, and which has imposed a 'bias audit' on all those who sell artificial intelligence-based software used in the process of selecting candidates for a job, aimed at ascertaining in advance that there are no discriminatory criteria in the way it is designed[103]– a fact that several firms have begun to record[104].

Similarly, the recent proposal for a regulation on artificial intelligence[105] has devoted attention to avoiding discriminatory use of AI: as far as businesses are concerned, this implies the choice to classify as "high-risk" the use of AI tools "in employment, workers management and access to self-employment, notably for the recruitment and selection of persons, for making decisions on promotion and termination and for task allocation, monitoring or evaluation of persons in work-related contractual relationships", and this is done in order to avoid that these systems can "perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual orientation". The Commission generally acknowledges that its proposal contains some limitations, such as this one, to the freedom to conduct business, but considers that "Those restrictions are proportionate and limited to the minimum necessary to prevent and mitigate serious safety risks and likely infringements of fundamental rights".

5. Conclusion: opposing progressive and conservative logical short circuits and proposals to overcome them

The analysis carried out has made it possible to draw an up-to-date picture of the main problems arising in courts as a result of the horizontal application of certain fundamental rights – under the banner of anti-discrimination law – as well as certain legislative developments on both sides of the Atlantic.

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[103] See *Bias In Recruitment Software To Be 'Illegal' In New York, Vendors Will Need Bias Audit*, Artificial Lawyer, 12 March 2020, available at https://www.artificiallawyer.com/2020/03/12/bias-in-recruitment-software-to-be-illegal-in-new-york-vendors-will-need-bias-audit/, last accessed 27 May 2021.

[104] See LSE News, *'Big data' from online recruitment platforms show discrimination against ethnic minorities and women - and sometimes men*, 20 January 2021, available at https://www.lse.ac.uk/News/Latest-news-from-LSE/2021/a-Jan-21/Big-data-from-online-recruitment-platforms-show-discrimination, last accessed 27 May 2021.

[105] *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final.

The picture that emerges is not a single-colour one, but one that is both forward-looking and resistant. It is difficult to identify a logically coherent line that unites all the events and regulations considered, even within individual legal systems.

However, it seems clear that there is a current tendency, both in Europe and in the United States, to increase the forms of interference with contractual freedom for reasons linked to the application in relationships between private individuals of a political agenda aimed at the pursuit of substantial equality: in this way, horizontal direct application appears to be expanding not only in those countries that have incorporated it into their constitutions, such as Colombia, but also in those that historically had limited themselves to indirect application[106]: this may perhaps be the logical thread that, despite appearances, sometimes unites different and distant legal systems, in prohibiting private operators from refusing to provide a service, and more generally from discriminating against those with whom they enter into relations.

As expressly stated by Italian judges, freedom of economic initiative tends to be considered secondary, especially in continental Europe, compared to other fundamental rights, as well as to the principle of equality. As we have seen, however, this leads to some paradoxical consequences, both from a progressive and a conservative perspective.

Indeed, as mentioned in the previous paragraph, it seems a clear contradiction that the express subordination of economic freedoms to other rights – in a social scope – and the refusal to recognise the private nature of social media leads to more space being given to neo-fascist inspired formations and sex offenders. Or, from another perspective: one has to realise that one can get more restriction on hate speech, whether anti-democratic or simply false, by leaving private individuals the power to decide which speech to allow and which not. It is certainly true that social media per se would tend to have an incentive to maximise interactions and thus minimise restrictions, and that the censorship-prone attitude they have shown more recently can be explained by various forms of pressure and interference from regulators[107]; but it seems to me that mainstream social media

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[106] See R. Poddar, *Constitutional Responses to Communalism in South Asia: The Case of India*, IACL-AIDC Blog, 14 November 2019, available at https://blog-iacl-aidc.org/2019-posts/2019/11/14/constitutional-responses-to-communalism-in-south-asia-the-case-of-india, last accessed 9 June 2021. The author quotes a number of cases from the Supreme Court of India in which so-called *anti-exclusionary constitutionalism*, which in his view should prevail over contractual autonomy, has been applied in the context of relationships between private individuals: *Vishakha v. State of Rajasthan* (13 August 1997); *IMA v. Union of India* (12 May 2011); *Indian Young Lawyers Association v. State of Kerala* (28 September 2018). On the other hand, in *Zoroastrian Cooperative v. District Registrar* (15 April 2005), the Court upheld the religious freedom of the Zoroastrian minority, declaring legitimate the bylaws of a real estate cooperative society that, under the banner of "communalism" typical of that society, discriminated against non-Zoroastrians in the sale of housing.

[107] This consideration can be found, for instance, in M. Bassini, *Internet e libertà di espressione. Prospettive costituzionali e sovranazionali*, Aracne, Aprilia, 2019, 237 ff., who correctly notes that platforms per se would have an interest in maximising content and interactions, and therefore in not censoring anything. Most likely, the practice of so-called jawboning by members of Congress also plays a role: see D.E. Bambauer, *Against Jawboning*, 100 *Minnesota*

wholeheartedly embrace this new role of gatekeepers and censors. On the other hand, even if one of the social media were to shirk this task[108], the progressive short-circuit would be reproduced, because any intervention by the regulator aimed at functionalising the platforms and forcing them to remove certain posts and/or users would clash with the constitutional need to leave extremists, racists, homophobes and anti-democrats[109] free to express themselves.

Nevertheless, an incredible turnaround is also what led the Democratic majority of the California State Legislature to vote for a constitutional amendment which, by repealing the previous amendment of 1996 that had banned discrimination and affirmative action on the basis of race, ethnicity or gender in certain areas of the public sphere, including selection in universities, proposed to legitimise discrimination on the basis of those categories, in a paradoxical twist and overcoming of the principle of equality[110] (the proposal was then rejected by California voters in a referendum in November 2020[111]).

However, there is also the conservative short-circuit, which is evident in America: when measures are invoked or even taken against the liberal prejudices of traditional and new media, it betrays respect for private autonomy, which from this perspective should remain sacred even for companies pursuing a progressive agenda. This is what has happened with former President Trump's Executive Order on social media[112], aimed at reducing the areas in which the latter are exempt from editorial

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Law Review 51 (2015), as well as *Association of American Physicians and Surgeons v. Schiff*, 2021 WL 354174 (D.D.C. Feb. 2, 2021).

[108] Which, according to some, actually still happens too often: see C. Gartenberg, *English soccer teams have started a four-day social media boycott to protest online abuse*, in *The Verge*, 30 April 2021, available at https://www.theverge.com/2021/4/30/22412060/english-soccer-teams-boycott-four-day-social-media-protest-online-abuse, last accessed 27 May 2021.

[109] The reference to L.C. Bollinger, *The Tolerant Society. Freedom of Speech and Extremist Speech in America*, Oxford University Press, Oxford, 1986.

[110] See The Wall Street Journal, *A Vote for Discrimination*, 25 June 2020.

[111] An almost entirely similar case had also occurred in the State of Washington: see The Wall Street Journal, *Washington's Affirmative Repudiation*, 13 November 2019. It is also worth mentioning *Romer v. Evans*, 517 U.S. 620 (1996), in which the U.S. Supreme Court held that an amendment to the Colorado Constitution, approved by the voters of that state and aimed at preventing public authorities from discriminating against homosexuals and bisexuals, was unconstitutional because it was contrary to the principle of equality guaranteed by the 14th Amendment.

[112] Executive Order 13925 of 28 May 2020, 85 FR 34079, *Preventing Online Censorship*. This act was revoked by the new President Biden with a new Executive Order, 14029 of 14 May 2021, 86 FR 27025, *Revocation of Certain Presidential Actions and Technical Amendment*. It may be noted that, from a progressive point of view, there is a certain contradiction in (again) widening the scope of irresponsibility of platforms, when from this perspective one would normally call for greater interventionism on their part, and the use of tools to sanction any inactivity in removing unwanted content. A lawsuit against this executive order had been filed by an organisation funded by Facebook, Google, and Twitter, but it was deemed to lack standing: see Reuters, *U.S. court dismisses lawsuit that had challenged social media executive order*, 12 December 2020, available at https://www.reuters.com/article/us-usa-trump-socialmedia-court/u-s-court-dismisses-lawsuit-that-had-challenged-social-media-executive-order-idUSKBN28M029, last accessed 7 June 2021. Trump then sent a final political signal against Section 230 by vetoing the *National Defense Authorization Act* for 2021 in December 2020, partly because of the failure of this provision to be repealed by the bill (Congress reapproved the bill, however, the only case of a veto override of his presidency: see T.B. Lee, *House overrides Trump veto, defying demand to repeal Section 230*, in *ArsTechnica*, 29 December 2020, available at

liability on the basis of the famous Section 230 of the *Communications Decency Act*[113] (but paradoxically destined, according to many observers, to prove a boomerang for authors, such as Trump himself, of content that is not always factually well-founded[114]); but it is also the case of the strong controversy against the decision of many platforms to deactivate Donald Trump's accounts[115], or of Amazon, Google, and Apple to hinder the new social media Parler, which had introduced itself as the social network of free speech, free of censorship and bans on expression[116], or of GoFundMe to exclude certain campaigns considered discriminatory from its platform[117], or against the decision of Harvard (a private university) to revoke the admission of Kyle Kashuv, a well-known survivor of a massacre in a Florida high school, very active on Twitter on conservative positions and in defence of the right to bear arms[118], after some of his racist writings had been made public.

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https://arstechnica.com/tech-policy/2020/12/house-overrides-trump-veto-defying-demand-to-repeal-section-230/, last accessed 9 June 2021).

[113] 47 U.S.C. § 230. For a defence of Section 230 against opposing attacks from progressive and conservative sides, see E. Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, in *Reason*, 29 July 2019, available at https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/, last accessed 7 June 2021; for a different perspective, see E. Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 *Notre Dame Law Review* 33 (2019).

[114] See P. Baker, D. Wakabayashi, *Trump's Order on Social Media Could Harm One Person In Particular: Donald Trump*, *The New York Times*, 28 May 2020.

[115] Such protests match Trump's own previous invectives against social media when they had deactivated some far-right profiles (see M. McGraw, *President Trump amplifies far-right voices in protest of Facebook ban*, ABC News, 5 May 2019). Significantly, in a further testimony of the paradoxical positions to which this matter often leads, it was an extreme left-wing politician such as Bernie Sanders who spoke out against Trump's censorship, also on the basis of his opposition to the alleged excessive power of tech companies (see J. Guynn, *Bernie Sanders against Donald Trump Twitter ban: 'Tomorrow it could be somebody else'*, USA Today, 24 March 2021). On the other hand, it must be acknowledged that the self-exile from the platforms that had banned the President, decided by some Republicans as a sign of protest, was a method that respected the principle of contractual autonomy: see M. Price, *Republicans in one NC county go dark on social media to protest sites banning Trump*, *The Charlotte Observer*, 11 January 2021. A very different assessment can be made, however, of the law promoted by the Republican governor of Florida, recently passed, which prohibits platforms from blocking political candidates for more than 14 days, as well as removing journalistic accounts on the basis of shared content: see J.D. McKinnon, *Florida's New Law Bars Twitter, Facebook and Others From Blocking Political Candidates*, in *The Wall Street Journal*, 25 May 2021. The enforcement of this law was recently suspended by a preliminary injunction finding a likely violation of the platforms' freedom of expression: United States District Court for the Northern District of Florida, Tallahassee Division, *Netchoice, LLC et al. v. Ashley Brooke Moody et al.*, Case 4:21-cv-00220-RH-MAF, 30 June 2021.

[116] See e.g. J. Nicas, D. Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, *The New York Times*, 9 January 2021.

[117] See S. Smith, *GoFundMe Removes Christian Grandma-Florist Barronelle Stutzman's Fundraising Page; 2nd Christian Business Facing 'Ruin' Removed From Site This Week*, in *The Christian Post*, 29 April 2015: it is the same article, moreover, that reminds us of the existence of alternatives: "*Although Stutzman's GoFundMe page was taken down, supporters can still offer their donations through an Alliance Defending Freedom online fundraising campaign. Likewise, Franklin Graham's Samaritan's Purse has set up an online fundraising avenue for Sweet Cakes by Melissa*".

[118] For a reconstruction of the case and a critique, see Z. Slayback, *Stop Glorifying Harvard; Kyle Kashuv Will Probably Be Fine*, in Fee.org, 21 June 2019, available at https://fee.org/articles/stop-glorifying-harvard-kyle-kashuv-will-probably-be-fine, last accessed 8 June 2021. The case, *Students for Fair Admissions v. President and Fellows of Harvard College,* was dismissed in the first instance by the United States District Court for the District of Massachusetts and on appeal by the First Circuit Court of Appeals.

But a conservative short-circuit can also be seen, in my opinion, in the legal initiatives of the German *Hotel Ban* and *Comcast*, *Freedom Watch* and *PragerU*[119] cases in the US, and in Jakubiak's case against the café that excluded his beer in Poland, as well as in the UK's controversial *Online Safety Bill*[120]. This recent bill proposes, on one hand, to prohibit platforms from excluding "journalistic" content, or in any case content of alleged "democratic importance", in a direct challenge to the censorship tendencies allegedly inspired by a liberal bias of the web giants; on the other hand, it provides for significant penalties to be imposed on them in the event of failure to remove certain content falling into the category of so-called "lawful but harmful content", thus considerably extending the obligations of control and interference by these subjects.

Lastly, the conservative resentment towards platforms has found its way to the United States, not only through a bill imposing a so-called '*fairness doctrine*'[121] and a white paper by the Department of Justice aimed at accepting the requests repeatedly expressed by then President Trump[122], but even to the Supreme Court, with the words penned by Justice Thomas that complete a trajectory that began with *Brand X*: in a well-known case concerning whether then-President Trump had the right to block users who made unwelcome comments, Thomas wrote in his *concurring opinion* that "Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties"[123] and that "There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner"[124].

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[119] On the latter two, see footnote 127 below.

[120] The full text is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf, last accessed 3 June 2021.

[121] This is Republican Senator Hawley's bill, called the *Ending Support for Internet Censorship Act* (S.1914 - 116th Congress (2019-2020)), and eloquently directed "To amend the Communications Act of 1934 to provide accountability for bad actors who abuse the Good Samaritan protections provided under that Act".

[122] U.S. Department of Justice, *Section 230 - Nurturing Innovation or Fostering Unaccountability?*, June 2020. For a critique of this initiative and the one mentioned in the previous footnote, see J. Czerniawski, *A 'Fairness Doctrine' for the Internet Could Backfire on Conservatives*, in Fee.org, 13 July 2020, available at https://fee.org/articles/a-fairness-doctrine-for-the-internet-could-backfire-on-conservatives/, last accessed 7 June 2021.

[123] *Biden v. Knight First Amendment Institute*, 593 U. S. ____ (2021), Thomas, J., concurring, p. 2 of the *slip opinion*.

[124] *Biden v. Knight First Amendment Institute*, 593 U. S. ____ (2021), Thomas, J., concurring, p. 6 of the *slip opinion*. See also the statements of a well-known American conservative opinion-leader (and jurist), Ann Coulter: R. Kraychik, *Ann Coulter: 'We Need to Apply the First Amendment to Social Media Companies'*, in *Breitbart*, 22 August 2018, available at https://www.breitbart.com/tech/2018/08/22/ann-coulter-we-need-to-apply-the-first-amendment-to-social-media-companies/, last accessed 3 June 2021. For a critique, see D. Root, *Clarence Thomas Declares War on Big Tech,* in Reason, July 2021 issue, available at https://reason.com/2021/06/06/clarence-thomas-declares-war-on-big-tech/, last accessed 7 June 2021.

Faced with such paradoxes and short-circuits, a perspective aimed at affirming the principle that social media, as[125] private entities, and as such protected by the First Amendment[126], have the right to discriminate against anyone and should not be obliged to discriminate against anyone or

[125] If from a formal point of view their private nature is undoubted, many argue the need to consider *social media* as *state actors*, therefore subject to the same obligations of non-discrimination and protection of freedom of expression as state bodies. However, the indications coming from the U.S. Supreme Court, apart from the very recent hint of Thomas just mentioned, seem to lead to exclude that such an eventual equalization can take place through case law. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court held that a company-town, although privately owned, exercised a 'public function', and therefore could not prevent the distribution of religious leaflets; similarly, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 501 (1946), the Court held that a company-town, although privately owned, exercised a 'public function', and therefore could not prevent the distribution of religious leaflets; similarly, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), the Court held that the spaces of a private shopping mall were like the pavements of a city, and therefore that the First Amendment protected union picketing in such areas. *Tanner*, 407 U.S. 551 (1972), concerning the distribution of political leaflets also in a shopping centre; thus, in *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), in a similar case in *Logan Valley*, the Supreme Court decided that the Constitution offered no protection for demonstrators, although such protection may be offered under certain conditions by the legislature; thus, in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), the Supreme Court held that a Californian shopping centre could not prevent students from carrying out a political leafleting, since the California Constitution provided for protection of freedom of expression in the affirmative, and not only in the negative, as the federal Constitution does. On this subject, see in general S. Jaggi, *State Action Doctrine*, in R. Grote, F. Lachenmann, R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (last updated October 2017), available at https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e473?rskey=XgQGSk&result=1&prd=MPECCOL last accessed 4 June 2021.

[126] See E. Goldman, *Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)*, 26 February 2018, available at https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question, last accessed 9 June 2021 (responding to H. Whitney, *Search Engines, Social Media, and the Editorial Analogy*, available at https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy, 27 February 2018, last accessed 9 June 2021). Goldman himself (*Are Social Media Services "State Actors" or "Common Carriers"?*, 12 February 2021, available at https://blog.ericgoldman.org/archives/2021/02/are-social-media-services-state-actors-or-common-carriers.htm, last accessed 9 June 2021) makes the following point: "Google is protected by the First Amendment's free speech and free press clauses. Thus, any regulatory mandate that Google include or exclude information in its search index is almost certainly unconstitutional. See, e.g., *Search King, Inc. v. Google Technology, Inc.*, 2003 WL 21464568 (W.D. Okla. 2003); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014); *Google, Inc. v. Hood*, 96 F. Supp. 3d 584 (S.D. Miss. 2015) (vacated on other grounds); *e-ventures Worldwide v. Google, Inc.*, 2017 WL 2210029 (M.D. Fla. 2017); Eugene Volokh & Donald M. Falk, *First Amendment Protection For Search Engine Search Results*, April 20, 2012; see also *Martin v. Hearst Corporation*, 777 F.3d 546 (2d Cir. 2015) (publication cannot be obligated to remove article about an expunged arrest). Furthermore, Section 230 (both (c)(1) and (c)(2)) statutorily immunize search engines for their indexing decisions, including their refusal to de-index content (even if that content is tortious). See, e.g., *Maughan v. Google Technology*, Inc. App. 4th 1242 (Cal. App. Ct. 2006); *Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007); *Shah v. MyLife.Com*, Inc., 2012 WL 4863696 (D. Or. 2012); *Merritt v. Lexis Nexis*, 2012 WL 6725882 (E.D. Mich. 2012); *Nieman v. Versuslaw, Inc.*, 2012 WL 3201931 (C.D. Ill. 2012); *Getachew v. Google, Inc.*, 491 Fed. Appx. 923 (10th Cir. 2012); *Mmubango v. Google, Inc.*, 2013 WL 664231 (E.D. Pa. 2013); *O'Kroley v. Fastcase Inc.*, 831 F.3d 352 (6th Cir. 2016); *Fakhrian v. Google Inc.*, 2016 WL 1650705 (Cal. App. Ct. 2016); *Despot v. Baltimore Life Insurance Co.*, 2016 WL 4148085 (W.D. Pa. 2016); *Manchanda v. Google, Inc.*, 2016 WL 6806250 (S.D.N.Y. 2016); *Mosha v. Yandex Inc.*, 2019 WL 5595037 (S.D.N.Y. 2019); see also *Yeager v. Innovus Pharmaceuticals, Inc.*, 2019 WL 447743 n.6 (N.D. Ill. 2019) ("no 'right to be forgotten' exists under United States law")". See also *S. Louis Martin v. Google Inc.*, Superior Court of the State of California, County of San Francisco, CGC-14-539972, 13 November 2014. The issue is intertwined with the right to be forgotten as referred to in the famous *Google Spain* judgment of the Court of Justice of the EU (C-131/12, 13 May 2014), followed by *CNIL* (C-507/17, 24 September 2019), which circumscribed its application from a territorial point of view; on the contrary, the Supreme Court of British Columbia in Canada, in *Equustek Solutions Inc. v. Jack* (2014 BCSC 1063, 13 June 2014), with a judgment echoing the well-known French judgment in the mentioned case *LICRA v. Yahoo!*, extended applicability beyond the relevant jurisdiction, risking to lay the conceptual foundations for the possibility of some authoritarian regimes to force web companies to remove unwelcome content, a powerful additional weapon of discrimination in their hands, albeit implemented through platforms: see Z. Graves, *The dangerous proliferation of the 'right to be forgotten'*, HuffPost, 18 June 2014, available at https://www.huffpost.com/entry/the-dangerous-proliferati_b_5507477, last accessed 9 June 2021.

anything, as opposed to what is invoked by progressive perspectives, would seem much more sustainable and coherent. Correlatively, a contract law defence seems much more promising for conservatives: exclusions can perhaps be much more effectively challenged on the basis that all platforms have always tended to promote themselves as generalist and open to all, with very general indications about the type of content not allowed[127].

[127] This reflection was developed by S. Thobani, *L'esclusione da Facebook tra lesione della libertà di espressione e diniego di accesso al mercato*, forthcoming in *Giurisprudenza italiana*, 2021, issue 2 (the work is a comment on the ordinance of the Court of Trieste mentioned above, in footnote 96, on which see also S. Martinelli, *Facebook - FNAI e la chiusura dell'account Facebook di un'associazione: quale tutela?*, forthcoming in *Giurisprudenza italiana*, 2021; see also the approach followed by the Court of Siena, in the order mentioned in the same footnote). This approach seems to be a valid argument in support of judicial initiatives such as that of the famous conservative columnist Candace Owens against two Facebook fact checkers (Lead Stories and USA Today), after some of her posts had been reported by them as containing false statements on COVID, with the consequent demonetisation of the page and therefore loss of money for Owens and her company: see https://www.factcheckzuck.com/, last accessed 4 June 2021. Owens's lawsuit is not based on freedom of expression but is entirely private. The strategy chosen by Prager University, another conservative organisation that sued YouTube for restricting access or demonetising a few hundred of its videos, was different; the institution claimed, among other things, that by doing so YouTube had violated PragerU's First Amendment rights, abusing the protection granted to it by *Section* 230, which should have obliged it, as a "*public forum*", to grant space to all those who requested it. However, the courts rejected the suit, both in the first instance (No. 17-CV-06064-LHK, 26 March 2018) and on appeal (No. 18-15712, 9th Cir. 26 February 2020), confirming the (only) private nature of YouTube, also in light of *Halleck*, and thus excluding its nature of "*state actor*", as already affirmed by the same appellate court twenty years earlier with respect to AOL: *Howard v. America Online*, No. 98-56138, 29 March 2000, which in turn recalls on this point *Accord Thomas v. Network Solutions, Inc.* 176 F.3d 500, 511 (D.C.Cir.1999) and *Cyber Promotions, Inc. v. America Online, Inc.* 948 F. Supp. 436, 443-44 (E.D.Pa.1996) (see also *Green v. America Online*, 318 F.3d 465 (3d. Cir. 2003)); a parallel initiative in a California Superior Court was no more successful (see https://assets.documentcloud.org/documents/6523323/Prager.pdf, last accessed June 5, 2021). The same fate was met, both in the first instance (*Lewis v. Google LLC*, 2020 WL 2745253 (N.D. Cal. May 21, 2020)) and on appeal (*Lewis v. Google LLC*, 2021 WL 1423118 (9th Cir. April 15, 2021)), by the similar initiative of the conservative pundit Bob Lewis against Google, for having removed, restricted, or demonetised some videos of his YouTube channel dedicated to denouncing misandry (male hatred). Failed initiatives challenging the constitutionality of Section 230 also include *American Freedom Defense Initiative et al. v. Lynch*, 2016 WL 6635634 (D.C. Nov. 9, 2016) and *Richard v. Facebook, Inc.*, C/A No. 2018-CP-2606158 (S.C. Court of Common Pleas May 22, 2019). Other cases that have ruled out the "state actor" nature of web giants (and some smaller entities) are: *Rutenberg v. Twitter, Inc.*, 2021 WL 1338958 (N.D. Cal. Apr. 9, 2021); *Daniels v. Alphabet Inc.*, 2021 WL 1222166 (N.D. Cal. March 31, 2021) (but see also, for other cases excluding a must-carry obligation on the part of platforms, *Doe v. Google LLC*, 2020 WL 6460548 (N.D. Cal. Nov. 3, 2020)); *Twitter v. Superior Court ex rel Taylor*, A154973 (Cal. App. Ct. Aug. 17, 2018), as well as *Langdon v. Google, Inc.*, quoted in the previous note); *Plotkin v. The Astorian*, 2021 WL 864946 (D. Ore. March 8, 2021), relating to a newspaper; *DeLima v. Google, Inc.*, 2021 WL 294560 (D.N.H. Jan. 28, 2021); *Divino Group LLC v. Google LLC*, 2021 WL 51715 (N.D. Cal. Jan. 6, 2021), a case brought by the same lawyers who filed *PragerU*, but in which LGBT youtubers complained of discrimination; *Atkinson v. Facebook Inc.* 20-cv-05546-RS (N.D. Cal. Dec. 7, 2020); *Belknap v. Alphabet, Inc.*, 2020 WL 7049088 (D. Ore. Dec. 1, 2020); *Perez v. LinkedIn Corp.*, 2020 WL 5997196 (S.D. Tex. Oct. 9, 2020); *Zimmerman v. Facebook, Inc.*, 2020 WL 5877863 (N.D. Cal. Oct. 2, 2020); *Wilson v. Twitter*, 2020 WL 3256820 (S.D. W.V. June 16, 2020); *Tulsi Now, Inc. v. Google, LLC*, 2:19-cv-06444-SVW-RAO (C.D. Cal. March 3, 2020); *Federal Agency of News LLC v. Facebook, Inc.*, 2020 WL 137154 (N.D. Cal. Jan. 13, 2020); *Fyk v. Facebook, Inc.*, No. C 18-05159 JSW (N.D. Cal. June 18, 2019); *Williby v. Zuckerberg*, 3:18-cv-06295-JD (N.D. Cal. June 18, 2019); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662 (N.D. Cal. May 9, 2019); *Freedom Watch Inc. v. Google, Inc.*, No. 19-7030 (D.C. Cir. May 27, 2020) (also unsuccessfully attempting to plead antitrust violations, while there is no mention of Section 230); *DeLima v. YouTube*, Magistrate R&R: *DeLima v. YouTube, LLC*, 2018 WL 4473551 (D.N.H. Aug. 30, 2018), District court approval of R&R (*verbatim*): 2018 WL 4471721 (D.N.H. Sept. 18, 2018); *Johnson v. Twitter, Inc.*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018); *Nyabwa v. Facebook*, Dist. Court, SD Texas, Civil Action No. 2:17-CV-24, January 26, 2018; *Shulman v. Facebook, Inc.*, 2017 WL 5129885 (D. N.J. Nov. 6, 2017); *Quigley v. Yelp*, 2017 U.S. Dist. LEXIS 103771 (N.D. Cal. July 5, 2017); *Forbes v. Facebook, Inc.*, Dist. Court, ED New York, No. 16 CV 404 (AMD), Feb. 18, 2016; *Buza v. Yahoo, Inc.*, 2011 WL 5041174 (N.D. Cal. Oct. 24, 2011); *Young v. Facebook*, 2010 WL 4269304 (N.D. Cal. Oct. 25, 2010); *Estavillo v. Sony Computer Entertainment America*, 2009 WL 3072887 (N.D. Cal. Sept. 22, 2009); *Jayne v. Google Internet Search Engine Founders*, No. 07-4083 (3rd Cir. Feb. 7, 2008); *Murawski v. Pataki*, 2007 WL 2781054 (S.D.N.Y. Sept. 26, 2007), also quoted above, *supra* note 126;

But the paradoxes and contradictions certainly do not only concern online speech. The American jurisprudence on wedding vendors, from which we started, seems by now to be oriented in the majority towards the recognition of the full legitimacy of the restrictions to contractual freedom imposed by the anti-discriminatory law, so much so that some states, such as Indiana and Arkansas, have wanted to issue special laws to reaffirm instead the right of wedding vendors to refuse their services for religious reasons; The only sentence of the Supreme Court that has gone in a different direction has not exactly affected a general (and in itself entirely appreciable) judicial deference towards the choices of the legislature. On closer inspection, in the United States the question of the relationship between anti-discrimination legislation and economic freedoms has tended to not be posed in terms of constitutionality, or of the compatibility of the former with the latter: the cases concerned, more than anything else, questions of an interpretative nature, without prejudice to the self-restraint, also of the Supreme Court, for the decisions taken by the legislator. The picture does not seem to be affected by rulings such as *Comcast* and *Halleck*, since in labour law cases such as *Bostock* confirm the respect of the legislator's choices.

For its part, Europe, with rulings such as *Achbita* and *Associazione Avvocatura per i diritti LGBTI*, also presents a partly contrasting picture, but undoubtedly anti-discrimination law is being progressively expanded, both in terms of protected categories and prohibited conduct, both through legislation and case law. This progressive extension of the application of fundamental rights to relations between private individuals, which has led to a profound departure from the original conception of the doctrine of *Drittwirkung*, also leads to paradoxical outcomes, or at least to outcomes worthy of discussion: it is one thing to state that freedom of thought also covers criticism of a film and calls for its boycott, and quite another to limit an entrepreneur's ability to choose his collaborators or clients. This opens up scenarios of cascading problems: how should the law treat the wedding vendor who performs his service, because he is obliged to do so by law, but does so at a lower quality level than normal, perhaps not for voluntary retaliation, but because an artist or even just a craftsman will certainly not be inspired to do his job to the best of his ability if forced to do it unwillingly, having received a request that "he can't refuse"? Not to mention the closures of a

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Langdon v. Google, quoted above and in the previous note; *KinderStart.com LLC v. Google, Inc.*, C 06-2057 JF (N.D. Cal. March 16, 2007); *McNeil v. VeriSign, Inc.* 2005 WL 741939 (9th Cir. Apr. 1, 2005), concerning ICANN; *CompuServe, Inc. v. Cyber Promotions, Inc.* 962 F. Supp. 1015 (S.D. Ohio 1997); *America Online, Inc. v. Cyber Promotions, Inc.* 948 F. Supp. 436 (E.D. Pa. 1996); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000); *Island Online, Inc. v. Network Solutions, Inc.* 119 F. Supp. 2d 289 (E.D.N.Y. 2000); *Nat'l A-1 Adver. v. Network Solutions, Inc.* 121 F. Supp. 2d 156 (D. N.H. 2000); *Thomas v. Network Solutions, Inc.* 176 F.3d 500 (D.C. Cir. 1999). The primary source for this very large selection of cases (many of them *pro se*) is Prof. Goldman's extraordinary Technology & Marketing Law Blog, https://blog.ericgoldman.org/. On this subject, see also the authoritative study by J. Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application – Or Lack Thereof – To Third-Party Platforms*, 32 *Berkeley Tech. L. J.* 989 (2017).

business which, as we have seen, are expressly considered preferable to the owner's choice to serve only a few or are (considered as) an inevitable consequence of this decision: the members of the discriminated class do not see their own faculty of choice improved, but all the others see it diminished.

This leads to a further consideration: without prejudice to the criticisms set out in paragraph 2, the practical consequence of such a marked extension of the anti-discrimination prohibitions is a sort of generalised, but completely abnormal and misunderstood application of competition law: when, in the hypothetical silence of the terms and conditions, a host decides not to rent its property to members of a certain class, the imposition of renting to all (as the only alternative to not renting) ends up treating each individual host as a monopolist in a dominant position[128]. It is as if the relevant market is being restricted in a totally unconscious way to the single neighbourhood, or even to the single building, as if any operator is being treated as a 'gatekeeper' as in the European Commission's draft of the *Digital Markets Act*[129], as if there really were no alternative when, instead, the cases where there are no real options seem to be limited to extreme situations[130] in which, in any case, it is questionable whether private property should be functionalised to the point of requiring individual owners to take responsibility for such situations, which should instead be borne more appropriately, if at all, by the community of reference, possibly through general taxation.

Similarly, it is difficult to imagine that a homosexual lawyer would not find alternative employment or collaboration to that of the law firm of Taormina, considering over 245,000 lawyers active in

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[128] This argument has been developed e.g. by the already frequently quoted R.A. Epstein, *The Problem With Antidiscrimination Laws*, in *defining ideas*, 13 April 2015, available at https://www.hoover.org/research/problem-antidiscrimination-laws, last accessed 27 May 2021. See in this respect also the debate on ProMarket between L. Zingales, *The Silent Coup*, 11 January 2021 (according to whom, substantially in line with Bernie Sanders's position recalled above, supra note 115, the 'over the top' companies that had just banned Trump from their platforms "are not random private companies, they represent (as the telephone in the past) a basic infrastructure of communication") and C. Amenta, M. Boldrin, C. Stagnaro, *Digital Platforms May Be Monopolistic Providers, But They Are Not Infrastructure*, 26 January 2021 (according to whom "From an economic point of view, an infrastructure should be regulated insofar as it is a natural monopoly. Each of the TAGAF may be a de facto monopolistic provider in its own markets [...] but there is nothing *natural* in this'). With regard to search engines, the reflection has been developed by G.A. Manne, *The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment*, in B. Szoka, A. Markus (eds.), *The Next Digital Decade. Essays on the Future of the Internet*, TechFreedom, Washington, 2010, pp. 419-434. With regard to digital stores of companies such as Apple and Google, the issue is at the centre of the legal dispute pending before the United States District Court for the Northern District of California between Apple itself and the video game company Epic Games (*Epic Games, Inc. v. Apple Inc.*). The issue is also at the heart of the *Google Shopping* case, currently pending before the General Court (*Google and Alphabet v. Commission*, T-612/17). Finally, see the judgment of the Czech Constitutional Court quoted above, footnote 35.

[129] COM/2020/842 final, 15 December 2020.

[130] Such as those recounted in the report by M. Frazier, *When No Landlord Will Rent to You, Where Do You Go?*, *The New York Times Magazine*, 20 May 2021.

Italy[131] (moreover, the discrimination in that case was only theoretical, as there was not even a concrete case of a gay lawyer being discriminated against, just as in the Deliveroo case there was not a single rider discriminated against, but the case was brought by the trade unions in a generic way, once again testifying to the progressive extension of the scope of anti-discrimination law)[132].

In the end, the most appropriate way to deal with these problems seems to be to first of all clarify at a logical and conceptual level the scope of the application of fundamental rights: the prohibited restrictions are those carried out by public authorities (as we always underline, the First Amendment establishes that it is Congress that "shall make no law [...] abridging the freedom of speech", and therefore does not set limits to restrictions by private individuals). This makes it very easy to solve the problem of online speech, as I reserve the right to discuss in more detail elsewhere.

It is certainly possible to imagine an effect vis-à-vis other private individuals (third-party effect), but the only way to end up in a logical short-circuit and an intellectual dead-end is to rely on robust protection of property rights (and the right to exclude inherent in it since Roman times) and contractual autonomy. Adequate respect for economic freedoms implies that I always have a right to express my opinion, but not if I am in the home of others who do not like it (and have the power to throw me out for it); I always have a right to self-determination, religious or sexual, or to dress as I like, but I do not have a right to be employed or to obtain a service, the lease of a property, etc. from others who are uncomfortable with my choices, however hateful and bigoted this discomfort may be.

The possible temporary difficulty of finding alternatives could be solved much more effectively with market solutions, compatible with a legal order based on freedom[133]. Moreover, as Frédéric Bastiat made clear in *The Law*, "it is impossible for me to separate the word *fraternity* from the word *voluntary*. I cannot possibly understand how fraternity can be *legally* enforced without liberty

[131] These are the most recent data, contained in CENSIS, *L'impatto della pandemia sulla professione: le risposte all'esplosione dell'incertezza*, 2021, available at https://www.cassaforense.it/media/9475/rapportocensis-2021.pdf, last accessed 27 May 2021.

[132] It is then possible to doubt the obligation to contract even for monopolists (see D.T. Armentano, *Antitrust. The Case for Repeal*, Mises Institute, Auburn, 20072 (1999), pp. 100 ff. but certainly the cases we are describing do not qualify as cases of market power by any reasonable market definition. Moreover, as recalled in the preceding paragraphs, the existence of alternatives as elements capable of excluding the harmfulness of contractual discrimination has been emphasised not only in cases of small operators – as in the case of the Polish hotel that had excluded the Russians – but also with regard to Facebook – thus the Court of Siena in the passage quoted above, footnote 96. The important decision of the US Supreme Court in *Packingham*, as previously mentioned, stated instead that social media have now acquired the nature of a public place, and therefore must be subject to the same regime; thus, also the *Stormans, Inc. v. Wiesman* case was finally decided in the sense that the existence of alternatives (in this case, a large number of nearby pharmacies willing to sell emergency contraceptives) was not relevant.

[133] Cf. C. Rocci, *"Abito giusto", ecco il patto tra inquilini e padroni per battere il "non si affitta agli stranieri"*, *La Repubblica*, 10 May 2021.

being *legally* destroyed, and thus justice being *legally* trampled underfoot"[134]: any "imposed fraternity" can only compress liberty in an unacceptable way, besides having paradoxical consequences on the economic level such as the restriction of supply for all.

After all, discrimination is now a term with a deterrent meaning, but on closer inspection it is possible to recover its neutral meaning: "Discrimination was said by Gautama Buddha to be the greatest essential human virtue. Truly it is a blessing – a blessing that is also in harmony with Judeo-Christian ideals. It is necessary to progress and to the advancement of civilisation. Many of the leading problems of our day [...] stem from a thought-disease about discrimination. It is well known that discrimination has come to be widely scorned. And politicians have teamed up with those who scorn it, to pass laws against it – as though morals can be manufactured by the pen of a legislator and the gun of a policeman. What is this thing, this discrimination, which has become so widely dubbed as an evil? Discrimination is the exercise of choice. It necessarily arises from knowledge and wisdom. And the greater the knowledge and wisdom, the higher the degree of discrimination"[135].

[134] F. Bastiat, *The Law*, Foundation for Economic Education, Irvington-on-Hudson, 1998 (1850), available at https://oll.libertyfund.org/title/bastiat-the-law, last accessed 3 July 2021.

[135] F.A. Harper, *Blessings of Discrimination*, 7(1) *In Brief* 1, 4-5 (1951). Cf. also the words of the Italian writer P. Mastrocola, *La scuola raccontata al mio cane*, Guanda, Modena, 2004, p. 13, here translated into English: "to discriminate is a verb I do not like much. Nothing should ever be discriminating. And to think that, in itself, 'discriminate' is such a harmless verb. It comes from *discrimen*, which means division, line of separation, interval, distance. And so, it just means to divide, to separate, to distinguish. What is the problem? It means that I do not put everything together in the same place, but I choose. Do we have any idea how many discriminations we make every day? [...] Instead, we immediately and automatically attach a negative meaning to the verb discriminate".