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Cross-Burning Is Not a Threat: Constitutional Protection for Hate Speech - R.A.V. v. City of St. Paul

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CROSS-BURNING IS NOT A THREAT: CONSTITUTIONAL PROTECTION FOR HATE SPEECH

R.A.V. v. City of St. Paul
112 S. Ct. 2538 (1992)

C. Catherine Scallan

I. INTRODUCTION

The Supreme Court handed down *R.A.V. v. City of St. Paul*,[1] on June 22, 1992, and it was immediately seized upon in the press as a statement by the Court that cross-burning was an acceptable mode of political expression.[2] While this may have been the popular impression – after all, the high Court had also been popularly reported to give its imprimatur to flag burning[3] – the Justices all carefully denied that any such interpretation was the case.[4] The Court did hold that a St. Paul, Minnesota anti-hate speech ordinance violated the petitioner's First Amendment right to freedom of speech.[5] The majority opinion crafted a rule against "content-based" governmental discrimination, while four Justices, in three separate

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1. 112 S. Ct. 2538 (1992).

2. *See, e.g.*, *Court Excerpts: Adding Free Speech "to the Fire,"* WASH. POST, June 23, 1992, at A-6; Glen Elsasser, *High Court Voids Ban on Hate Signs*, CHI. TRIB., June 23, 1992, at 1; Linda Greenhouse, *High Court Voids Law Singling Out Crimes of Hatred*, N.Y. TIMES, June 23, 1992, at A-1; Linda Greenhouse, *The Court's 2 Visions of Free Speech*, N.Y. TIMES, June 24, 1992, at A-13; Greg Henderson, *Justices Say "Hate Crime" Laws Violate Free Speech*, UPI, June 22, 1992, *available in* LEXIS, Nexis Library, UPI File; Dick Lehr, *High Court Overturns "Hate Crime" Ordinance*, BOSTON GLOBE, June 23, 1992, at 1; Ruth Marcus, *Supreme Court Overturns Law Barring Hate Crimes. Free Speech Ruling Seen as Far-Reaching*, WASH. POST, June 23, 1992, at A-1.

3. These allegations were made following the decision in Texas v. Johnson, 491 U.S. 397 (1989). *See infra* notes 73-75 and accompanying text. *See, e.g.*, Linda Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. TIMES, June 22, 1989, at A-1; Al Kamen, *Court Nullifies Flag-Desecration Laws; First Amendment Is Held to Protect Burnings During Political Demonstrations*, WASH. POST, June 22, 1989, at A-1; Judith Martin, *A Banner Day for Etiquette*, WASH. POST, July 16, 1989, at F-1 ("In judging how best to protect the sanctity of the American flag, the U.S. Supreme Court has awarded custody to etiquette. Miss Manners concurs.").

4. In the majority opinion, there is the following statement: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 112 S. Ct. at 2550. Justice White, in his concurrence, called this type of expression "repugnant." *Id.* at 2559 (White, J., concurring). Justice Blackmun spoke out more strongly:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

Id. at 2561 (Blackmun, J., concurring). Finally, Justice Stevens stated, "The cross-burning in this case – directed as it was to a single African-American family trapped in their home – was nothing more than a crude form of physical intimidation. That this cross-burning sends a message of racial hostility does not automatically endow it with complete constitutional protection." *Id.* at 2569 (Stevens, J., concurring).

5. *Id.* at 2542.

concurrences, would have invalidated the ordinance based on the more technical First Amendment doctrine of overbreadth.[6]

This Note will discuss the facts and procedural history of the present case; the probable and presumed legislative intent of the ordinance; the more recent history of United States case law in the area of the First Amendment, especially with regard to fighting words, obscenity, and defamation – all proscribable categories of speech; and the differing views of the Justices in the instant case. Finally, this Note will examine the legal viability, as well as the future social utility and efficacy, of anti-hate speech laws.

II. Facts and History of the Instant Case

Before dawn on the morning of June 21, 1990, a minor, identified by the Court as "R.A.V.,"[7] along with a group of cohorts, set fire to a cross he had fashioned from wooden chair legs outside the home of the only African-American family in his neighborhood.[8] R.A.V. was subsequently prosecuted under the St. Paul, Minnesota, Bias-Motivated Crime Ordinance.[9]

The City Council of St. Paul, Minnesota, undoubtedly passed its Bias-Motivated Crime Ordinance with the best of intentions and hopes that such a law would have a positive effect by easing racial tensions and ameliorating improperly-based biases in the community. As an initial point in understanding the legislative history of the ordinance, it may be analyzed according to the "fighting words" doctrine carved out by the Supreme Court beginning with *Chaplinsky v. New Hampshire*[10] and later widely recognized as an "exception" to the usual protections of the First Amendment.[11] In fact, the 1990 St. Paul ordinance at issue in the instant case is substantially similar to a Minnesota "fighting words" statute litigated in an earlier

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6. *See generally* Laurence H. Tribe, American Constitutional Law § 12-27 (2d ed. 1988) [hereinafter Tribe]. "[O]verbreadth analysis ordinarily compares the *statutory* line defining burdened and unburdened conduct with the *judicial* line specifying activities protected and unprotected by the first amendment; if the statutory line includes conduct which the judicial line protects, the statute is overbroad and becomes eligible for invalidation on that ground." *Id.* at 1022.

7. The petitioner has since reached the age of majority and disclosed his identity to the press. His name is Robert A. Viktora, and he is a member of a neo-Nazi-type organization in the St. Paul area. *See, e.g.*, Nick Coleman, *The Court Sends a Message. Hate Crimes: Will Ruling Spur Bigotry?*, Atlanta Const., June 25, 1992, at A-15.

8. *R.A.V.*, 112 S. Ct. at 2541.

9. *Id.* (citing St. Paul, Minn., Legis. Code § 292.02 (1990)). That statute states:

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

St. Paul, Minn., Legis. Code § 292.02 (1990).

10. 315 U.S. 568 (1942).

11. *See, e.g.*, *In re* Welfare of S.L.J., 263 N.W.2d 412, 417 (Minn. 1978) ("Ever since *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the Supreme Court examined a First Amendment challenge to a New Hampshire statute . . . such offensive speech statutes have been found to be constitutional only if criminal prosecution is permitted solely for 'fighting words.' " (citations omitted)); *see also R.A.V.*, 112 S. Ct. at 2552 (White, J., dissenting) ("Today, however, the Court announces that earlier Courts did not mean their *repeated* statements that certain categories of expression are 'not within the area of constitutionally protected speech.' " (emphasis added) (quoting Roth v. United States, 354 U.S. 476, 483 (1957)); *see generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981).

case,[12] except that the more recent law has an added feature of criminalizing bias-based speech.[13]

In the case of *In re Welfare of R.A.V.*,[14] the petitioner's primary argument was that the St. Paul ordinance[15] was substantially overbroad.[16] The doctrine of overbreadth will be discussed later at some length;[17] for now it suffices to say that the Minnesota trial court granted the petitioner's motion to dismiss on the grounds that the anti-hate speech ordinance was overly broad in violation of the First Amendment.[18] However, the Minnesota Supreme Court did not find the ordinance to be overly broad because it was possible for the court to narrow the construction of the statute to reach only fighting words.[19] The Minnesota Supreme Court therefore reversed the dismissal at the trial court level and sought to remand the case for a determination of whether R.A.V.'s actions constituted proscribable conduct within the newly-narrowed meaning of the ordinance,[20] but the United States

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12. *S.L.J.*, 263 N.W.2d at 412.

13. In the case of *In re Welfare of S.L.J.*, the Minnesota case construing the forerunner to the present statute, a 14-year old girl was prosecuted under a law criminalizing fighting words after she proclaimed to police officers, "Fuck you pigs." *Id.* at 415. An interesting comment on the development of the English language and the changeable nature of what are found to be "fighting words" becomes apparent when one compares "damned racketeer" and "damned Fascist," the fighting words of Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942), with the strong words at issue in the Minnesota case, which were found not to constitute fighting words. *S.L.J.*, 263 N.W.2d at 415.

The Minnesota statute at issue in *S.L.J.* reads as follows:

> Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
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> (1) Engages in brawling or fighting; or
>
> (2) Disturbs an assembly or meeting, not unlawful in its character; or
>
> (3) Engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.

MINN. STAT. ANN. § 609.72(1) (West 1987). The Minnesota Supreme Court held the statute constitutional, saying that it reached only fighting words, which were not protected under the First Amendment. *S.L.J.*, 263 N.W.2d at 418-19. That court, in an interesting tactic which it repeated in *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn.), *cert. granted sub nom.* R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991), *and rev'd*, 112 S. Ct. 2538 (1992), said that the statute was facially unconstitutional, but it could be salvaged by a narrow construction limiting it to fighting words. *S.L.J.*, 263 N.W.2d at 418-19. Later, in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), the United States Supreme Court would hold that it was bound by the state court's narrow construction, and that it must construe the statute exactly as the state high court had done. *Id.* at 2542. The Court therefore held, "[W]e accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of *Chaplinsky*." *Id.*

In *S.L.J.*, the fighting words statute was held to be constitutional, but the girl's profane declaration was not found to be within the ambit of the statute because, the court reasoned, they were spoken to two police officers by a 14-year old "child," from a distance of 15 feet away, and were thereby not likely "to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person." *S.L.J.*, 263 N.W.2d at 419-20. It is important to remember, however, that when the constitutionality of a statute that limits freedom of speech is at issue, "the specific conduct responsible for the conviction being challenged is irrelevant." *Id.* at 418 (citing Gooding v. Wilson, 405 U.S. 518, 520 (1972); Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974)).

14. 464 N.W.2d 507 (Minn.), *cert. granted sub nom.* R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991), *and rev'd*, 112 S. Ct. 2538 (1992).

15. *See supra* note 9.

16. *R.A.V.*, 464 N.W.2d at 508-09.

17. *See infra* notes 104-23 and accompanying text.

18. *See supra* note 13.

19. *See supra* note 13.

20. *R.A.V.*, 464 N.W.2d at 511.

Supreme Court granted a writ of certiorari to the Minnesota Supreme Court before any further action was taken.[21]

The high Court ruled in agreement with the Minnesota trial court and struck down the ordinance as unconstitutional, not, said the majority, because of overbreadth, but because the ordinance "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[22] The three concurrences, representing the opinions of four Justices, would have stricken the ordinance based on overbreadth.[23] The decision of the Minnesota Supreme Court was reversed and remanded for action consistent with the ruling of the Court.[24]

III. HISTORY OF THE LAW

A. Fighting Words

The seminal fighting words case is *Chaplinsky v. New Hampshire*,[25] in which the Supreme Court held the following:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[26]

The definition of "fighting words" stated above is still the central statement of this exception to First Amendment protection of speech, and statutes which would proscribe "fighting words" must come narrowly within this definition in order to be constitutional.[27] *Chaplinsky* also presented the still-vital idea that the social utility of free speech should be weighed against the state's interest in suppressing certain speech acts, saying that some "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[28]

In *Chaplinsky*, the appellant's conviction under the New Hampshire fighting words statute was affirmed, as the Supreme Court found, "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a

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21. R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991) (mem.).

22. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

23. *See id.* at 2550 (White, J., joined by Blackmun, J., O'Connor, J., and Stevens, J., except for Part I(A), concurring in the judgment only); *id.* at 2561 (Blackmun, J., concurring in the judgment) ("[T]his particular ordinance reaches beyond fighting words to speech protected by the First Amendment."); *id.* (Stevens, J., joined by White, J., and Blackmun, J., as to Part I, concurring in the judgment).

24. *Id.* at 2550.

25. 315 U.S. 568 (1942).

26. *Id.* at 571-72 (footnote omitted).

27. According to the concurring justices in the instant case, the ordinance at issue in *R.A.V.* went beyond this definition and was therefore unconstitutional. *See infra* notes 173-82 and accompanying text.

28. *Chaplinsky*, 315 U.S. at 572. For a recent expression of this idea, see Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991). *See also* TRIBE, *supra* note 6, § 12-8 at 836-38.

breach of the peace."[29] The test, therefore, is what would cause the "average person" to be incited to violence. The Court hinted cryptically that there are " 'classical fighting words,' " but other types of speech would be proscribable on this basis as well, including "profanity, obscenity and threats."[30]

In *Lewis v. City of New Orleans*,[31] the Supreme Court again heard the issue of fighting words. In this case, an ordinance declaring as unlawful " 'wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty' "[32] was held to be overly broad and therefore unconstitutional.[33] The Louisiana Supreme Court had held that the statute was limited to fighting words within the meaning of *Chaplinsky v. New Hampshire*,[34] but the United States Supreme Court found that since "opprobrious" language was not narrowly defined, the plain meaning of the ordinance encompassed protected speech, and thereby violated the overbreadth doctrine.[35]

The common tactic, then, of fighting words analysis is to say that words which fit narrowly within the definition set out in *Chaplinsky* are not protected by the First Amendment.[36] This facile categorization has been used by courts to rationalize the denial of First Amendment protection for speech acts which are dangerous, which might provoke violence, and which are devoid of any other social value which would militate their protection under the Constitution.[37] Seemingly, the drawing of such categories to facilitate First Amendment analysis would be a useful tool, appreciated by courts and legislators alike; however, this paper will attempt to show that such categorization leads to improper results and the misguided valuing of speech which has no real social worth.

B. Other "Content-Based" Government Regulations of Speech

A sampling of other cases and fact situations in which the Court has dealt with governments seeking to restrict free speech will show the breadth and variety of "content-based" restrictions on speech. *Cantwell v. Connecticut*[38] is an early case involving a statute requiring religious or philanthropic organizations to register with the Secretary of State before their members are allowed to solicit contributions.[39] Under the facts of the case, two Jehovah's Witnesses set out distributing

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29. *Chaplinsky*, 315 U.S. at 574. *See supra* note 13.

30. *Chaplinsky*, 315 U.S. at 573 (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H.), *prob. juris. noted*, 62 S. Ct. 89 (1941), *and aff'd*, 315 U.S. 568 (1942)).

31. 415 U.S. 130 (1974).

32. *Id.* at 132 (quoting NEW ORLEANS, LA., ORDINANCE 828 M.C.S. § 49-7 [sic]).

33. *Lewis*, 415 U.S. at 131-32.

34. City of New Orleans v. Lewis, 269 So. 2d 450, 456 (La. 1972), *prob. juris. noted*, 412 U.S. 926 (1973), *and rev'd*, 415 U.S. 130 (1974). *See supra* notes 25-26 and accompanying text.

35. *Lewis*, 415 U.S. at 132-33. *See infra* notes 104-23 and accompanying text.

36. TRIBE, *supra* note 6, § 12-10 at 850.

37. These standards follow Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *See supra* note 28 and accompanying text.

38. 310 U.S. 296 (1940).

39. *Id.* at 300-02 (citing CONN. GEN. STAT. § 6294 (1930)).

information and collecting contributions in a predominantly Catholic neighborhood.[40] Some of their informational materials contained anti-Catholic sentiments.[41] When confronted over these materials, the appellant Jehovah's Witness peacefully left the scene; nevertheless, he was arrested and charged with violation of the registration statute and with breach of the peace.[42]

The State argued that the law requiring registration was for the purpose of safeguarding its citizens from the fraudulent acts of persons who would pretend to be soliciting for legitimate religious groups.[43] It was with this idea of "legitimacy" that the Court took exception, for the Secretary of State would have to make a determination of which religious groups were legitimate and which were illegitimate.[44] The Court would allow the State some room to regulate the solicitation of contributions, but the idea of the State granting a license to a religious cause was held to be too much of a burden on the free exercise of religion.[45] Analogously, the State can regulate freedom of expression, as long as there is no indication that official sanctioning of certain ideas or viewpoints is intended.[46]

The Court also held that the petitioner's conviction for breach of the peace must be set aside, as the petitioner had done nothing that might incite others to riot or to "exhort others to physical attack."[47] Even though the Court conceded that the Catholics in the neighborhood were "highly offended" by the petitioner's propaganda, his speech was held to be constitutionally protected because there was no breach of the peace, and the petitioner's actions and statements were not "likely to provoke violence."[48] The Court did point out, however, that if there had been "[r]esort to epithets or personal abuse," the speech would not have been protected by the Constitution, as that sort of speech "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[49]

In *United States v. O'Brien*,[50] the Court held that the government did have a sufficiently substantial interest in the Selective Service System to suppress the defendant's free speech interest in burning his draft card.[51] The Court first addressed O'Brien's contention that his act of burning the draft card constituted "speech."[52] Chief Justice Warren made clear that the Court would not accept "an apparently

40. *Id.* at 301-03.
41. *Id.*
42. *Id.* at 302-03.
43. *Id.* at 304-05.
44. *Id.* at 305.
45. *Id.* at 306-07.
46. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992).
47. Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).
48. *Id.* at 309.
49. *Id.* at 309-10. This case is pre-*Chaplinsky*, but one may assume that these hypothetical speech acts would have been analyzed in a manner similar to *Chaplinsky* fighting words standards. *See supra* notes 25-30 and accompanying text.
50. 391 U.S. 367 (1968).
51. *Id.* at 382.
52. *Id.* at 376.

limitless variety of conduct [to] be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[53] However, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[54] Therefore, there must be a substantial government interest at stake in order to limit the free expression of ideas, even when the act may not be easily described as "speech."

In 1969, the Supreme Court heard *Brandenburg v. Ohio*,[55] in which the appellant had been charged with violation of Ohio's Criminal Syndicalism Act[56] for his actions at a Ku Klux Klan rally, including burning a cross, making racially derogatory statements, and allegedly advocating violence to bring about social change.[57] The Criminal Syndicalism Act would levy criminal penalties for "mere advocacy" of violence, as opposed to "incitement to imminent lawless action."[58] The Supreme Court held that the former was protected by the free speech guarantees of the First Amendment, while the latter was not protected and could properly be proscribed by the State.[59]

The distinction between "advocacy" and "incitement" surely lies outside of the simple content of the disputed speech, and somewhere the context of the words must be considered. Justice Douglas, in his concurrence in this case,[60] approached this idea of context when he quoted Justice Holmes' dissent in *Gitlow v. New York*:[61]

> 'Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.'[62]

Thus, the "danger" or, alternatively, the value, of a certain type of speech is evaluated not simply based on what was said, but on the context surrounding the speech. In the context of a Ku Klux Klan rally, it may readily be seen that certain types of speech would "set fire to reason" and incite violence. What would be "mere advocacy" in one setting might easily transcend that in another.

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53. *Id.*

54. *Id.*

55. 395 U.S. 444 (1969).

56. OHIO REV. CODE ANN. § 2923.13 (Baldwin 1970) (repealed 1974).

57. *Brandenburg*, 395 U.S. at 445-46.

58. *Id.* at 448-49.

59. *Id.*

60. *Id.* at 450-57 (Douglas, J., concurring).

61. 268 U.S. 652 (1925).

62. Brandenburg v. Ohio, 395 U.S. 444, 452 (1969) (Douglas, J., concurring) (quoting Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

Police Department v. Mosley[63] concerned a Chicago ordinance which prohibited any picketing within 150 feet of a school, but which specifically excluded " 'peaceful picketing of any school involved in a labor dispute.' "[64] Mr. Earl Mosley brought his case soon after the city of Chicago passed the ordinance.[65] Prior to the passage of the ordinance, for a period of about seven months, he had been involved in frequent picketing of a Chicago high school, carrying a sign which read " 'Jones High School practices black discrimination. Jones High School has a black quota.' "[66] The Court described his "lonely crusade [as] always peaceful, orderly, and quiet."[67] Given the facts of the case, it became difficult for the city to argue why it should disallow other types of peaceful pickets, while permitting labor picketing.[68]

The Supreme Court struck down the ordinance "because it makes an impermissible distinction between labor picketing and other peaceful picketing."[69] This was held to be an unconstitutional, content-based discrimination: "The operative distinction is the message on a picket sign."[70] The focus of the Court's opinion was on the impermissibility of such content-based discrimination – the idea that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities."[71]

In 1989, the Court struck down a Texas flag desecration statute[72] in *Texas v. Johnson*.[73] Justice Brennan reiterated the idea that governments cannot regulate freedom of expression merely because of disagreement with the ideas expressed, stating, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[74] Further, the Court again addressed the issue of actions which will sometimes fall under the protection of the First Amendment guarantee of freedom of speech, holding that flag burning carried enough of a communicative element to be brought under the protections of the First Amendment.[75]

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63. 408 U.S. 92 (1972).
64. *Id.* at 92-93 (quoting CHICAGO, ILL., MUN. CODE c. 193-1(i) (1968)).
65. *Id.* at 93-94.
66. *Id.* at 93.
67. *Id.*
68. *Id.* at 94-95.
69. *Id.* at 94.
70. *Id.* at 95.
71. *Id.* at 96.
72. TEX. PENAL CODE ANN. § 42.09(a)(3) (West 1989) (repealed 1989).
73. 491 U.S. 397 (1989).
74. *Id.* at 414.
75. *Id.* at 409.

Finally in 1992, the Court heard the case of *Burson v. Freeman*[76] which concerned content-based regulation of political speech.[77] A Tennessee statute prohibiting political speech near polling places and creating an "election-day 'campaign-free zone' "[78] was upheld as a constitutional exercise of the State's regulation of speech.[79] The Court stressed the idea that such content-based restrictions of speech must pass a test of "exacting scrutiny," and "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' "[80] The State of Tennessee was held to have "two compelling interests" which were protected by this statute: "First, . . . the right of its citizens to vote freely for the candidates of their choice. Second, . . . the right to vote in an election conducted with integrity and reliability."[81] In regard to the strict scrutiny standard, the Court "reaffirm[ed] that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case."[82]

C. Related Categories of Defamation and Obscenity

In *R.A.V. v. City of St. Paul*, the Supreme Court held a city ordinance unconstitutional because it was impermissibly content-based.[83] In cases of both defamation and obscenity, governments seek to regulate freedom of expression because there is something objectionable about the *content* of that expression. One major case in each of these related areas will serve to draw the bounds of permissible government suppression of speech.

The case of *New York Times Co. v. Sullivan*[84] is a quite famous case for historical reasons. It was heard by the Supreme Court in 1964 and was brought by the Commissioner of Public Affairs of Montgomery, Alabama, against the New York Times Company in response to an advertisement taken in *The New York Times* by supporters of Dr. Martin Luther King, Jr.[85] The advertisement was an effort to raise money for his defense, as Dr. King was then being prosecuted for what many believed to be baseless perjury charges.[86] The full-page advertisement described events which had been taking place in the South and the "wave of terror" with which those working for civil rights had been met.[87] The respondent Sullivan claimed, although he was not actually named in the advertisement, readers would

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76. 112 S. Ct. 1846 (1992).
77. *Id.* at 1847.
78. *Id.* at 1848 (citing TENN. CODE ANN. § 2-7-111(b) (Supp. 1991)).
79. *Id.* at 1857.
80. *Id.* at 1851 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
81. *Id.* (footnotes omitted).
82. *Id.* at 1857.
83. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).
84. 376 U.S. 254 (1964).
85. *Id.* at 256.
86. *Id.* at 256-57. Dr. King was later acquitted of the charge of perjury. *Id.* at 259.
87. *Id.* at 256-57.

infer that the actions of the "police" described in the advertisement were his actions.[88]

Sullivan brought suit, and the trial court instructed the jury that the statements in the advertisement were " 'libelous per se,' . . . so that . . . 'falsity and malice are presumed' [and] 'general damages need not be . . . proved but are presumed.' "[89] Sullivan later argued to the United States Supreme Court that the petitioners' rights to free speech were not violated because "the Constitution does not protect libelous publications."[90] The Supreme Court recognized that libel is not considered to be constitutionally protected speech, but neither can a state use its "libel laws to impose sanctions upon expression critical of the official conduct of public officials."[91]

In order to avoid a rule of law that "dampens the vigor and limits the variety of public debate,"[92] the Supreme Court held that in order for speech in criticism of a public official to lose its constitutional protection, there must be actual malice, that is knowledge of falsity or reckless disregard for truth, on the part of the speaker.[93] "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct . . . ."[94] Consequently, a heightened level of constitutional protection for speech critical of public officials was reached.

The respondents in *City of Renton v. Playtime Theatres, Inc.*[95] were owners of two movie theaters in which they sought to exhibit feature-length pornographic films.[96] The City Council of Renton, Washington, had adopted a resolution which "imposed a moratorium on the licensing of 'any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials.' "[97] Furthermore, a city zoning ordinance prohibited the location of adult movie theaters within 1000 feet of any residence, church, or park, and within one mile of any school.[98]

The Court, in its decision, addressed the following problem:

> At first glance, the Renton ordinance, . . . does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, . . . the Renton ordinance is aimed not at the *content* of the films . . . but rather at the *secondary effects* of such theaters on the surrounding community.[99]

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88. *Id.* at 258.
89. *Id.* at 262.
90. *Id.* at 268.
91. *Id.*
92. *Id.* at 279.
93. *Id.* at 279-80.
94. *Id.* at 273.
95. 475 U.S. 41 (1986).
96. *Id.* at 45.
97. *Id.* at 44 (quoting City of Renton, Wash., City Council Res. No. 2368 (1980)).
98. *Id.* (citing City of Renton, Wash., City Council Ordinance No. 3526 (1981)).
99. *Id.* at 47.

By this reasoning, the Court does not even need to make the factual finding of whether or not the materials the respondents sought to exhibit in their theater were obscene and therefore proscribable; it may merely hold that the ordinance is content-neutral and aimed only at the secondary effects of the speech. In essence, the Court held that the ordinance was not even about speech, but rather was only a means to curtail crime, for example.

The respondents were unsuccessful with their argument that the ordinance was " 'under-inclusive,' in that it fail[ed] to regulate other kinds of adult businesses that [were] likely to produce secondary effects similar to those produced by adult theaters."[100] The "secondary effects" that supposedly prompted the city's ordinance included increased crime, decline in property values, deterioration of neighborhoods, and general diminishing of the quality of life.[101] The Court held that the Renton ordinance was justified on a content-neutral basis as a proper exercise of governmental control over speech in an attempt to pursue proper governmental ends.[102] Regulations which are found to be content-neutral are not rigorously reversed for over- or under-inclusiveness, so no violation of the respondents' First Amendment rights was found.[103]

D. The Doctrine of Overbreadth

The doctrine of overbreadth is often described as a technical exception to the standing requirement,[104] as in *Brockett v. Spokane Arcades, Inc.*,[105] where the Court held that "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court."[106] Therefore, even though the actions of a particular individual may properly be sanctioned under the law, that individual may challenge the statute, contending that the statutory language is so

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100. *Id.* at 52.

101. *Id.* at 48.

102. *Id.* at 54-55.

103. *Id.* at 47, 54-55.

104. Generally, the doctrine of standing acts as an initial hurdle constitutional cases must overcome before they may properly be reviewed by a court. The Supreme Court clarified the requirements of this doctrine in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). Justice Rehnquist, writing for the Court, held that "at an irreducible minimum," the Constitution requires a litigant to " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Id.* at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976) (citations omitted)). Standing requirements will not be met where a litigant " 'rest[s] his claim to relief on the legal rights or interests of third parties' " or presents " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 474-75 (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975) (citations omitted)). Lastly, a litigant's complaint must come within a " 'zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Id.* at 475 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (citations omitted)).

105. 472 U.S. 491 (1985).

106. *Id.* at 503.

broadly drawn as to prohibit other, perfectly legal, actions which may in the future be committed by others.[107]

An Oklahoma statute limiting the right of state employees to engage in political activities[108] was held by the Court in *Broadrick v. Oklahoma*[109] to be sufficiently narrow and explicit so as not to fail for overbreadth.[110] The law proscribed a "broad range of political activities,"[111] but because the law was quite clear as to what types of activities were prohibited,[112] it was held to be constitutional.[113] The Court expressed the limited usefulness of the overbreadth doctrine as follows:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine.[114]

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*,[115] the Court held that a resolution of the Los Angeles Airport Commission which banned all " 'First Amendment activities by any individual and/or entity' " from the airport was substantially overbroad.[116] Following passage of the resolution, a member of the religious group Jews for Jesus was stopped while distributing leaflets at the airport terminal.[117] The Court once again balanced the government's interest in restricting speech with the individual's right to freedom of expression,[118] in light of the rule that governments may restrict activities on certain government property (i.e., in certain types of fora) if the restriction is " 'reasonable and not an effort to suppress expression merely because officials oppose the speaker's view.' "[119] The Court concluded that the resolution was substantially overbroad because, "the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting

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107. *See* TRIBE, *supra* note 6, § 12-27; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 858 (1991) ("The basic overbreadth problem is easily framed: When should someone whose conduct is not constitutionally protected escape a legal sanction on the ground that the statute under which she is threatened would be consitutionally invalid as applied to someone else?"); Christopher P. Lu, *The Role of State Courts in Narrowing Overbroad Speech Laws After* Osborne v. Ohio, 28 HARV. J. ON LEGIS. 253, 254 (1991) ("[O]verbreadth doctrine is a traditional exception to the notion that 'individuals may not litigate the rights of third parties.' " (quoting TRIBE, *supra* note 6, § 12-27 (2d ed. 1988) (further citations omitted))).

108. OKLA. STAT. ANN. tit. 74, § 818 (1965) (repealed 1982).

109. 413 U.S. 601 (1973).

110. *Id.* at 615-16, 618.

111. *Id.* at 604.

112. *Id.* at 607-08.

113. *Id.* at 618.

114. *Id.* at 613.

115. 482 U.S. 569 (1987).

116. *Id.* at 574-75 (quoting Board of Airport Comm'rs Res. No. 13787 (1983)).

117. *Id.* at 571.

118. *See supra* note 28 and accompanying text.

119. *Jews for Jesus*, 482 U.S. at 572-73 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

all protected expression, purports to create a virtual 'First Amendment Free Zone' at [the Los Angeles International Airport]."[120]

The Court further noted that it could see no way to construe this resolution narrowly, and thereby save it from a finding of overbreadth.[121] Indeed, this ban on "First Amendment activities" might be held to reach "even talking or reading, or the wearing of campaign buttons or symbolic clothing."[122] Had the Airport Commission merely regulated against activities which might cause disruption or block the orderly flow of travelers through the airport, then such a regulation might have been upheld by the Court, but as it was written, it was held to be facially unconstitutional.[123]

IV. The Instant Case

A. Rules of Construction and Decision

Three preliminary issues should be discussed before the main holdings of the case are analyzed. These issues include limiting the construction of the statute to the interpretation of the state high court, limiting the decision of the United States Supreme Court to the issues which had been briefed by the parties, and keeping the holding of the Court within the bounds of precedent in this area. Discussion of these relatively minor issues will be presented first because the concurring opinions all diminish the majority's analytical strength by pointing out flaws in the application of these well-established rules of construction and decision.

Justice Scalia began the majority opinion with the rule that the Court would construe the St. Paul ordinance as the state supreme court had done.[124] Consequently, the majority of the Court did not find the ordinance to be fatally overbroad, since the state court had narrowed its interpretation to reach only fighting words.[125] Rather, the Supreme Court reached a new rule against content-based discrimination, holding the ordinance unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[126] Although the state supreme court had effectively held that the ordinance was content-neutral, as it reached only fighting words, Justice Scalia found it to be impermissibly content-based, restricting speech because of the message expressed by the speaker.[127]

Justice White, in his concurring opinion, agreed with the majority as to the rule that the Supreme Court was bound by the state high court's interpretation.[128] However, "the mere presence of a state court interpretation does not insulate a statute

120. *Id.* at 574.
121. *Id.* at 575.
122. *Id.*
123. *Id.* at 574-77.
124. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992). *See supra* notes 14-21 and accompanying text.
125. *R.A.V.*, 112 S Ct. at 2542.
126. *Id.*
127. *Id.*
128. *Id.* at 2558-59 (White, J., concurring).

from overbreadth review. We have stricken legislation when the construction supplied by the state court failed to cure the overbreadth problem."[129] Accordingly, Justice White would have stricken the statute for overbreadth in spite of the limiting interpretation of the Minnesota Supreme Court.[130]

Justice White was further disturbed by the idea that the theory of unconstitutionality advanced by the majority was not "fairly included" in the arguments presented to the Court.[131] White wrote, "Previously, this Court has shown the restraint to refrain from deciding cases on the basis of its own theories when they have not been pressed or passed upon by a state court of last resort."[132] Justice Scalia responded to this charge in the main opinion by arguing, "It was clear from the petition . . . that [petitioner's] assertion . . . was *not* just a technical 'overbreadth' claim—*i.e.*, a claim that the ordinance violated the rights of too many third parties—but included the contention that the ordinance was 'overbroad' in the sense of restricting more speech than the Constitution permits."[133]

Another concern Justice White expressed in his concurrence was that the new rule stated by the Court encompassed "serious departures from the teaching of prior cases" as well as being "inconsistent with the plurality opinion in *Burson v. Freeman*."[134] There the Court upheld a Tennessee statute, finding that the State of Tennessee had enough of a compelling interest to place restrictions on freedom of speech in order to create an "election-day 'campaign-free zone.' "[135] Justice White felt that this break from precedent was even more fraught with potential problems for the Court because the issues which the majority addressed in its opinion had not been properly briefed by the parties to aid the Court in its decision, so that the Court would have a careful examination of the precedent prepared by each side of the case.[136] Justice Blackmun, in his concurring opinion, echoed Justice White's concerns, but stated the problem in a more impassioned tone:

> The majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. . . .
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> . . . .
>
> In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words.[137]

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129. *Id.* at 2559 (citing Lewis v. City of New Orleans, 415 U.S. 130, 132-33 (1974); Gooding v. Wilson, 405 U.S. 518, 524-25 (1972)).

130. *Id.* at 2558-59.

131. *Id.* at 2550-51 n.1.

132. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 217-24 (1983)).

133. *Id.* at 2542 n.3.

134. *Id.* at 2551 (White, J., concurring) (citing Burson v. Freeman, 112 S. Ct. 1846 (1992)).

135. *Burson*, 112 S. Ct. at 1846, 1848, 1857-58 (1992) (citing TENN. CODE ANN. § 2-7-111(b) (Supp. 1991)). *See supra* notes 76-82 and accompanying text.

136. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2551 (1992) (White, J., concurring).

137. *Id.* at 2560-61 (Blackmun, J., concurring).

B. Distinctions Between Content and Context

The majority's insistence on a shift in the semantics, if not the underlying analysis of free-speech cases, appears to have greatly distressed the writers of the concurring opinions. This "shift" is the rejection of the traditional "categories" of speech which are often said to be outside of the protection of the First Amendment.[138] Justice Scalia nullified this categorical method of analysis, which had become pervasive in First Amendment thought:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[139]

The other members of the Court, concurring in the judgment only, found the categorical approach to First Amendment analysis to be quite useful, and feared that the majority's rejection of this long-employed methodology would result in confusion among the lower courts.[140] Justice Stevens, however, was also critical of the categorical approach, but for the reason that "the categorical approach does not take seriously the importance of *context*."[141] That is, the approach is insufficiently sensitive to the tension between free speech and other interests to be protected in a given case.

Justice Stevens' emphasis on context is much more esoteric than the hard-and-fast rule Justice Scalia stated in the main opinion: "Content-based regulations are presumptively invalid."[142] Justice Stevens took him to task for this

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138. *See supra* note 11 and accompanying text.

139. *R.A.V.*, 112 S. Ct. at 2543 (citations omitted) (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 124 (1989); Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 504 (1984); Roth v. United States, 354 U.S. 476, 483 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146 (1986)).

140. *See, e.g.*, Justice White's statement condemning the majority opinion: "Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion." *R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring). See also Justice Stevens' concurrence referring to "the Court's revision of the categorical approach" as "an adventure in a doctrinal wonderland," *id.* at 2562 (Stevens, J., concurring), and Justice Blackmun's prediction that "[i]f we are forbidden from categorizing, as the Court has done here, we shall reduce protection [of speech] across the board." *Id.* at 2560 (Blackmun, J., concurring).

141. *Id.* at 2566 (Stevens, J., concurring). Justice Stevens did admit that categories have some analytical utility because they create "safe harbors for governments and speakers alike." *Id.* (Stevens, J., concurring).

142. *Id.* at 2542.

pronouncement, reasoning that such an absolutism would lead the Court to irrational holdings in future cases.[143]

> Although the Court has, on occasion, declared that content-based regulations of speech are "never permitted," such claims are overstated. Indeed, in *Mosley* itself, the Court indicated that Chicago's selective proscription of nonlabor picketing was not *per se* unconstitutional, but rather could be upheld if the City demonstrated that nonlabor picketing was "clearly more disruptive than [labor] picketing." Contrary to the broad *dicta* in *Mosley* and elsewhere, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.[144]

Justice Stevens further addressed the issue of conduct-based (as opposed to context-based) analysis by examining the types of harm that the *same* conduct or speech, in different contexts, can produce:

> Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.[145]

Justice Stevens' arguments center on the idea that many restrictions on speech allowed under the First Amendment are content-based.[146] Therefore, it is not the content of the regulated speech that matters; rather, it is the *context*. Further, fighting words uttered in a race-based or other biased context may be reasonably determined by St. Paul to be more dangerous, and consequently more proscribable, within the boundaries of the First Amendment.[147] Stated another way, in certain situations, context may justify content-based discrimination.

Further examples of the types of government regulation of speech based on content are offered in the context of obscenity prohibitions:

> Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. Similarly, although legislatures may freely regulate most nonobscene child pornography, such pornography that is part of "[A] serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device," may be entitled to constitutional protection; the "question whether a specific act of communication is protected

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143. *Id.* at 2562 (Stevens, J., concurring).

144. *Id.* at 2563 (alteration in original) (citations omitted) (quoting Police Dep't v. Mosley, 408 U.S. 92, 99-100 (1972)).

145. *Id.* at 2561.

146. *Id.* at 2563. *See supra* notes 38-82 and accompanying text.

147. *R.A.V.*, 112 S. Ct. at 2565-66.

by the First Amendment always requires some consideration of both its *content* and its *context*."[148]

Justice Stevens, therefore, founds his evaluation of the ordinance on a "more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."[149] Had it not been overly broad, he would have upheld St. Paul's ordinance as an even-handed regulation of speech: "In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of . . . 'race, color, creed, religion or gender.' "[150]

C. Exceptions to the Majority's Rule

Following the rejection of categorical analysis, coupled with the rule that "content-based regulations are presumptively invalid,"[151] the Court created exceptions to this rule so that the holding in *R.A.V.* would comport more closely with precedent.[152] Justice White summarized these, which he described as "an apparently nonexhaustive list of ad hoc exceptions," in his concurring opinion.[153]

First, "[c]ontent-based distinctions may be drawn within an unprotected category of speech if the basis for the distinctions is 'the very reason the entire class of speech at issue is proscribable.' "[154] The next exception was crafted for regulations which would protect against "secondary effects" of speech,[155] such as the prohibition against sexually derogatory words which, in a work-place setting, would violate Title VII of the Civil Rights Act of 1964;[156] along with the "secondary effects" of adult theaters on the surrounding neighborhood which were sufficient reasons for the City of Renton to ban the theaters.[157] Justice Scalia explained that he saw these regulations as affecting primarily conduct, and prohibiting speech only incidentally, saying, "[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."[158]

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148. *Id.* at 2566 (emphasis added) (quoting New York v. Ferber, 458 U.S. 747, 778 (1982) (Stevens, J., concurring)).

149. *Id.* at 2567.

150. *Id.* at 2571 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

151. *Id.* at 2542.

152. *Id.* at 2556 (White, J., concurring).

153. *Id.*

154. *Id.* (quoting *id.* at 2545). This is the exception which Justice White describes as "swallow[ing] the . . . rule." *Id.* (White, J., concurring).

155. *Id.* at 2546 (emphasis omitted).

156. *Id.* at 2557 (White, J., concurring) (citing 42 U.S.C. § 2000e-2(a)(1) (1988); 29 C.F.R. § 1604.11(a) (1991)).

157. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986), *cited in* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992). *See supra* notes 95-103 and accompanying text.

158. *R.A.V.*, 112 S. Ct. at 2546.

The majority's third exception was referred to by Justice White as a "catchall exclusion to protect against unforeseen problems."[159] This distinction allows for regulation of speech where "there is no realistic possibility that official suppression of ideas is afoot."[160] The majority gave a parenthetical example of the meaning of this exception, saying, "We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses."[161]

The majority applied its rule of (and exceptions to) content-based discrimination to the St. Paul ordinance and found the ordinance flawed because it "applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[162] To illustrate, if a speaker wished to harangue a member of her audience on the basis of "political affiliation, union membership, or homosexuality," such abusive display would not be prohibited by the St. Paul ordinance.[163] This is the reasoning in the majority opinion which the concurrences criticize harshly as stating a rule of "underbreadth."[164]

D. The Idea of Underbreadth

The majority was concerned that the St. Paul City Council's limitation of the ordinance to fighting words based on particular types of expression operated as "viewpoint discrimination."[165] Justice Scalia illustrated this concern with the metaphor that St. Paul's ordinance would permit "one side of a debate to fight free-style, while requiring the other to follow Marquis of Queensbury Rules."[166] The majority further explained that if St. Paul had sought only to prohibit a certain "mode" of expression, such as threats, then that regulation would fall within an exception to the First Amendment protections.[167] However, according to the majority, St. Paul banned a certain "message"—that of racial hostility—of which it does not approve.[168] "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."[169]

Justice Scalia and the majority held that an ordinance banning all "fighting words," not merely those which spring from racial or other biases, would have

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159. *Id.* at 2558 (White, J., concurring).

160. *Id.* at 2547.

161. *Id.*

162. *Id.* (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

163. *Id.*

164. *Id.* at 2553 (White, J., concurring) (emphasis omitted). Justice Blackmun's brief concurrence concisely states the "underbreadth" problem: "a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads)." *Id.* at 2560 (Blackmun, J., concurring).

165. *Id.* at 2547.

166. *Id.* at 2548.

167. *Id.* at 2548-49.

168. *Id.* at 2549.

169. *Id.*

accomplished the same effect as the ordinance the Court struck down.[170] With this, the concurring Justices disagreed. Justice White wrote:

> [T]he Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms, until the city of St. Paul cures the underbreadth by adding to its ordinance a catch-all phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."[171]

Justice White also argued that St. Paul had a compelling state interest in regulating this type of speech and that the ordinance would work to protect that interest.[172]

E. The Concurring Justices' Overbreadth Analysis

As noted above, the concurring Justices would all have declared the ordinance unconstitutional for overbreadth.[173] Justice White's concurrence outlined the overbreadth problem, and all the other concurring Justices joined him for that portion of his opinion. Justice White noted that the Minnesota Supreme Court had relied upon *Brandenburg v. Ohio*[174] and *Chaplinsky v. New Hampshire*[175] to construe the statute more narrowly so as to avoid a First Amendment violation.[176] However, the definition of fighting words set out in *Chaplinsky* was misapplied.[177]

Chaplinsky defined fighting words as those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[178] The Minnesota court held that the St. Paul ordinance prohibited those words which cause "anger, alarm or resentment based on racial, ethnic, gender or religious bias."[179] Justice White stated the rule as follows: "Our fighting words cases have made clear . . . that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."[180] Therefore, the ordinance is overbroad because "it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment."[181] Words which merely result in "anger, alarm or resentment" because they express racial hostility are not constitutionally proscribable, and,

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170. *Id.* at 2550 ("An ordinance not limited to the favored topics . . . would have precisely the same beneficial effect.").

171. *Id.* at 2553 (citations omitted) (quoting for emphasis only).

172. *Id.* at 2554 (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501 (1991)).

173. *See supra* notes 104-23 and accompanying text.

174. 395 U.S. 444 (1969). *See supra* notes 55-62 and accompanying text.

175. 315 U.S. 568 (1942). *See supra* notes 25-30 and accompanying text.

176. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2559 (1992) (White, J., concurring).

177. *Id.*

178. *Chaplinsky*, 315 U.S. at 572. *See supra* notes 25-30 and accompanying text.

179. *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.), *cert. granted sub nom.* R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991), *and rev'd*, 112 S. Ct. 2538 (1992), *quoted in R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

180. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

181. *Id.*

therefore, the statute would need to be redrawn to include specifically words which "inflict injury" or "incite an immediate breach of the peace," thereby conforming to the standard set forth in *Chaplinsky*.[182]

V. ANALYSIS

A. The Policies and Motivations of the Instant Case

Justice Scalia's opinion for the majority approvingly quoted the Minnesota Supreme Court, which had said, "It is the responsibility, even the obligation, of diverse communities to confront such notions [bigotry, bias, discrimination, prejudice, racism, sexism, and other forms of intolerance] in whatever form they appear."[183] The City of St. Paul had argued in its brief to the Supreme Court that the ordinance at issue was intended to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against."[184] St. Paul also argued to the Court that it had a compelling interest in protecting the "basic human rights" of its citizens.[185] To this Justice Scalia responded, "We do not doubt that these interests are compelling, and that the ordinance can be said to promote them."[186] Thus, given these goals, it must have been the means employed, not the anticipated ends, which drove the Court to invalidate the St. Paul ordinance.

The Court recognized that the harms the City of St. Paul sought to protect against are real, but said that these types of harms, arising as they do from the operation of speech, are not of the sort that governments may properly proscribe.[187] The constraints of the First Amendment prevent governmental bodies from taking such action. Were it simply a matter of Robert A. Viktora having accidentally bashed into the African-American family's car, or murdered their young son, or sent them letters falsely offering fabulous prizes through the United States mail, then a host of laws would have redressed the harm suffered by the unnamed family. To draw the distinctions more finely, the United States has, of course, ceased to condone racist acts. No one under color of law can force a person to leave a lunch counter or to sit at the back of a bus because of that person's race. Yet, racist speech and the strongly-felt harms it causes continue to be protected.[188] The difference, certainly, arises because these harms are brought about by *speech*, or actions which have sufficient communicative element to be protected as speech.[189]

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182. *Chaplinsky*, 315 U.S. at 572.

183. *R.A.V.*, 464 N.W.2d at 508, *quoted in R.A.V.*, 112 S. Ct. at 2548.

184. Respondents Brief at 28, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675), *quoted in R.A.V.*, 112 S. Ct. at 2549.

185. *R.A.V.*, 112 S. Ct. at 2549.

186. *Id.*

187. *Id.* at 2548-50.

188. *See* Lee C. Bollinger, The Tolerant Society: *A Response to Critics*, 90 COLUM. L. REV. 979, 980 (1990) [hereinafter Bollinger].

189. *See supra* notes 50-54, 72-75 and accompanying text.

Not only is hate speech protected because it is speech, more than that, such speech seems to contain a political element. In the loosest sense, Mr. Viktora had a "political statement" to make when he burned the cross on the family's lawn. Consequently, his actions are protected with all the force of the First Amendment; at least that has been the reasoning of certain commentators, who have explained the American courts' grant of constitutional protection to hate speech as based on the heightened level of protection accorded political speech under current First Amendment jurisprudence.[190]

Despite Justice Scalia's discussion of abandoning the categorical approach to First Amendment analysis, it is almost certain that courts and scholars will continue to make judgments in categorical terms, although possibly the categories will take on a somewhat different shape. As they are constructed now, they are based on content. There are actually two different sorts of categories within which First Amendment cases are decided: categories of protection (or privilege or "tolerance"[191]), and categories of proscription. The categories of protection range from political speech, which is the most protected, to commercial speech, which is accorded the least protection.[192] A comprehensive list of the categories of proscription would include "fighting words, clear and present danger, group defamation, captive audience, intentional infliction of emotional distress, nuisance laws, and obscenity."[193]

One way of approaching the issue of hate speech addressed in the present case is to consider that a category of protection – political speech – has met head on with a category of proscription – fighting words. In this confrontation, political speech won, and a safe bet is that it always will. The way to resolve the confrontation constitutionally may be to rethink the categories themselves. Professor Harel suggests a resolution through a broader category of "abhorrent speech" which would include instances of hate speech, as well as pornography,[194] which many feminist scholars have attacked as presenting the same types of harm to women as racist speech and cross-burnings present to racial minorities.[195] Harel explains the expected results of this new categorization as follows:

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190. *See* Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1888 (1992) [hereinafter Harel].

191. "Tolerance" is the term preferred by Lee Bollinger in his 1986 book *The Tolerant Society*. *See* Bollinger, *supra* note 188, at 983.

192. Harel, *supra* note 190, at 1892-94.

193. Harel, *supra* note 190, at 1899-1900 (footnotes omitted). Case references for each of these categories are listed extensively in the Harel article. See also Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which lists "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including "the lewd and obscene, the profane, the libelous, and the insulting." *Id.* at 571-72.

194. Harel, *supra* note 190, at 1889.

195. *See* SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (1981); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5 (1984); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

> The fragmentation of abhorrent speech into protected and unprotected subcategories has concealed [a] common nature. Instead of regarding racist and pornographic speech as peripheral exceptions to the First Amendment, we must view them as instances of a comprehensive category of unprotected speech. From this perspective, the relations between abhorrent speech and privileged forms of speech must be examined. Abhorrent speech has been protected because of its alleged contribution to political discourse. However, a close examination of the nature of political discourse reveals that this classification is flawed. Abhorrent speech cannot contribute to political discourse because it promotes values that cannot generate genuine political obligations.[196]

If one accepts that traditional protections of racist speech stem from its miscategorization as political speech, then whatever the *apparent* political nature of such speech (Mr. Viktora was, after all, a neo-Nazi), it has no value as political discourse because "racist speech cannot change or influence our political obligations."[197] Hate speech simply lacks the minimal normative social force and ability to bind us as a society which ought to be the requirements for protection as political speech.[198]

Harel explicitly applied his theory of abhorrent speech to the traditional fighting words doctrine, which he said "illustrates the bias inherent in traditional judicial exceptions to First Amendment protection. This doctrine protects the interests of those who fight back, neglecting to protect those who are less likely to react violently on account of their different cultural or psychological background."[199] Simply put, some other theory of valuation of political discourse would result in a more sensible ordering of the broad protections afforded under the political speech category of First Amendment jurisprudence.

Other motivations and revelations about the state-of-mind of the Court in this decision are found in Justice Blackmun's brief concurrence: "I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here. If this is the meaning of today's opinion, it is perhaps even more regrettable."[200] As lawyers, scholars, and the population at large become more aware of the ways our Supreme Court truly is affected by extra-legal debate, it becomes less difficult to imagine that this decision, and the new rule of First Amendment law it sets forth, has its genesis in a squabble taking place largely on college and university campuses.

There has been a great deal of scholarly discussion of the ways educational institutions can confront the growing problem of acts of racial, gender-based, or

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196. Harel, *supra* note 190, at 1930.

197. Harel, *supra* note 190, at 1922.

198. Harel, *supra* note 190, at 1922.

199. Harel, *supra* note 190, at 1902.

200. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2561 (1992) (Blackmun, J., concurring).

other biased motivation.[201] The issue of regulation of speech in a university atmosphere is not specifically under consideration here; it is only broached in order to show that the Court may have been willing to base its decision on a cultural debate, rather than attempting to decide the issue within the existing legal framework.

The recognition of this problem provided the background for Anthony D'Amato's article, *Harmful Speech and the Culture of Indeterminacy*.[202] In it he wrote, "[T]he constitutional law of at least one category of content regulation of free speech ["harmful speech"] is indeterminate, and recognition of this indeterminacy has been and ought to continue to be the Supreme Court's decisional basis for protecting speech against content regulation."[203] D'Amato defines "harmful speech" as speech acts at issue in those "cases in which the factfinder and/or decisionmaker must arrive at a judgment . . . that harm must have occurred because the particular utterance in question is *itself* harm producing."[204] The reason that the law in this area of harmful speech is indeterminate is because the underlying culture is indeterminate; "[t]he strong currents of our culture propel the constitutional law of free speech."[205] In one social context, "damned racketeer" and "damned Fascist" are fighting words, while in another era "Fuck you pigs" are not.[206]

Given this indeterminacy, Professor D'Amato arrives at the conclusion that laws restricting "harmful speech" should not be allowed under the Constitution.[207] Because language is slippery, because what is "harmful" or "offensive" or "proscribable" is ever-changing within our culture (D'Amato cites as proof the sexual mores of the early days in motion pictures and television programming as compared to that which is seen today),[208] courts cannot properly fashion decisions about which sorts of speech fall within the category of "harmful." Rather,

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201. *See* Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?*, 39 BUFF. L. REV. 1 (1991); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Thomas Huff, *Addressing Hate Messages at the University of Montana: Regulating and Educating*, 53 MONT. L. REV. 157 (1992); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within*, 53 U. PITT. L. REV. 631 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990); Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105 (1990); David F. McGowan & Ragesh K. Tangri, Comment, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); David Rosenberg, Note, *Racist Speech, the First Amendment, and Public Universities: Taking a Stand on Neutrality*, 76 CORNELL L. REV. 549 (1991); Sean M. SeLegue, Comment, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919 (1991).

202. Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329 (1991).

203. *Id.*

204. *Id.* at 330 (emphasis added) (footnote omitted).

205. *Id.* at 332.

206. *See supra* note 13.

207. D'Amato, *supra* note 202, at 330.

208. *Id.* at 344-45.

D'Amato argues, "The claimant should prove harm independently from the utterance if we are to give free speech breathing room."[209]

The Court in *R.A.V.* was willing to accept that harm had been done, holding instead that there was no governmental remedy for this type of harm.[210] This "easy" way out, based as it seems to have been on vague fears of campus "thought police" infringing on the rights of racists to spout hate, leads us nowhere in the analytical development of this area of the law. The Court applied its old categorical system, while claiming to explicitly reject it, and identified a particularized wrong, while providing no means for redress.[211]

B. The Future of Anti-Hate Speech Laws

The reasons the City of St. Paul enacted the ordinance are not hard to see. The goal was to encourage one type of speech by criminalizing another type. There was certainly a value judgment made, resulting in a legally-enforced suppression of speech. The city government decided that St. Paul would be a better place, a safer, happier, more well-balanced community, if the people of St. Paul were prohibited by law from attacking one another for reasons based on race, religion, or gender.[212] The effect of the ordinance was aimed, not so much at punishing behavior, as at fostering a more tolerant social consciousness among the citizenry.[213] Stated differently, "[Anti-hate speech] rules are plainly not designed to regulate specific forms of behavior or expression, but rather to encompass and to forbid all exterior 'signs' of an interior frame of mind."[214] Thus, by forbidding any physical manifestation or expression of this "frame of mind," we reduce its occurrence.

This legislation by the St. Paul City Council is a good example of an attempt to deal with the tensions between democracy, in which each expression of idea is valued equally, and community, in which some ideas must be suppressed, or given less value, for the good of all.[215] As another writer has put it, "The plain fact is that not all free speech is good speech. Which means that freedom of speech is not always a sound or just public policy."[216] Some thinkers have argued for an "accommodationist" approach which would "endorse tightly worded, cautiously progressive measures that tend to proscribe only targeted vilification of a person on the basis of race, gender, religion, ethnic origin, sexual orientation, or other

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209. *Id.* at 351.

210. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2550 (1992). "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.*

211. It must be noted that Justice Scalia commented in a footnote that there were other Minnesota statutes under which the petitioner could have been charged, including those for "terroristic threats," arson, and criminal damage to property. *Id.* at 2541 n.1. While "terroristic threats" comes closer to the mark, it seems clear that fire damage to the lawn was not the real harm done.

212. *Id.* at 2569-71 (Stevens, J., concurring).

213. *Id.*

214. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 269 (1991) [hereinafter Post].

215. *See id.* at 286-87.

216. WALTER BERNS, FREEDOM, VIRTUE & THE FIRST AMENDMENT 125 (1957).

protected characteristics."[217] This, it seems, is precisely the route the City of St. Paul took, and it was unsuccessful. So, short of the sweeping changes in First Amendment analysis discussed above, entailing rejection of the protection of hate speech as a form of political speech and creating a new, proscribable category of "abhorrent speech,"[218] what options does the Court have for dealing with a burgeoning legal and social problem?

One possibility for resolving the hate speech conflict between protection for political speech and censure for "fighting words" involves a look toward the Court's solution in another case where two categories clashed. In *New York Times Co. v. Sullivan*,[219] the problem was a conflict between the protections traditionally accorded citizens to criticize their political leaders and the laws against defamation.[220] Justice Brennan described the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks."[221] The Court sensibly crafted a heightened standard for alleging defamation when the plaintiff in the defamation action is a public figure—that plaintiff must allege and prove actual malice.[222]

Similarly, when a speech act is alleged to constitute "hate speech," then the protections for political speech could be suspended unless or until it is proven that the speech does have real political value, meaning as Professor Harel suggests, that it adds to our national debate, that it is in fact "part of political discourse."[223] This proposal is analogous to the holding of *New York Times Co. v. Sullivan*, but in some ways is contrary. The focus should be on the values the courts seek to protect. In *Sullivan*, the proper focus was on the right of citizens to criticize public officials; in the hate speech context, the concern would be the right to be free from racial or other improperly-biased attacks.

VI. CONCLUSION

With social, racial, and ideological gulfs ever widening—with affirmative action and entitlement programs continuing to cause divisiveness—these "political correctness" issues will continue to be debated, and "anti-hate speech" laws will continue to be enacted by governments at all levels.[224] The question of their effectiveness is in many ways the same as the larger question of the deterrent effect of

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217. Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 213 (1991).

218. *See supra* notes 194-201 and accompanying text.

219. 376 U.S. 254 (1964). *See supra* notes 84-94 and accompanying text.

220. *Sullivan*, 376 U.S. at 256.

221. *Id.* at 270.

222. *Id.* at 279-80.

223. Harel, *supra* note 190, at 1889.

224. *See, e.g.*, Linda Greenhouse, *Defining the Freedom to Hate While Punching*, N.Y. TIMES, Dec. 20, 1992, at 4-5 [hereinafter Greenhouse]. "Hate-crime laws have spread quickly with little guidance from the courts. . . . While Justice Antonin Scalia's analysis in the St. Paul case last June . . . was sweeping, . . . it is not clear that the Court will apply that analysis automatically to resolve [other] case[s]." *Id.*

any type of criminal sanction, and honest minds differ widely on that issue.[225] But with this type of law, symbolic value may be seen as having as much worth as any ability to pursue additional criminal charges. Communities want to be able to say to their citizens, and to the rest of the nation: "We will not tolerate racial epithets or threats being cast in our community. We want all races, religions, and ethnicities to feel welcome here. In order to accomplish this, we are willing to proscribe the expression of certain points of view in order to nurture others."

Therein lies the real irony behind this type of legislation – widely perceived as a dilemma for liberals[226] – that groups and individuals who would ordinarily defend freedom of speech are feeling themselves drawn toward law-making that would suppress that freedom.[227] Professor Post expressed the conflicting impulses well, saying, "I should add that writing this essay has been difficult and painful. I am committed both to principles of freedom of expression and to the fight against racism. The topic under consideration has forced me to set one aspiration against the other, which I can do only with reluctance and a heavy heart."[228] As a final word on the apologist tone which imbues so much of the writing in favor of restricting hate speech,[229] it may well be that we can restrict hate speech on constitutionally sound grounds, without necessitating a sort of "guilty conscience" because of misplaced feelings that we are meeting one group's intolerance and hate with intolerance of our own.

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225. The Court ruled on June 11, 1993, in a Wisconsin case arising from a penalty enhancement feature of Wisconsin law that would increase criminal penalties for crimes found to have been motivated by racial, ethnic, or religious hatred. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). Various groups such as the Anti-Defamation League of B'nai B'rith and the American Civil Liberties Union had supported the penalty-enhancement approach to anti-bias legislation, and the Supreme Court upheld this tactic as constitutional. *Id.* at 2196, 2201.

Wisconsin v. Mitchell is distinguishable from the *R.A.V.* case because through the penalty enhancement mechanism, it is clearly conduct, with no protected speech element at all, which is being punished. *See id.* at 2199. Criminal courts are thoroughly familiar with inquiries into the alleged criminal intent and motivation, so it is not a constitutional error to punish law-breakers more severely "if the victim is selected because of his race or other protected status." *Id.*

An apparent change in tone from *R.A.V.* should be noted in this case. Chief Justice Rehnquist delivered the unanimous opinion of the Court and stated:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.

Id. at 2201. This argument worked for the State of Wisconsin in the penalty-enhancement context, but it was ineffective for the City of St. Paul in the "pure speech" realm one term earlier.

226. *See, e.g.*, Nat Hentoff, *Scalia Outdoes the ACLU*, WASH. POST, June 30, 1992, at A-19 ("The free speech world had been turned upside down.").

227. *See, e.g.*, Greenhouse, *supra* note 224, at 4-5. "But does the First Amendment really disable the Government from responding to the political need to tell the world that violence driven by racial hatred is more destructive than violence driven by class hatred, political animosity, labor strife or just plain greed?" *Id.*

228. Post, *supra* note 214, at 271.

229. Professor Harel also recognizes and analyzes this scholarly-angst phenomenon. *See* Harel, *supra* note 190, at 1911.