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Free Speech by the Light of a Burning Cross

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FREE SPEECH BY THE LIGHT OF A BURNING CROSS

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I. INTRODUCTION

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.[2]
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> The most frightening and disturbing depictions [on a wall in a school's playing field] . . . were those that threatened violence against one of our senior black students. He was drawn, in cartoon figure, identified by his name, and his initials, and by the name of his mother. Directly to the right of his head was a bullet, and farther to the right was a gun with its barrel directed toward the head. Under the drawing of the student, three Ku Klux Klansmen were depicted, one of whom was saying that the student "dies." Next to the gun was a drawing of a burning cross under which was written "Kill the Tarbaby."[3]

When the Supreme Court decided unanimously in 1992 that a St. Paul "hate speech" ordinance ran afoul of the First Amendment in *R.A.V. v. City of St. Paul*,[4]

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[2]United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled on other grounds by*, Grovard v. United States, 328 U.S. 61 (1946).

[3]Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L. J. 431, 460 (describing one act of hate speech in a letter dated May 17, 1988, from Dulany O. Bennett to parents, alumni and friends of the Wilmington Friends School).

[4]112 S. Ct. 2538 (1992). The ordinance prohibited placing 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

it revealed an important fissure in the logic that has permeated free speech decisions over the last 50 years. The stark contrast between Justice Antonin Scalia's majority opinion and the concurrences[5] of Justices Byron White, Sandra Day O'Connor, John Paul Stevens and Harry Blackmun indicates that no one theory of the application of the free speech guarantee yet commands widespread support.[6] Indeed the *R.A.V.* decision, aside from being riddled with ironies, is a classic example of a court united in judgment and divided in understanding.

For scholars of the First Amendment this case is an excellent example of the dilemmas posed by many of the doctrines created by the Court. While Justice Scalia proposes an elaborate and novel understanding of the limits of free speech regulation, Justice White responds with an assertion that Scalia's reasoning is "transparently wrong,"[7] and that his opinion is a "radical revision of First Amendment law."[8] According to Justice Stevens, the majority opinion is no more than "an adventure in a doctrinal wonderland."[9] Part II of this paper examines the attacks made by Justices White and Stevens against the majority opinion. Part III.A demonstrates a critical weakness in the majority opinion, one that reveals a perverse use of precedent by Justice Scalia. Part III.B demonstrates another weakness of the majority opinion: How fighting words are apparently more deserving of government protection than commercial speech. The fourth and fifth parts of the paper analyze the fundamental issues raised in the preceding discussion with a particular focus on the unpredictable standards used by Justice Scalia in free speech cases. The conclusion explains why the categorical approach to the First Amendment taken by the Supreme Court in *R.A.V.* is untenable.

II. CONCURRING CRITIQUES

The concurrences in *R.A.V.* deserve close consideration for at least two reasons. The first is that Justice Scalia's analysis became the majority opinion by a 5-4 margin. If the Court should change course on this issue in the near future, the reasoning espoused by the concurring Justices will likely lead the

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grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 2541 (quoting MINN. STAT. § 292.02 (1990)).

[5]Justices Blackmun and O'Connor joined in Justice White's concurring opinion, with Justice Stevens joining in Part I(A) of Justice White's concurrence. Justice Blackmun wrote an additional separate concurring judgment. Justice Stevens wrote a separate concurrence with whom Justices White and Blackmun joined as to Part I.

[6]As one scholar put it: "There is near universal agreement now, as there was not in 1919 or 1954, that political dissent may not be subject to the coercive power of the state. But beyond that core commitment, the consensus dissipates." Kathleen M. Sullivan, *The First Amendment Wars*, THE NEW REPUBLIC, Sept. 28, 1992, at 36.

[7]*R.A.V.*, 112 S. Ct. at 2551.

[8]*Id.* at 2556.

[9]*Id.* at 2562.

way. Second, the significance of the divided opinion is that the concurring Justices leave open the possibility that a hate speech law *could* pass First Amendment analysis. Treating overbreadth as the key problem in the city's ordinance, Justices White, Stevens, O'Connor and Blackmun leave open to legislators the option of a more narrowly tailored prohibition of hate speech. In contrast, Justice Scalia's majority opinion leaves legislators no options at all.

The first concurrence, from Justice White, attacks Justice Scalia's opinion on three grounds. The first is a procedural issue of little significance.[10] Second, it is argued that Justice Scalia's judgment has the effect of undermining the categorical approach that has measured the reach of the free speech guarantee.[11] The categorical approach dates back (at least) to the claims made in *Chaplinsky v. New Hampshire*[12] that "certain well-defined and narrowly limited classes of speech" are simply not covered by the free speech guarantee.[13] These classes include: defamation, obscenity, and fighting words.[14] Justice White's point in this attack is that Justice Scalia's reshaping/manipulation of *Chaplinsky* leads to the ironic result that fighting words *are* protected by the First Amendment when the government is too selective in its prohibition. In contrast, Justice White's interpretation of *Chaplinsky* is that *R.A.V.*'s expression has no First Amendment protection whatsoever.[15]

Third, Justice Scalia's opinion has the effect of eviscerating strict scrutiny review.[16] Again the irony is that Justice Scalia had agreed that St. Paul had a compelling interest in preventing cross burning and that the ordinance promoted that interest.[17] Yet the regulation remained unconstitutional in the majority's view. Justice White can only conclude that, in Justice Scalia's scheme, far-reaching bans of speech have a better chance of survival than narrowly drawn prohibitions.[18] Such a result is a perversion of traditional free speech doctrine.

This part of the critique deserves closer attention as it appears that Justice Scalia's argument is dangerously close to self-destruction. The majority

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[10]Justice White, joined by Justices Blackmun, O'Connor and Stevens, thought that the majority was deprived of the power to decide the case as it did. *Id.* at 2551 n.2 ("[P]etitioner did not present to this Court or the Minnesota Supreme Court anything approximating the novel theory the majority adopts today.").

[11]*Id.* at 2551-53.

[12]315 U.S. 568 (1942).

[13]*Id.* at 571-72.

[14]*R.A.V.*, 112 S. Ct. at 2552.

[15]*Id.* at 2553.

[16]*Id.* at 2554.

[17]*Id.* at 2549.

[18]*Id.* at 2554.

suggests that while fighting words are proscribable, there is a danger in isolating one subset of fighting words for prohibition.[19] More precisely, Justice Scalia's point is that the greater power to punish fighting words does not include the lesser power to punish certain subcategories of fighting words.[20] The danger lies in the viewpoint discrimination that is virtually inevitable when government selects the subcategories.[21] Thus Justice Scalia finds in the St. Paul ordinance government interference with the marketplace of ideas.[22] As explained by Justice Scalia, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[23] For Justice Scalia government prohibition of *some* hate speech becomes analogous to prohibition of flag burning; the government has no business banning expression simply because it is offensive.[24]

However at this point Justice Scalia is confronted with a dilemma; if the government is forbidden from proscribing subsets of categorically unprotected speech, won't laws against threatening government officials fail constitutional muster? Justice Scalia finds a solution to this problem in a "special force" argument: The reasons why threats of violence are outside the First Amendment "have special force when applied to the person of the President."[25] Thus, threats against the President may legitimately be subject to special prohibition.

Now another difficulty arises, one which Justice Scalia never addresses directly. The special force argument can readily be adopted by St. Paul to justify its ordinance. The argument would be that while all fighting words are bad, when they are directed against groups that have long suffered discrimination in this society, they bring extra harm. The groups that most need protection from fighting words are those who are (and have been) disadvantaged in society. Thus the reasons why fighting words are bad in general, are more valid (have "special force") when that speech is directed against "insular

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[19] *R.A.V.*, 112 S. Ct. at 2545.

[20] *Id.* at 2545-47. One is tempted to say that no subcategory may be punished, but Scalia argues that some selectivity is left open to government, as long as viewpoint discrimination is not involved. *Id.* To illustrate this point he presents an example that is so fantastic as to be entirely inconsequential, stating, "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." *Id.* at 2547.

[21] *Id.* at 2546.

[22] *Id.* at 2547.

[23] *Id.*

[24] It is surprising that Justice Scalia did not underscore this point by reference to the classic version of a liberal view of the First Amendment, Justice Robert Jackson's eloquent defense of dissent in West Virginia v. Barnette, 319 U.S. 624 (1943).

[25] *R.A.V.*, 112 S. Ct. at 2546.

minorities."[26] As Justice White put it: "The exception swallows the majority's rule."[27]

Justice Scalia does not see "special force" as a double-edged sword. Instead he prefers to characterize the city's law as selective in a way that "creates the possibility that the city is seeking to handicap the expression of particular ideas."[28] Nevertheless, it takes little stretch of the imagination to see that laws against verbal threatening of the President could also be termed as 'seeking to handicap the expression of particular ideas.'

Leaving aside, for a moment, Justice White's concurrence, the possibility that all categories of unprotected speech are in essence efforts to 'handicap the expression of particular ideas' should be considered. At least in the cases of obscenity, and that class of speech which falls under the clear and present danger rule,[29] it would appear that government prohibitions are as much based on the ideas presented as on the risk of consequential harm. This issue reappears in Justice Stevens's concurrence and will be examined more closely in the third part of this paper.

The core of Justice White's critique is well summarized by Justice Blackmun in a separate concurrence, "[B]y deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads) the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws."[30]

Two more critiques appear in Justice Stevens's concurrence. His first attack brings attention to Justice Scalia's disdain for content-based restrictions on speech. This disdain is clearly at odds with the history of First Amendment interpretation, "[O]ur 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."[31] Indeed the entire categorical approach, which Justice Scalia claims to respect, is built on government interest in the content of communications.

The final attack addresses Justice Scalia's belief that the ordinance regulates expression based on viewpoint. Justice Stevens disagrees, pointing out in one example that both Muslims and Catholics are forbidden from using fighting words based on the religion of the other. The ordinance is essentially "even handed."[32] St. Paul expressed no preference regarding particular religious,

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[26]This term is borrowed from the famous comment of Justice Harlan Stone in United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

[27]*R.A.V.*, 112 S. Ct. at 2556 (White, J., concurring).

[28]*Id.* at 2549.

[29]Currently governed by Brandenburg v. Ohio, 395 U.S. 444 (1969).

[30]*R.A.V.*, 112 S. Ct. at 2560.

[31]*Id.* at 2563.

[32]*Id.* at 2571.

racial or gender points of view; instead it prohibited personal attacks based on an individual's race, gender, etc.

The two concurrences examined here reveal critical weaknesses in the majority's opinion. Other lines of attack also warrant close consideration. In the next section I will examine two arguments: one based on the relevance of *Beauharnais v. Illinois*,[33] another based on the implications of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[34]

III. JUSTICE SCALIA'S MAJORITY OPINION

A. The Beauharnais/Chaplinsky Dilemma

One of the many ironies of Justice Scalia's opinion is his approval of, and apparent reliance on, *Beauharnais v. Illinois* as precedent. *Beauharnais* appears twice in the majority opinion.[35] The first instance is in support of the contention that defamation is a "traditional limitation" on free speech.[36] The second is in relation to the idea that some categories of speech are not constitutionally protected.[37] Justice Scalia argues that the scope of the defamation exception (for which *Beauharnais* is most frequently cited[38]) has been narrowed by subsequent decisions, particularly *New York Times Co. v. Sullivan*.[39] As a result, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."[40] Ironically, the speech at fault in *Beauharnais*, which was held unprotected, directly addressed government,[41] while in *R.A.V.* the expressive conduct, which St.

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[33] 343 U.S. 250 (1952).

[34] 478 U.S. 328 (1986).

[35] *R.A.V.*, 112 S. Ct. at 2543.

[36] *Id.*

[37] *Id.*

[38] *See* Jerome O'Callaghan, *Pornography and Group Libel: How to Solve the Hudnut Problem*, 27 NEW ENG. L. REV. 363, 367 (1992).

[39] 376 U.S. 254 (1964). Justice Scalia's evaluation of *Beauharnais* is more positive than that of most scholars; many believe *Beauharnais* to have been completely eviscerated by subsequent decisions. *See* Calvin Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 U.C.L.A. L. REV. 103, 141, 166 (1992); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 25 n.103 (1991).

[40] *R.A.V.*, 112 S. Ct. at 2543.

[41] Beauharnais circulated a petition demanding action from the Mayor and City Council of Chicago. *Beauharnais*, 343 U.S. at 252. Compared to cross burning, Beauharnais's expression was quite mild; he accused the black population of being responsible for various unspecified "rapes, [and] robberies." *Id.*

Paul was not allowed to regulate, neither addressed nor concerned government.[42]

Even with the *New York Times* qualification, Justice Scalia's reliance on *Beauharnais* makes little sense in *R.A.V.* As in many majority opinions that have paid passing homage to *Beauharnais*,[43] this judgment avoids any detailed consideration of what *Beauharnais* reveals about the limits of free speech. Thus Justice Scalia, while rejecting on constitutional grounds an ordinance that prohibited expressive attacks based on an individual's "race, color, creed, religion or gender,"[44] cites in his argument an opinion that *upheld* a state law prohibiting libels based on "race, color, creed or religion."[45]

The group libel statute upheld by Justice Felix Frankfurter's[46] opinion in *Beauharnais* is remarkably similar in content and purpose to the St. Paul ordinance rejected in *R.A.V.* If Justice Scalia believes *Beauharnais* is no longer good law (as several scholars have argued[47]) he certainly fails to make that clear in *R.A.V.* On the contrary, his comments support the validity of *Beauharnais*, qualified only by the demands of the *New York Times*.[48]

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[42] *R.A.V.*, 112 S. Ct. at 2541.

[43] *See* O'Callaghan, *supra* note 38, at 366-67.

[44] *R.A.V.*, 112 S. Ct. at 2541 (quoting MINN. STAT. § 292.02).

[45] *Beauharnais*, 343 U.S. at 251. The Illinois Criminal Code section implicated in *Beauharnais* stated:

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

Id.

[46] Justice Scalia is said to have been deeply influenced by Justice Felix Frankfurter. *See* Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990).

[47] Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297, 330 (1988); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 396 (1970); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM & MARY L. REV. 211, 219 (1991); Jeffry M. Gamso, *Sex Discrimination and the First Amendment: Pornography and Free Speech*, 17 TEX. TECH L. REV. 1577, 1598 (1986); William E. Brigman, *Pornography as Group Libel: The Indianapolis Sex Discrimination Ordinance*, 18 IND. L. REV. 479, 484-485 (1985). *But see* O'Callaghan, *supra* note 38, at 367; Rhonda G. Hartman, *Revitalizing Group Defamamtion as a Remedy for Hate Speech on Campus*, 71 OR. L. REV. 855 (1992); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

[48] This qualification presumably requires a strict level of review in libel cases when the alleged victim is a government official or other public figure.

It is already apparent that neither the fighting words exception, nor the group libel exception, has been overruled. The resilience of *Beauharnais* and *Chaplinsky*, and the dilemma that they pose in current doctrinal developments, deserve serious attention. At heart, the *Beauharnais* opinion rests on the same fundamental assertion made in *Chaplinsky*, that some speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[49] The only curtailment of these doctrines occurs through the ramifications of *New York Times*. Yet the *New York Times* opinion restricts the reach of *Beauharnais* only in those cases where a libel (group or otherwise) addresses public officials.[50] This point was made clear by the Supreme Court in *Ferber v. New York*,[51] when it stated, "Leaving aside the special considerations when public officials are the target, *New York Times Co. v. Sullivan* . . . a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois* . . ."[52]

Nevertheless, First Amendment commentators have been quick to rule *Chaplinsky*, and particularly *Beauharnais*, irrelevant.[53] As the prior discussion illustrates, the Supreme Court has not followed that lead.[54] This divergence of opinion may be explained by a misunderstanding of a seminal work on First Amendment doctrine. Writing in 1964, Professor Harry Kalven, Jr., argued, "[T]he special logic of *Chaplinsky*, *Beauharnais* and *Roth* may well disappear now that the *Times* opinion is on the books."[55] Others have followed that route.[56] The result has been an assumption that, in effect, *New York Times* overruled *sub silentio Beauharnais* (and to some extent *Chaplinsky*[57]).

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[49] *Chaplinsky*, 315 U.S. at 572.

[50] New York Times v. Sullivan, 376 U.S. 254, 282-83 (1964).

[51] 458 U.S. 747 (1982).

[52] *Id.* at 763 (citations omitted).

[53] *See supra* note 47. Some prominent constitutional law texts pay scant, or no attention to these cases. For example, neither case appears in CRAIG DUCAT & HAROLD CHASE, CONSTITUTIONAL INTERPRETATION (5th ed. 1992). Another version of the imagined demise of *Beauharnais* holds that Ashton v. Kentucky, 384 U.S. 195 (1966), made all criminal libel law unconstitutional. *See* DAVID O'BRIEN, 2 CONSTITUTIONAL LAW AND POLITICS 447 (1991).

[54] Only Justices Hugo Black and William O. Douglas have explicitly favored overruling *Beauharnais*, see A Quantity of Books v. Kansas, 378 U.S. 205, 214 (1964).

[55] Harry Kalven, Jr., *The New York Times Case: A Note On The "Central Meaning Of The First Amendment"*, 1964 SUP. CT. REV. 191, 218.

[56] *See supra* note 47.

[57] Some commentators argue that *Chaplinsky* has been so crippled that its interment is long overdue. *See* Note, *The Demise of the Chaplinsky Fighting Words Doctrine*, 106 HARV. L. REV. 1129, 1130 (1993). Others believe modification of *Chaplinsky* can ensure its vitality. *See* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1529, 1571 (1993).

A closer reading of Professor Kalven indicates that such a conclusion is not justified. By "special logic," Professor Kalven referred to an approach, evident in Justice Frank Murphy's *Chaplinsky* reasoning, that dichotomized all speech for First Amendment purposes.[58] On the one hand were categories of speech that the guarantee protected (political, religious, etc.), and on the other hand were categories that were not protected.[59] The latter could not even be called speech for First Amendment purposes; they included defamation, obscenity, and fighting words.[60] Because these were not within "the freedom" guaranteed by the First Amendment, no First Amendment test (e.g., clear and present danger) need be applied to legislation proscribing them.[61] That logic, as Professor Kalven predicted,[62] is undeniably absent from First Amendment decisions after *New York Times*. However, Professor Kalven does not believe that the outcome in *Chaplinsky*, *Beauharnais*, and *Roth* must now be doubted.[63] Using obscenity as an example, he states, "Had the *Times* case preceded *Roth*, for example, *Roth* could not have been written the way it was, although the decision might have been the same."[64] Thus the impact of *New York Times Co. v. Sullivan* is significant in terms of the premises used by the Supreme Court when addressing a First Amendment claim. *New York Times* does not per se claim that defamation, fighting words and obscenity are presumably protected by the First Amendment. The *New York Times* decision clearly allows government the power, albeit carefully circumscribed power, to attack libels and fighting words.[65]

Justice Scalia in *R.A.V.* concedes this point, stating "[O]ur decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation."[66] He then acknowledges that *Chaplinsky* and *Beauharnais* cannot be ignored because "a limited categorical approach has remained an important part of our First Amendment jurisprudence."[67] At least on its surface the majority opinion supports the fighting words exception, just as decisions of the

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[58] *See* Kalven, *supra* note 55, at 217.

[59] *Id.*

[60] *See Chaplinsky*, 315 U.S. at 571.

[61] Kalven, *supra* note 55, at 217.

[62] *Id.* at 218.

[63] *Id.*

[64] *Id.*

[65] New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964).

[66] *R.A.V.*, 112 S. Ct. at 2543.

[67] *Id.*

1980s have supported other exceptions through explicit reference to *Beauharnais*.[68]

Beauharnais and *Chaplinsky* have survived the doctrinal shifts of the last three decades for at least two reasons. First, the ease of application of a categorical approach is especially attractive to a Supreme Court prone to standardized tests. Second, the fundamental dilemma that permeates all free speech cases is captured precisely in Justice Murphy's claim that the benefits of some speech are so few that they are easily outweighed by more significant social interests.[69] This assertion rejects the absolutism that most agree would make First Amendment adjudication, not to mention democracy itself, impossible.[70] At the same time it promotes the intuitively attractive idea that only significant social interests can justify suppression of speech. 'Order and morality' remain perennial concerns in the business of government. Much of the content of democratic debate, of public policy making, and of political life in general is about the specific application of ideals of order and morality. In this light it is of little surprise that the contours of the First Amendment should be curtailed by the same criteria.[71] While labels, doctrines, paradigms and methodologies vary in First Amendment jurisprudence over time, the essence of all those shifts involves a determination of which order, which morality, will measure the reach of a free speech claim.

This is not to say that *Chaplinsky* is the better, or best, way of handling First Amendment claims. It obviously raises a troublesome specter of judges either,

a) applying their own elite vision of order and morality, or

b) deferring to a popular majority's vision of order and morality.

Nevertheless, what *Chaplinsky* reflects so well is that the First Amendment makes such dangers inevitable. A First Amendment jurisprudence independent of contemporary understanding of order and morality is ultimately a contradiction in terms.

Thus Justice Robert Jackson's famous claim that no official "can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion"—makes for a fine, even romantic, ideal, while at the same it

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[68] *See* Bose v. Consumer's Union, 466 U.S. 485, 504 (1984) (libel); New York v. Ferber, 458 U.S. 747, 763 (1982) (child pornography); Central Hudson v. Public Serv. Comm'n, 447 U.S. 557, 592 (1980) (commercial speech).

[69] Justice Frank Murphy wrote that fighting words are unprotected because they 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." *Chaplinsky*, 315 U.S. at 572.

[70] *See* Jerome O'Callaghan, *Free Speech: Dimensions and Limits in* LAW AND POLITICS: UNANSWERED QUESTIONS 226 (ed. David Schultz 1994); JOHN BRIGHAM, CIVIL LIBERTIES AND AMERICAN DEMOCRACY 40 (1984).

[71] From a comparative perspective it is worth noting that under the Constitution of the Republic of Ireland the "right of citizens to express freely their convictions and opinions" is guaranteed, "subject to public order and morality." IRE. CONST. art. 40.6.1.i. I expect many other nations attach similar caveats.

substantially misses the point.[72] The *Schenck v. United States*[73]/*Brandenburg v. Ohio*[74] clear and present danger test,[75] and the obscenity test from *Miller v. California*,[76] both reveal and support the power of government officials to determine the orthodox.

Ultimately *Beauharnais* and *Chaplinsky* remain significant developments in the Supreme Court's understanding of the First Amendment. They create an unmistakable tension when placed next to more liberal interpretations of free speech such as *West Virginia v. Barnette*[77] and *Texas v. Johnson*.[78] One of the ironies of the *R.A.V.* opinion is that it supports, at least nominally, *Beauharnais* and *Chaplinsky* while achieving a result more ideologically in keeping with *Barnette* and *Johnson*. In sum, it is a perversion of *Beauharnais* to use it to help defeat the St. Paul ordinance. Similarly it is a perverse use of *Chaplinsky*[79] that results in government's inability to punish cross burning for its hate speech elements.

B. The Posadas Argument

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[80] the Supreme Court upheld the power of government to restrict advertising for some forms of gambling on the island of Puerto Rico.[81] The majority's focus was on

a) the nature of the speech involved (commercial) and

b) the power of a local legislature to protect the welfare of its citizens.[82]

The *Posadas* decision supports government creation of two double standards: the first gave Puerto Ricans less access to information than citizens on the mainland; the second put advertisements for casino gambling beneath advertisements for other forms of gambling.[83]

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[72] West Virginia v. Barnette, 319 U.S. 624, 642 (1943).

[73] 249 U.S. 47 (1919).

[74] 395 U.S. 444 (1969).

[75] 249 U.S. at 52; 395 U.S. at 447-48.

[76] 413 U.S. 15 (1973).

[77] *Id.*

[78] 491 U.S. 397 (1989).

[79] Recall that *Chaplinsky* developed this test for the reach of the First Amendment, that unprotected speech is speech that is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

[80] 478 U.S. 328 (1986).

[81] *Id.* at 348.

[82] *Id.* at 340-42.

[83] *Id.*

Posadas is mentioned only once in Scalia's majority opinion.[84] However even this reference is ironic, as *Posadas* certainly strengthens the hand of government in the regulation of speech. Just as the Puerto Rican double standards were based on legislative concern for general welfare,[85] so too was St. Paul's double standard (i.e., some, not all, fighting words were singled out for punishment).[86] On Justice Scalia's side, however, is the fact that commercial speech has consistently been viewed as a unique category for First Amendment purposes.[87] In general the Supreme Court has tolerated more government power over commercial speech than over other forms of speech.[88]

A comparison of *Posadas* and *R.A.V.* raises some curious problems. This is not an instance of comparing 'pure speech' to some lesser form of communication. Recall that R.A.V. engaged in *expressive conduct*.[89] If R.A.V. had made a racist speech, the issue would have been substantially different in that the St. Paul ordinance would not even apply.[90] Thus we have expressive conduct compared to commercial speech—which of the two should rank higher in a hierarchy of protectable speech is not immediately clear. The question becomes more intriguing when one looks to the particulars. Should casino advertisements be less deserving of First Amendment protection than a cross-burning[91] on the property of a black family in the dead of night?

Even if one concludes that commercial speech *in general* is a lower priority than expressive conduct, one must ask whether it matters what the content is, or what the topic is in expressive conduct. So, for example, would it make sense to say that commercial speech (as in, say, a billboard) is ranked beneath expressive conduct the topic of which is a commercial transaction and the content of which is essentially an advertisement?[92]

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[84] *R.A.V.*, 112 S. Ct. at 2542.

[85] *Posadas*, 478 U.S. at 341.

[86] *See R.A.V.*, 112 S. Ct. at 2541-42.

[87] See MALCOM FEELEY & SAMUEL KRISLOV, CONSTITUTIONAL LAW 474 (2d ed. 1990).

[88] *See* O'Brien, *supra* note 53, at 482-484.

[89] *See R.A.V.*, 112 S. Ct. at 2541.

[90] For the text of the ordinance *see supra* note 4.

[91] The incident that brought *R.A.V.* to court was in fact part of a more widespread pattern of harassment and intimidation of a black family newly arrived in a white neighborhood. They endured tire slashing, racial epithets hurled at their nine year-old son and a vandalized car window. Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory & the First Amendment*, 37 VILL. L. REV. 787, 787 (1992).

[92] This hypothetical may appear bizarre, but compares well to Justice Scalia's hypothetical of a government prohibition of only those obscene movies that feature blue-eyed actresses. *R.A.V.*, 112 S. Ct. at 2547.

To determine the appropriate place of a particular instance of expressive conduct in a hierarchy[93] of First Amendment speech, one should examine its topic and content.[94] It should come as no surprise that the best known examples of protected expressive conduct, *Tinker v. Des Moines*[95] and *Texas v. Johnson*,[96] both involved a political topic and overt political content.[97] Likewise a prominent example of expressive conduct that fared poorly with the Court involved a message of eroticism.[98] Thus the topic and content of R.A.V.'s expressive conduct need examination.

Put it in a light most favorable to the defendant, the topic was race relations. (In another light, it was hate.) The content surely was the equivalent of a verbal threat. It is difficult, if not impossible, to interpret the burning cross without using the word intimidation. As explained by one scholar, "Remarks whose dominant object is to hurt and humiliate, not to assert facts or values, have very limited expressive value."[99] Given that threats against the life, liberty or property of another are often prohibited by state or local law, it is difficult to see how R.A.V.'s expressive conduct must necessarily rank above commercial speech in degree of First Amendment protection. If anything the result should be the opposite; advertisements for legitimate commercial transactions are deserving of greater First Amendment protection than threats based on racial animus.

In sum, the argument that no comparison can be made between expressive conduct and commercial speech is fundamentally flawed and serves only to avoid another measure by which the *R.A.V.* reasoning appears truly perverse. The St. Paul ordinance is, like the regulation upheld in *Posadas*, an effort to promote the "health, safety and welfare" of its residents and the city's interest is certainly "substantial."[100] *R.A.V.* does not satisfactorily explain why government has less power to prohibit physical threats than it has to ban the distribution of truthful information in the form of an advertisement.

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[93]The very existence of separate standards for commercial speech regulation presupposes such a hierarchy.

[94]A hierarchy of First Amendment speech cateogies will inevitably depend on topic/content classifications, see, e.g., WILLIAM VAN ALSTYNE, INTERPRETATION OF THE FIRST AMENDMENT 41-42 (1984).

[95]393 U.S. 503 (1969) (wearing of black arm bands as a protest of U.S. policy in Vietnam).

[96]491 U.S. 397 (1989) (burning of an American flag as a protest of Reagan Administration policies).

[97]*See* 393 U.S. at 504-05; 491 U.S. at 399-400.

[98]Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562-65 (1991) (nude dancing as conduct expressive of erotism and sexuality).

[99]Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 298 (1990).

[100]Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986).

IV. FUNDAMENTAL FLAWS

Justice Scalia's most prominent theme in *R.A.V.* is the accusation that the government has chosen to display favoritism in the realm of speech, that "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[101] Because fighting words that do not involve race, creed, etc. are ignored by the law, Justice Scalia concludes that the viewpoints of some are given an unfair advantage, licensing "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[102]

This line of thinking raises two immediate questions: i) whether the ordinance actually punishes one side of a debate, and ii) whether punishing one side (i.e. violating a neutrality command) is at odds with First Amendment doctrine?

To answer the first question one must look at, and beyond, the facts of *R.A.V.* It is obvious that no "debate" was occurring on the front lawn of that suburban home in the "predawn hours."[103] Even if *R.A.V.* had engaged in direct speech, it strains reason to call it a "debate" when one side is either expected, or known, to be asleep. Thus the particular application of the ordinance infringed on no debate.

In other circumstances the ordinance might be applied where two or more sides do face off in debate. Even then, however, the ordinance indicates a government preference only when it comes to non-verbal expression of hate.[104] A debate the point of which is the non-verbal expression of hate between the participants, can hardly be counted as a "debate" in any meaningful sense. A debate the point of which is something more substantial is surely at a point of derailment when non-verbal expressions of hate are vented.

Consider this dialogue:

> Attorney 1: And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.
>
> Attorney 2: Well that's not your job, Mr. Hairpiece.
>
> Witness: As I said before, you have an incipient—

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[101] 112 S. Ct. at 2547 (citations omitted).

[102] *Id.* at 2548.

[103] The cross burning incident was one in an ongoing series of efforts to intimidate a solitary black family in a predominantly white neighborhood. *See supra* note 91.

[104] Recall the specific language of the then ordinance: "'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.'" *R.A.V.*, 112 S. Ct. at 2541 (quoting MINN. STAT. § 292.02 (1990)).

Attorney 1: What do you want to do about it asshole?

Attorney 2: You're not going to bully this guy.

Attorney 1: Oh you big tub of shit, sit down.[105]

If that exchange counts as part of a deposition in any real sense, then perhaps R.A.V.'s expression counts as a contribution to some debate. In both cases it takes an enormous leap of the imagination to suggest that something other than simple intimidation is involved. As Justice White phrases it in his concurrence, "[B]y characterizing fighting words as a form of 'debate' . . . the majority legitimates hate speech as a form of public discussion."[106]

Here lies another important error in Justice Scalia's opinion. He sees viewpoint discrimination as the effect of the ordinance. In fact, the ordinance is, on its face, concerned with the topic of "debate", not the point of view of the speaker. So at least at first glance the ordinance involves not viewpoint favoritism, but content favoritism. Professor Kagan, in a perceptive analysis of *R.A.V.*, reaches the same conclusion;[107] however, she also concludes that the practical effect of the ordinance will be viewpoint discrimination:

> The St. Paul ordinance, it is true, handicaps both sides (and therefore neither side) when Jews and Catholics, whites and blacks scream slurs based on religion or race at each other. But surely race-based fighting words occur (indeed, surely they usually occur) in something other than this double-barrelled context. In most instances, race-based fighting words will be all on one side, because only racists use race-based fighting words, and racists usually do not assail only each other. When the dispute is of this kind, the government effectively favors a side in barring only race-based fighting words. To put the point another way, if a law prohibiting the display of swastikas takes a side, no less does a law that punishes as well the burning of crosses.[108]

On this basis, Professor Elena Kagan concludes that Justice Scalia, though he tends to confuse viewpoint neutrality with content neutrality, could fairly assail the ordinance for its viewpoint favoritism.[109] Yet this analysis is far from convincing. To begin, no empirical data on the actual application of the law has been marshaled to show which viewpoints were favored and which were not. Second, if it is true that most racial insults will all be on one side (presumably pro-white) that only means that there are more speakers on one side of the

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[105] *Bar Wars*, HARPER'S MAGAZINE, Jan. 1993, at 32 (excerpted from the transcript of a deposition).

[106] *R.A.V.*, 112 S. Ct. at 2553-54 (White, J., concurring).

[107] Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 68-69.

[108] *Id.* at 70-71.

[109] *Id.* at 70.

"debate" than on the other. The fact that white racists can intimidate through numbers hardly indicates that the government only opposes pro-white racial slurs. Third, if it is true that most racial insults will all be on one side, and that the other side relies on non-racial fighting words (can this really be a likely occurrence?), then what favoritism has been demonstrated?

Consider a management-union dispute in which one side is prone to using racial slurs and the other is not. St. Paul would punish the racists, but would it thereby reveal a preference on the labor issue? Even if all of one side were racists, would the government thereby have favored one side on the labor issue or altered the labor dispute itself? Why should it matter at all to St. Paul which side relied on racial slurs? Fourth, it is certainly plausible that an anti-swastika law shows viewpoint as well as content preference. But recall that the St. Paul ordinance banned *all* symbols including "but not limited to"[110] swastikas and burning crosses when they were used to arouse anger or alarm "on the basis of race, color, creed, religion or gender."[111] The broad sweep of the ordinance undermines the claim that some viewpoints would necessarily fare better than others.

To state the obvious, a social interest in order and morality is furthered by minimizing incidents where debates degenerate into 'hate-fests'. Justice Stevens' evaluation agrees:

> 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 the target's "race, color, creed, religion or gender.[112]

Just as it is hard to believe that R.A.V.'s acts actually contributed, or even were intended to contribute, to a debate, it is equally difficult to swallow the peculiar notion that the St. Paul ordinance somehow could impoverish debate. Thus Justice Scalia's concern about viewpoints driven from the marketplace seems profoundly beside the point. Only the truly naive could describe this decision as one that "reaffirmed a rule against government orthodoxy."[113]

V. JUSTICE SCALIA'S ERRATIC STANDARDS

One of the stranger aspects of *R.A.V.* is that Justice Scalia's concern for political debate, *in this case*, causes him to ponder, with alarm, the "specter that the Government may effectively drive certain ideas or viewpoints from the

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110*See supra* note 104 (quoting MINN. STAT. § 292.02).

111*Id.*

112*R.A.V.*, 112 S. Ct. at 2571.

113Kathleen M. Sullivan, *The Supreme Court—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 44 (1992).

marketplace."[114] Even if *R.A.V.* had raised this specter, there remain serious issues relating to the marketplace theory that Justice Scalia must surely want to avoid. As put by one commentator:

> The marketplace of ideas! Do we appreciate enough the revolutionary daring of that conception? At one bold stroke it identifies the deliberative and the bargaining arts, turns the scientist into a businessman, the sage into the salesman. This is the most significant triumph of a business civilization. Or it would be, if it did not ensure disaster. For, unfortunately, we need the product of deliberation, and, however difficult it may be for us to recapture the sense of difference, deliberating and bargaining are not the same, neither in process nor in result.[115]

Justice Scalia's faith in a marketplace of ideas is also ironic, as his position in other First Amendment cases indicates skepticism about free trade for speech.[116] It has already been observed that he has found several values that outweigh free speech rights, including "the preservation of the special status of government employment, the protection of communities from pandering, the maintenance of the electoral process, the protection of captive audiences from unwanted speech, and the fostering of education."[117] For reasons not yet explained by Justice Scalia, the protection of individuals from harassment and intimidation (based on their race, creed, etc.) has not made that list.[118]

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[114]112 S. Ct. at 2545 (quoting Simon & Schuster v. New York Crime Victims Board, 502 U.S. 105 (1992)).

[115]JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 104 (1960).

[116]Analysis of Justice Scalia's record in the D.C. Circuit and on the Supreme Court (through the 1991 term) reveals a voting pattern dominated by votes against free speech claims.

> Of all areas of the First Amendment, Justice Scalia has been most sympathetic toward free speech claims. He has voted to uphold free speech claims in eleven of twenty-nine (37.9%) cases. However, his support for free speech claims has not been spread uniformly across all speech categories. In the area of pure speech, he opposed free speech claims 75% of the time, and he opposed all First Amendment claims in the area of obscenity. Yet he only opposed free speech claims involving expressive conduct 28.6% of the time.

David Schultz, *Justice Antonin Scalia's First Amendment Jurisprudence: Free Speech, Press and Association Decisions*, 9 J.L. & POL. 515, 526 (1993).

[117]David Schultz, *Justice Antonin Scalia's First Amendment Jurisprudence: Free Speech, Press and Association Decisions*, 9 J. L. & POL. 515, 545 (1993).

[118]A similar point is evident in the contrast between Justice Scalia's approach in *R.A.V.* and his approach in Employment Div. Dept. of Human Resources v. Smith, 494 U.S. 872 (1990):

> [I]n providing such strong protection for the First Amendment [in *R.A.V.*], Justice Scalia seemed to ignore many of the pillars of his own jurisprudence. Take for example his professed belief in the political process . . . [In *Smith*] Justice Scalia rejected a First Amendment

Another irony lies in Justice Scalia's willingness to see expression of some value, expression worth protection, in *R.A.V.*'s actions, while five years earlier he found a speaker's verbal assertion of support for a *hypothetical* assassination of the President to be completely unprotected.[119] This contrast stands out in the record of one who has written, "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic."[120]

One final irony evident in this case concerns the equality arguments that are frequently used by proponents of government restriction of hate speech.[121] Typically they assert that true equality, the kind that is denied by acts of intimidation, is a prerequisite to real freedom of speech.[122] However, Justice Scalia, by requiring that all fighting words be treated alike, uses an equality argument to defeat the St. Paul ordinance.

At its most fundamental level *R.A.V.* raises the question whether punishing one side of a debate[123] violates First Amendment principles. The most that can be said in response is that established First Amendment principles are notoriously ambivalent. On one hand we find decisions in the *Barnette-Johnson* vein that espouse a government disinterested in the extreme.[124] On the other hand, the very existence of categories of unprotected speech (a fact that Justice Scalia does not dispute[125]) indicates that evenhandedness is not the utmost

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> challenge to a state's right to prohibit Native Americans from using peyote in their worship. . . . Despite the First Amendment, he stated at that time "values that are protected against government interference through enshrinement in the Bill of Rights are not thereby vanished from the political process . . . It may fairly be said that leaving accommodation to political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." Such deference to the political process is notably absence [sic] in *R.A.V.*

Wendy E. Parmet & Judith Olans Brown, *Scalia and Free Speech*, NAT'L L. J., July 27, 1992, at 18.

[119] *See* Rankin v. McPherson, 483 U.S. 378, 397 (1987); *see also* Schultz, *supra* note 118, at 532.

[120] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989).

[121] *See, e.g.*, Massaro, *supra* note 47, at 230.

[122] *Id.*

[123] Assuming, *arguendo*, that debates were subject to the ordinance.

[124] *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971); Stanley v. Georgia, 394 U.S. 557, 563-64 (1968).

[125] "[O]ur decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation." *R.A.V.*, 112 S. Ct. at 2543.

priority. The debate, discussion, consideration, and examination by the body politic of what is obscene has been hampered by *Miller v. California*.[126] Consideration of radical alternatives to our democratic structures has been restricted by decisions such as *Schenck v. United States*[127] and its progeny.[128] The categorical approach itself informs us that government can and will create barriers around the marketplace of ideas.

Even defamation law, it can be argued, reveals a government that discriminates against content. The argument[129] suggests that in defamation cases the government obviously discriminates against some speech on the basis of content. Further, some viewpoints are preferred over others, such as false unflattering (injurious) comments which are punished, unlike false flattering (non-injurious) comments which are not punished. The difference between the two depends in part on viewpoint and content. Finally, the very act of allowing a jury or judge to determine what is a false unflattering comment will inevitably lead to content discrimination. One can only conclude that First Amendment principles do not consistently favor neutrality[130] toward purveyors in the market, nor do they show indifference to the content of debate, as stated by Professor Kagan:

> Exceptions to the rule [of viewpoint neutrality] exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law (and especially when so called low-value speech is implicated), the Court breezily has ignored both more and less obvious forms of viewpoint preference.[131]

R.A.V. is a particularly interesting decision for many reasons, not the least of which is the fact that it is the only majority opinion authored by Justice Scalia

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[126]To the extent that *Miller* allows government restriction of obscenity, the public is denied an opportunity to decide for itself the value of obscene material.

[127]249 U.S. 47 (1919).

[128]*Schenck* was quickly followed by a decision which upheld the imprisonment of one of the most prominent Socialist Party leaders of the day. *See* Debs v. United States, 249 U.S. 211 (1919). In effect part of the Socialist Party platform had been declared illegal. Similarly, the court's decision to uphold convictions in Dennis v. United States, 341 U.S. 494 (1951), discouraged advocacy that lies at the core of the Communist movement.

[129]I am indebted to Professor Steven Shiffrin of Cornell Law School for the development of this argument.

[130]According to one First Amendment scholar, "No principle has been articulated more consistently in First Amendment law than the doctrine that legislation affecting speech may not be based on disapproval of its content." Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 749 (1992). If that proposition were true, no obscenity statute could withstand constitutional scrutiny. In contrast, the Supreme Court has expended a great deal of energy explaining how obscenity statutes need not offend the Bill of Rights.

[131]Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873, 876 (1993).

that upholds a free speech claim.[132] Indeed analysis of Justice Scalia's record shows a pronounced antagonism toward free speech claims in general:

> [W]hile Scalia's participation in certain high profile decisions striking down flag burning or cross burning laws as unconstitutional have given him the reputation as a defender of free speech, press and association, he is not. In the forty-six identified cases involving these freedoms, he has voted against them thirty-three times . . . and he has voted against the press in ten of eleven decisions.[133]

Justice Scalia has already been criticized for his sporadic use of principle to suit his preferred causes.[134] "When the methodology has to give in order for the merits to go as Justice Scalia wants, it gives."[135] He has been criticized for his "rigid formalism"[136] and his deference to the powers established in the status quo.[137] "Justice Scalia's 'neutral principles' are no more neutral than anyone else's . . . [they] often result in a lack of judicial protection for the poor, the powerless and the unpopular."[138] With regard to *R.A.V.* in particular, it has also been argued that he is blind to the unique relevance of other Constitutional guarantees. As Professor Akhil Amar has commented, burning crosses may "cease to be part of the freedom of speech protected by the First and Fourteenth Amendments, and instead constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments."[139]

VI. CONCLUSION: SCHIZOPHRENIA

The essence of the problem raised in many recent First Amendment cases, and most apparent in *R.A.V.*, lies in a two-track First Amendment doctrine.

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[132]This remained true as of Spring, 1993. *See* Schultz, *supra* note 118, at 537.

[133]*Id.* at 519.

[134]Jeffrey Rosen, *The Leader of the Opposition*, THE NEW REPUBLIC, Jan. 18, 1993, at 20-21.

[135]Peter Edelman, *Justice Scalia's Jurisprudence and the Good Society Shades of Justice Frankfurter and the Harvard Hit Parade of the 1950's*, 12 CARDOZO L. REV. 1799, 1800 (1991).

[136]Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1798 (1991) ("[T]he central theme of Justice Scalia's jurisprudence is that justice is not his business. His business is to enforce objective rules. If these are unjust, it is up to others—Congress, the states, We the People—to change them.").

[137]"Justice Scalia's devaluation of the past . . . follows from the root principle of his jurisprudence—that the strong are entitled to rule. All of us should remember, however, the fate prophesied for those who live by the sword." Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1697 (1991).

[138]Edelman, *supra* note 136, at 1801.

[139]Akhil R. Amar, *The Case of the Missing Amendments, R.A.V. v. St. Paul*, 106 HARV. L. REV. 124, 126 (1992). That argument raises intriguing questions about the portions of the ordinance that were aimed at hate speech based on gender and religion.

These tracks[140] were laid at least 50 years ago; they reveal a "tension between robust protection of the offensive expression and protection of the dignity and physical integrity of potential victims of such expression."[141] The first approach emphasizes the anti-majoritarian nature of the free speech guarantee, the minimal role of government in any public debate, and the courts' duty to ensure that government meets the highest standard before a restriction of speech/expression will be allowed.[142] This is not just anti-censorship, it is anti-chilling effect and fundamentally anti-government. Given the liberalism of the Warren Court (and to a lesser extent the Burger Court), it is not surprising that this approach was dominant in the 1960s and 1970s.[143]

The second approach emphasizes the purposes of the text, the limited reach of the term "speech" itself, and the countervailing interests in order, morality and security.[144] The victories of this approach may be fewer but they remain significant.[145] Obviously *Chaplinsky* and *Beauharnais* are prime examples.[146]

What Justice Scalia's majority opinion attempts in *R.A.V.* is an integration of both tracks, which explains why the reasoning is so convoluted, if not perverse.[147] His effort to integrate both strands of divergent analyses is ultimately unconvincing. As one scholar put it, "Doctrine . . . yields no clear answer to whether the first amendment protects speech that is as confrontational and potentially destructive of human dignity and social solidarity as is hate speech."[148] Justice Scalia's judgment in effect tells the legislature that it can advance a social interest in order and morality with fighting-word laws only when those laws are neutral. If Justice Scalia's concern is content-neutrality, that position is ultimately nonsensical. Fighting-words

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[140]For a full examination of the philosophical underpinnings of this dichotomy, *see* Massaro, *supra* note 47.

[141]Massaro, *supra* note 47, at 212.

[142]Devotees of this approach are inclined, like their counterparts, to see it as the only free speech tradition. *See* Amar, *supra* note 140, at 133.

[143]*See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414-15 (1989); Cohen v. California, 430 U.S. 15, 24 (1971); Tinker v. Des Moines, 393 U.S. 503, 513 (1969); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Stanley v. Georgia, 394 U.S. 557, 563-64 (1968); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964); West Virginia v. Barnette, 319 U.S. 624, 641-42 (1943).

[144]*See* JOHN BRIGHAM, CIVIL LIBERTIES AND AMERICAN DEMOCRACY 40-76 (1984).

[145]Others that would be included in this category include, Osborne v. Ohio, 495 U.S. 103 (1990); Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988); Bethel v. Fraser, 478 U.S. 675 (1986); New York v. Ferber, 458 U.S. 747, 763 (1982); United States v. O'Brien, 391 U.S. 367 (1968).

[146]From this perspective it appears that supporters of the flag-burning opinion cannot consistently criticize *R.A.V.*

[147]It has been suggested that Scalia's opinion relies heavily on a brief submitted by the "libertarian Center for Individual Rights." Rosen, *supra* note 135, at 27.

[148]Massaro, *supra* note 47, at 221.

laws must always discriminate on the basis of content. If his concern is viewpoint-neutrality, it is misplaced. The St. Paul ordinance attacked content, irrespective of viewpoint. The boundary that Justice Scalia wants to set for the fighting words exception is at odds with the very foundation of the exception itself: The government's legitimate interest in order and morality.

To suggest, as did Justice White, that Justice Scalia's analysis is "transparently wrong" is not to argue that the St. Paul ordinance will be an effective tool against hate speech or its harms. It may well be the case that the ordinance will be used most often to harass groups that in Justice White's words, "have historically been subjected to discrimination,"[149] as well as hate speech.[150] In any case, effectiveness does not guarantee constitutionality, nor vice-versa.

The categorical approach that is the source of the one true debate in *R.A.V.* also has its weaknesses. One problem is that ultimately it begs the question, where is the containment principle? At what point do we know that the list is complete? What is to prevent the Supreme Court from creating a simple ad hoc list of disfavored expression at random? Indeed the Court's willingness to find good reasons for restricting freedom of speech brings to mind the criticism once leveled at the clear and present danger test by Alexander Meiklejohn, that "The court has interpreted the dictum that Congress shall not abridge freedom of speech by defining the conditions under which such abridging is allowable. Congress, we are now told, is forbidden to destroy our freedom except when it finds it advisable to do so."[151]

To a cynic, the restrictions that have been placed on the First Amendment reveal the essential force of political expediency. The victims of the clear and present danger test[152] were the Socialist and Communist parties. A Supreme Court sensitive to the wishes of the majority created a child pornography exception that bore little or no relation to established First Amendment doctrine.[153] In sum, it can be argued that the categorical approach, though intuitively coherent (especially from an original intent perspective), in practice has been an excuse for the creation of an ad hoc blacklist reflecting majoritarian pressures.

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[149] *R.A.V.*, 112 S. Ct. at 334.

[150] "Bans on hate speech may have perverse effects: they may replicate the very marginalization that they are meant to subvert, carrying a subtext that the victims cannot talk back for themselves." Sullivan, *supra* note 6, at 40; *see also* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L. J. 484, 556; Massaro, *supra* note 47, at 226.

[151] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 29 (1948).

[152] Included in this category are the subsequent mutations of the test, up to and including the *Brandenburg* decision.

[153] See the critique of Justice White's opinion in *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 145 (1982).

This article began with a quote from Justice Oliver Wendell Holmes, Jr. It is fitting that it should end with a comment that describes his approach to free speech cases. This comment captures well the conundrum that hate speech cases present in First Amendment doctrine:

> What matters for a legal system is what words *do*, not what they *say*, and, therefore, the law should only direct its attention to the use of words which do something illegal, not their use to say something. Looking at the words alone, instead of at what difference they make in the full set of circumstances in which they are uttered, is simply insufficient to determine their significance for a legal system generally, or for first amendment adjudication, in particular.[154]

[154]Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283, 299 (1988).