AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Advocacy

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R.A.V. v. St. Paul, 505 U.S. 377 (1992)

On June 21, 1990, Robert Viktora and several other white teenagers burned a cross on the front lawn of the home occupied by the only African-American family in their St. Paul, Minnesota, neighborhood. Viktora was arrested and charged with violating St. Paul Bias-Motivated Crime Ordinance. The crucial provisions of that regulation stated,

> *Whoever places on public or private property a symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows . . . 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.*

Vitkora's trial lawyer moved to have the charges dismissed on the ground that the law as applied violated the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The trial court granted the motion, but that decision was reversed by the supreme court of Minnesota, which ruled that the St. Paul ordinance was a legitimate regulation of "fighting words." Vitkora, whose identity was a nominal secret, then appealed to the Supreme Court of the United States.

The amicus briefs filed in R.A.V. *reflected the way in which hate speech regulations divided the liberal community. Such liberal organizations as the American Civil Liberties Union urged the justices to declare the Minnesota law unconstitutional. The brief for the ACLU asserted,*

> *This case began with an act of racism and hatred that deserves condemnation by government at every level. But, in combating such racism, government may not ignore the First Amendment principles that distinguish our constitutional system, and that have played such a large role in the still ongoing struggle for equal rights.*

Other organizations identified with the political left insisted that the Minnesota law promoted constitutional values. The Asian-American Legal Defense and Education Fund claimed,

> *Hate crimes laws send a clear message that racial violence is intolerable and that all citizens and residents must be free from intimidation and hatred. Protecting all members of society from violence is thus a compelling state interest and must be the impetus for enacting and upholding statutes that address hate crimes.*

The Supreme Court unanimously declared that the Minnesota law was unconstitutional, but they could not agree on a common rational. The justices agreed that the government could not constitutionally punish Republicans who used fighting words. Justice Scalia's majority opinion insisted that the Minnesota statute was analogous to such a law. Why did he make that claim? Under what conditions would Scalia permit elected officials to punish some fighting words and not others? Why did the concurring justices reject Justice Scalia's analogy? Under what conditions would they permit elected officials to punish some fighting words but not others? Which justice had the better of the argument? Suppose you were asked to write a speech code for your campus. How would you draft that code to satisfy Justice Scalia? Justice White?

JUSTICE SCALIA delivered the opinion of the Court.

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. . . Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. . . . From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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." . . .

. . . [T]hese 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. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. . . .

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The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. . . .

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: each is, as Justice Frankfurter recognized, a "mode of speech," . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. . . .

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When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: a State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. . . . And the Federal Government can criminalize only those threats of violence that are directed against the President, . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. . . .

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Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. . . . [T]he ordinance 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. Those who wish to use

"fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. 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. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

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Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, JUSTICE STEVENS suggests that this "fundamentally misreads" the ordinance. . . . It is directed, he claims, not to speech of a particular content, but to particular "injur[ies]" that are "qualitatively different" from other injuries. . . . This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on one of these characteristics. . . .

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. . . St. Paul and its amici defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. . . . The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact, the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

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.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, and with whom JUSTICE STEVENS joins except as to Part I-A, concurring in the judgment.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. . . .

All of these categories are content-based. But the Court has held that the First Amendment does not apply to them, because their expressive content is worthless or of de minimis value to society. . . . We have not departed from this principle, emphasizing repeatedly that, "within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." . . .

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. . . Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." . . . Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: "Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense, and with our jurisprudence as well.". . . It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.

The majority's observation that fighting words are "quite expressive indeed" . . . is no answer. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. . . . Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. . . .

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. . . Indeed, by characterizing fighting words as a form of "debate" . . . the majority legitimates hate speech as a form of public discussion.

. . . In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression. . . . Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.

This abandonment of the doctrine is inexplicable in light of our decision in *Burson v. Freeman* (1992). . . . The statute at issue prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The plurality concluded that the legislation survived strict scrutiny because the State had asserted a compelling interest in regulating electioneering near polling places, and because the statute at issue was narrowly tailored to accomplish that goal. . . .

Significantly, the statute in *Burson* did not proscribe all speech near polling places; it restricted only political speech. . . . The *Burson* plurality, which included THE CHIEF JUSTICE and JUSTICE KENNEDY, concluded that the distinction between types of speech required application of strict scrutiny, but it squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms. . . .

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Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," would unquestionably fail rational-basis review.

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. . . A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, . . . a

message that is at its ugliest when directed against groups that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory ["the very reasons the entire class of speech at issue is proscribable"].

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Although I disagree with the Court's analysis, I do agree with its conclusion: the St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds.

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Our fighting words cases have made clear, however, that . . . 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.

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JUSTICE BLACKMUN, concurring in the judgment.

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JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join in part, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. 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.

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The Court today revises th[e] categorical approach. It is not, the Court rules, that certain "categories" of expression are "unprotected," but rather that certain "elements" of expression are wholly "proscribable." To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains. Thus, obscene antigovernment speech may be regulated because it is obscene, but not because it is antigovernment. . . .

As an initial matter, the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland, for the concept of "obscene antigovernment" speech is fantastical. . . . "Obscene antigovernment" speech . . . is a contradiction in terms: if expression is antigovernment, it does not "lac[k] serious . . . political . . . value," and cannot be obscene.

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I am, however, even more troubled by the second step of the Court's analysis—namely, its conclusion that the St. Paul ordinance is an unconstitutional content-based regulation of speech. . . .

Although the Court has, on occasion, declared that content-based regulations of speech are "never permitted," . . . such claims are overstated. . . .

. . . In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity: although the First Amendment broadly protects "speech," it does not protect the right to "fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort." . . . [T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. . . .

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Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and

nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly "unprotected," it certainly does not follow that fighting words and obscenity receive the same sort of protection afforded core political speech. Yet, in ruling that proscribable speech cannot be regulated based on subject matter, the Court does just that. Perversely, this gives fighting words greater protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers, and if a city can prohibit political advertisements in its buses, while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender," while leaving unregulated fighting words based on "union membership . . . or homosexuality." . . .

Perhaps because the Court recognizes these perversities, it quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations. First, the Court states that a content-based regulation is valid "[w]hen the content discrimination is based upon the very reason the entire class of speech . . . is proscribable." . . . .

Precisely this same reasoning, however, compels the conclusion that St. Paul's ordinance is constitutional. Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.

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. . . Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike JUSTICE WHITE, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish 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. Applying this analysis and assuming arguendo (as the Court does) that the St. Paul ordinance is not overbroad, I conclude that such a selective, subject matter regulation on proscribable speech is constitutional.

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First, . . . the scope of protection provided expressive activity depends in part upon its content and character. We have long recognized that, when government regulates political speech or "the expression of editorial opinion on matters of public importance," . . . "First Amendment protectio[n] is 'at its zenith.'" . . . In comparison, we have recognized that "commercial speech receives a limited form of First Amendment protection," . . . and that "society's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate." . . . The character of expressive activity also weighs in our consideration of its constitutional status. As we have frequently noted, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." . . .

The protection afforded expression turns as well on the context of the regulated speech. We have noted, for example, that "[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers." . . .

The nature of a contested restriction of speech also informs our evaluation of its constitutionality. Thus, for example, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." . . . More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on subject matter and restrictions based on viewpoint, indicating that the latter are particularly pernicious. . . .

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Looking to the content and character of the [St. Paul ordinance], two things are clear. First, by hypothesis, the ordinance bars only low-value speech, namely, fighting words. By definition, such expression constitutes "no essential part of any exposition of ideas, and [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." . . . Second, the ordinance regulates "expressive conduct, [rather] than . . . the written or spoken word." . . .

Looking to the context of the regulated activity, it is again significant that the statute (by hypothesis) regulates only fighting words. . . . Fighting words are not words that merely cause offense; fighting words must be directed at individuals so as to, "by their very utterance, inflict injury." By hypothesis, then, the St. Paul ordinance restricts speech in confrontational and potentially violent situations. . . .

Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm the speech causes. . . . Contrary to the Court's suggestion, the ordinance regulates only a subcategory of expression that causes injuries based on "race, color, creed, religion or gender," not a subcategory that involves discussions that concern those characteristics. . . .

Moreover, even if the St. Paul ordinance did regulate fighting words based on its subject matter, such a regulation would, in my opinion, be constitutional. . . . [S]ubject-matter-based regulations on commercial speech are widespread, and largely unproblematic. . . .

The St. Paul ordinance is evenhanded. 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." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt"—by either party. It does not, therefore, favor one side of any debate.