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HATE CRIMES: AN ANALYSIS OF THE VIEW FROM ABOVE

Tom Foley†

My introduction to oral argument before the United States Supreme Court was relatively unusual, and now that the decision in *R.A.V. v. City of St. Paul*¹ has been announced, some would say that it also was prophetic. I had not even arranged my papers on the lectern before Mr. Justice Blackmun announced that he had a few “trivial” questions for me. One of these questions concerned a park very near the location of the cross burning that was the subject of the case. As a St. Paul native, Justice Blackmun said he remembered the view of the city from that location to be one of the most beautiful views anywhere. Yet, he said, when he visited the park last summer, “the grass was so high you couldn’t see the view” of the city. Justice Blackmun wanted me to see what I could do, as counsel for the City of St. Paul in this particular case, to have the city maintenance department cut the grass. This brief exchange, for the most part unrelated to the case itself, prompted some laughter throughout the courtroom, which, in turn, allowed me to feel a bit more at ease with my argument.

Having reviewed the Court’s decision a few times now, I wonder if Justice Blackmun was warning me with his question to beware of the way the Court may view the case before it. Although the entire Court recognized in *R.A.V.* the compelling interest a community like St. Paul has to protect its citizens from discrimination, intimidation, coercion, and harassment, its majority decision and the premises that underlie its conclusions about St. Paul’s bias-motivated disorderly conduct ordinance fundamentally misunderstand such legislation.

The majority decision in *R.A.V.* begins and ends its reason-

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Mr. Foley was counsel of record for the respondent in *R.A.V. v. City of St. Paul*. The author would like to thank Tim Murphy, Special Assistant Ramsey County Attorney, for his help in preparing this essay.

ing with the First Amendment, failing to recognize the other constitutional principles which must be considered and ignoring completely the stated purpose of St. Paul’s regulation. It is as though the *R.A.V.* majority is either unable or unwilling, for all the importance of the First Amendment’s protections, to see some of the most pressing constitutional issues.

St. Paul has never argued that the First Amendment is not important to the resolution of the *R.A.V.* case or that communities like it should be permitted to sacrifice the constitutional guarantees provided by the First Amendment in the interest of providing equal protection for the members of its community. Indeed, St. Paul as much as any community believes in the importance and necessity of the freedom of speech. St. Paul’s argument is that it should be permitted to punish, with particularity, specific criminal acts that result in unique actual and social harm. No act having the intended purpose of causing fear and actual injury to others should find protection behind the First Amendment.

**INTRODUCTION**

The title of this Symposium—*R.A.V.* v. *St. Paul*: More Conflict Between Free Speech and Equality—accurately identifies the Constitutional interests that must be considered in regulating communication that is uttered solely for the purpose of inflicting injury on a person, family or group. The interests of equality and free speech in the context of so-called “hate” speech regulation are typically but unnecessarily so entangled that it is difficult to identify and give adequate value to the underlying purpose and design of such regulations. Professor Charles Lawrence has written that the unconscious racism which exists in all of us “causes us (even those . . . who are the direct victims of racism) to view the First Amendment as the ‘regular’ amendment—an amendment that works for all people—and the equal protection clause and racial equality as a special interest amendment important to groups that are less valued.”

The First Amendment has for so long been viewed as one of the most important elements for successful democratic self-governance and the pursuit of truth that it tends to overshadow other important interests reflected in the Constitution.

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When balanced in the context of hate speech regulation, against equality and dignity, First Amendment values have been afforded an overarching value, often with the effect of impeding the progress and attainment of other constitutional guarantees.

Unfortunately, Justice Antonin Scalia's majority decision in *R.A.V. v. City of St. Paul* may succeed in eclipsing the constitutional provisions that aim to provide equality and dignity to those who have historically been denied these values. It is also unfortunate that the Court's decision could shade the values of equality and dignity and at the same time seriously weaken the authority of years of First Amendment jurisprudence, thus making it possible for the first time for a community to regulate virtually any speech so long as it can attach some neutral, non-speech justification for doing so. It is this last ironic result—the weakening of the First Amendment—which is, perhaps the most disappointing aspect of the R.A.V. decision.

**In re Welfare of R.A.V.**

At issue in the *R.A.V.* case was the constitutionality of a St. Paul, Minnesota, disorderly conduct ordinance which made it a misdemeanor to place an object or appellation such as a burning cross or nazi swastika on public or private property knowing that such conduct will arouse anger, alarm, or resentment in another because of their race, religion or gender.

In 1990, St. Paul attempted to use the ordinance to prosecute a juvenile who placed a burning cross in the yard of a black family living in a predominantly white St. Paul neighborhood. Initially the case was dismissed by the trial court based on the ground that the ordinance unconstitutionally infringed on the First Amendment's guarantee of free speech. However, the Minnesota Supreme Court reversed the trial court's

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decision, holding that the ordinance, when read in light of the many similarly worded disorderly conduct ordinances throughout Minnesota, was designed to apply only to situations where the actor’s conduct or expression could be viewed as “fighting words,” tending by their very utterance to inflict injury or incite a breach of the peace.\(^5\) Interpreted in this way, the Minnesota Supreme Court determined that the ordinance was to be used to regulate only “those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. . . . [T]he ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, and therefore is not prohibited by the first amendment.”\(^6\)

\(\textbf{R.A.V. v. City of St. Paul}\)

The case was appealed by the juvenile to the United States Supreme Court, where a majority of the Court’s members disagreed with the Minnesota Supreme Court’s handling of the central issue of the case, namely: whether a community may make the political decision to punish certain forms of communication where, in its collective opinion, the value of the communication is outweighed by the value of preventing the personal and social harm likely to result from such communication. Five of the Court’s members followed Justice Scalia’s reasoning in holding the St. Paul ordinance unconstitutional because it singled out a specific form of speech and silenced it because of its content—something which, in the opinion of the majority, amounted to the “official suppression of ideas.”\(^7\) The majority opinion, therefore, develops the rule that, with exception, any regulation that attempts to single out certain expression for special treatment—even if that expression falls within one of the traditionally unprotected speech categories (“fighting words,” obscenity, or defamation)—is presumptively invalid.

Four of the Court’s members strongly disagreed with Justice Scalia’s reasoning and found no constitutional flaw in singling

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5. \textit{Id.} at 510.
6. \textit{Id.} at 511.
out and prohibiting portions of speech categories, such as “fighting words” and obscenity, which do not have value. Justice White, writing in part for the minority, observed that the Supreme Court’s decisions concerning the First Amendment “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.”

Characterizing the majority opinion’s theory that regulations turning on the content of expression are presumptively invalid as “puzzling,” Justice White next observed that the Court’s majority opinion effectively “legitimates hate speech as a form of discussion.” In addition, the minority discusses a number of inconsistencies in Justice Scalia’s requirement that a community must ban all “fighting words” if it is to ban any at all.

First, it is permissible under the majority opinion for a community to prohibit specific forms of expression within a category of unprotected speech if the reason for singling out a specific form of expression is “the very reason the entire class of speech at issue is proscribable.” For example, the statute which makes it illegal to threaten the life of the President, although indicating a particular disfavor for a particular form of threat, would be constitutional under the majority reasoning because it is necessary not to suppress the idea of assassinating the President but to prevent the chaos which could follow such an expression.

A second and particularly ominous exception considers regulation of the “secondary effects” of speech, where the regulation is “justified without reference to the content of the . . . speech.” This exception was first discussed in Young v. American Mini Theatres, Inc., and was later perfected with the deci-

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8. Id. at 2551 (White, J., concurring). Justice White was joined by Justices Blackmun, O’Connor and Stevens, who joined except as to Part I.A. of Justice White’s opinion. Additionally, Justice Blackmun filed a separate concurrence, as did Justice Stevens, with whom Justices White and Blackmun joined as to Part I of that opinion.

9. Id. at 2553-54 (White, J., concurring).

10. Id. at 2545.

11. Id. at 2556 (White, J., concurring) (citing Watts v. United States, 394 U.S. 705 (1969) (per curiam)).

12. Id. at 2546 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)) (alterations by the Renton Court).

13. 427 U.S. 50 (1976) (considering Detroit’s “Anti-Skid Row” ordinances,
sion of Renton v. Playtime Theatres, Inc.\textsuperscript{14} and Boos v. Berry.\textsuperscript{15} The practical impact of the secondary effects exception, as it has developed, is that communities may prohibit any speech they wish so long as they can concoct some neutral and technically removed reason for prohibiting the speech.

The third exception carved out of the majority's new rule that content-based regulations are presumptively invalid is a catchall that will allow regulation based on content provided "there is no realistic possibility that official suppression of ideas is afoot."\textsuperscript{16} The existence of "adequate" content-neutral alternatives to a content-based regulation, which the majority believed were present in \textit{R.A.V.}, would undermine even a compelling state interest and would result in the presumption that suppression of ideas is afoot.\textsuperscript{17}

Each of the foregoing exceptions appear to detract from the force of the majority's view that regulations relying on the content of speech are presumptively invalid. This detraction is particularly damaging, according to the minority opinions, in light of the fact that the purpose and design of the St. Paul ordinance arguably fits each of the exceptions. As Justice Stevens understands the example offered by the majority to illustrate its first exception—that content distinctions may be used within an unprotected category of expression if the distinction is based on the very reason the entire class of speech at issue is proscribable—"Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause 'fear of violence,' 'disruption,' and actual 'violence.' Precisely this same reasoning, however, compels the conclusion that St. Paul's ordinance is constitutional."\textsuperscript{18}

The majority's basis for overturning the Minnesota Supreme Court is also apparently inconsistent with a wealth of U.S.

\textsuperscript{14} 475 U.S. 41 (1986).
\textsuperscript{15} 485 U.S. 312 (1988).
\textsuperscript{16} \textit{R.A.V.}, 112 S. Ct. at 2547.
\textsuperscript{17} \textit{Id.} at 2550. The majority stated that \textit{R.A.V.} could have been prosecuted under several content-neutral laws. See \textit{Minn. Stat.} § 609.713 (1992) (terroristic threats); \textit{id.} § 609.595 (criminal damage to property); \textit{id.} § 609.563 (arson). However, given the facts presented in \textit{R.A.V.} and the general interpretation of these statutes, it is questionable whether St. Paul could have used them successfully.
\textsuperscript{18} \textit{Id.} at 2565 (Stevens, J., concurring).
Supreme Court jurisprudence. For instance, the entire Court concedes that St. Paul has succeeded in presenting a compelling interest in regulating hate speech and crime—"to ensure the basic human rights of members of groups that have historically been subjected to discrimination . . . ."19 Yet the majority ignores the strict scrutiny analysis that would have upheld the ordinance had it addressed expression that has traditionally found protection behind the First Amendment.20 Justice Blackmun suggests in a separate concurrence that the majority holding in R.A.V.

will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over "politically correct speech" and "cultural diversity," neither of which is presented here. . . .

I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community. 21

The minority opinions strongly assert the view that the aim of St. Paul’s bias-motivated disorderly conduct ordinance clearly is not to suppress ideas. 22 This position is affirmed by Justice Stevens in a separate concurrence, where he notes "the St. Paul ordinance restricts speech in confrontational and potentially violent situations," where the words, by their very utterance inflict injury. 23 The aim is not the suppression of ideas but the prevention of the harm created by conduct in certain contexts. "[T]he 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." 24 With this purpose in mind, it is clear that the suppression of ideas is not afoot. An individ-

19. Id. at 2554 (White, J., concurring).
22. Id. at 2558 (White, J., concurring) ("this case does not concern the official suppression of ideas").
23. Id. at 2569 (Stevens, J., concurring).
24. Id. at 2570 (Stevens, J., concurring) (emphasis in original).
ual would be prosecuted under St. Paul's ordinance only where the individual's "expression" is conducted with the purpose of inflicting injury. Where the purpose of the expression is the discussion of ideas, the individual would not be subject to prosecution.

The downfall of the ordinance in the minority opinions is its treatment of the overbreadth doctrine. Given the way the St. Paul ordinance is worded, the minority believes it would prohibit not only expression that is uttered with the purpose and has the effect of causing actual injury, but it also would prohibit expression that merely causes "hurt feelings, offense, or resentment"—expression which clearly is protected by the First Amendment. The minority hints at the defining elements it would have required in order to uphold the ordinance when it notes that although the First Amendment protects expression that is offensive and causes hurt feelings, it does not require that one must be subjected to such expression at all times—particularly when one is perceived as a targeted and captive audience.

ST. PAUL'S RESPONSE

The Illusion of Unanimity

The R.A.V. decision, taken as a whole, is remarkable for a variety of reasons but foremost for its illusory undertones. One can begin with the appearance that the Court's decision is unanimous. As a technical matter, the Court's decision is unanimous—all nine members of the Court believed the St. Paul ordinance violated the Constitution. Upon a closer reading of the opinions, however, one finds the Court is very sharply divided over the central issue that decides the case. Five justices believe it is not permissible for a community to regulate fighting words based on their ideological content, and four justices find no harm in doing so, and in fact, provide a

25. Id. at 2560 (White, J., concurring).
26. Id. at 2560 n.13 (White, J., concurring) (citing Frisby v. Schultz, 487 U.S. 474, 484-85 (1988), and FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978)). The Court chose not to address the captive, targeted audience issue "because of the manner in which the Minnesota Supreme Court construed the . . . ordinance." Id. This is a surprising way for the Court to answer the issue of the captive audience since the issue was fully briefed by St. Paul and was therefore "before" the Court for its consideration. See Brief for Respondent at 32-33, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675).
number of different examples of how the Court’s First Amendment jurisprudence already regulates unprotected speech based on the content of that speech. Therefore, to read the R.A.V. decision as a unanimous rejection of the idea that a community may not regulate bias-motivated attacks against its members misunderstands the import of the decision.

Four members of the Court believe such regulations are permissible and also necessary, provided they are more narrowly tailored to address the specific harm the regulations aim to prevent. A successful hate speech regulation according to the minority position, would be more specific in identifying the kinds of injuries inflicted by the expression St. Paul sought to regulate.27 Additionally, a successful hate speech regulation would require a narrowed scope of application such as that found in the Court’s Frisby decision, where it upheld an ordinance which prohibited “picketing before and about the residence or dwelling of an individual,” noting that “individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom.”28

The differences between the majority and minority opinions are so significant, from the point of view of communities that wish to address the actual and social injuries caused by acts of racial hatred, that, for practical purposes, the minority opinions may be classified as dissents. The result of the R.A.V. majority opinion is that communities like St. Paul may not address with particularity the injuries and harm caused by racial hatred; the minority opinions would allow St. Paul to address these problems with particularity, given a more carefully crafted ordinance.

27. R.A.V., 112 S. Ct. at 2558-60 (White, J., concurring); see also Charles H. Jones, Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression, 18 WM. MITCHELL L. REV. 935, 950-59 (1992) (discussing actual injuries inflicted by acts and speech motivated by racial hatred); Ruth Wedgwood, Why Protect Racial Speech?, YALE L. REP., Spring 1990, at 8. Wedgwood writes:

[M]inority groups lack the same capacity for physical self-help and may suffer palpable and justifiable fear at even ‘abstract’ suggestions or intimations that they should be harmed. A government may not be able to prevent injury to vulnerable members of a group when choate danger is finally at hand. And there is fear, not historically absurd, that a government will choose not to act. Why should any group that has lived with racial violence be asked to regard group threats as abstract or idle speech? Such speech causes a real harm, destroying a citizen’s sense of physical security.

Id. at 11.

If You Cut Down All The Laws

Those First Amendment purists who initially lauded the *R.A.V.* decision as the latest affirmation of and victory for free speech may in time regret *R.A.V.*'s majority holding. Already, pundits have read the *R.A.V.* decision as a subtle but effective attack on the university speech codes which have evolved from the so-called “political correctness” movement.\(^{29}\) Yet, given a more detailed reading of the majority's decision, the First Amendment purist will find that it is more an ally for thought control than an enemy.

The pundits quickly point out that the majority holding in *R.A.V.* does not suddenly make legal the burning of crosses and painting of swastikas on targeted individuals' property. The argument made by the pundits and by the Court’s majority is that a community may prohibit and punish such conduct without violating the Constitution only if it does so using laws that are neutral with respect to whom they protect and what they prohibit. For example, in the case of *R.A.V.*, St. Paul could have prosecuted the cross-burning by charging terrorist threats,\(^{30}\) criminal damage to property,\(^{31}\) or arson.\(^{32}\) Each of these laws punish the conduct of placing a burning cross in the yard of a black family living in a predominantly white neighborhood without making the statement that the community disfavors this type of conduct more than a cross-burning conducted as part of an organized, public demonstration.\(^{33}\) Taken a step further, all of the neutral laws mentioned above prohibit cross-burning without indirectly supporting the ideological position that those who abhor such conduct would support—for instance, that it is more desirable than not to have diverse and integrated neighborhoods, or simply that it is wrong to force a family out of a neighborhood because of their race or religion.

\(^{29}\) See, e.g., Charles Krauthammer, *Scalia vs. Political Correctness*, MPLS. STAR TRIB., June 28, 1992, at 18A.

\(^{30}\) See MINN. STAT. § 609.713 (1990).

\(^{31}\) See id. § 609.595.

\(^{32}\) See id. § 609.563.

\(^{33}\) As suggested earlier, it is questionable, given the facts presented in *R.A.V.* and the general interpretation given to the three statutes mentioned above, that St. Paul would have been successful in prosecuting R.A.V. under any of the three. Yet all parties agree—including R.A.V.'s counsel—that the act of placing a burning cross in the yard of a black family in the middle of the night constitutes a criminal offense.
It is important to understand that St. Paul’s bias-motivated disorderly conduct ordinance is concerned with hateful ideology to the same extent, for instance, that Minnesota’s aggravated robbery statute is concerned with the ideology that motivates a criminal to use a dangerous weapon while committing a robbery. It is generally accepted that communities may choose specific punishment for a specific crime based on the harm that results from the crime, yet the Court becomes uneasy when the punishment can be seen to show preference for an idea or group.

The fear in having laws like St. Paul’s bias-motivated disorderly conduct ordinance is that there is apparently no limit to what could be added to or subtracted from the list of groups and interests to be protected, with the ultimate possibility that all offensive speech could be silenced. R.A.V.’s brief states this fear in a poignant way by quoting from A Man For All Seasons. In an exchange between Roper and Sir Thomas More, Roper questions the prudence of giving the Devil the benefit of the law. Roper would not hesitate to cut down every law to get at the Devil, but Thomas More would give the Devil the benefit of the law if only for his own safety’s sake. After all, More explains, “when the last law was down, and the Devil turned round on you—where would you hide, the laws all being flat? . . . [I]f you cut them down . . . d’you really think you could stand upright in the winds that would blow then?”

Although persuasive, there are flaws in the logic of More’s argument, particularly if it is to be taken as the strength of R.A.V.’s and the majority opinion’s arguments. More’s argument is based on the unsupported reasoning that the denial of the benefit of one law to the Devil will inevitably result in the denial of the benefit of all laws, therefore leaving no laws to protect against the Devil. If one applies this logic to the R.A.V. case, the argument that a community could and would have carte blanche to ban whichever fighting words it preferred cannot be taken seriously since it does not address the purpose of “fighting words” regulations. A community would not be permitted to ban fighting words based on, for instance, political

party affiliation because it would be difficult to articulate some compelling interest in doing so. In the end, to the extent that an ordinance like St. Paul’s can be viewed as favoring one ideology ("acts of racial hatred are bad") over another ("acts of racial hatred are protected by the First Amendment"), the danger in singling out a subcategory of unprotected speech is far less troublesome than giving that subcategory of traditionally unprotected speech the same value as core First Amendment speech, thus legitimizing such acts. This is just what the R.A.V. majority does.36

The Meaning of the Content Distinction

The more frightening illusion presented by the R.A.V. majority is the signal the decision sends concerning the fallibility of the First Amendment. When it is viewed in the light of several other recent First Amendment decisions which have indicated a willingness to apply lower levels of scrutiny to content-based and content-neutral regulations alike, the possibility that First Amendment purists will discover the "official suppression of ideas is afoot" rationale becomes more, rather than less, 36. The majority’s holding necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone’s lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment. Indeed, by characterizing fighting words as a form of “debate,” the majority legitimates hate speech as a form of public discussion. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2554 (1992) (White, J., concurring).

Already courts have begun to struggle with this result—the legitimization of acts of racial and religious hatred—when confronted with First Amendment arguments attacking the constitutionality of penalty enhancement statutes. Enhancement statutes operate to increase or reclassify the penalties for crimes proved to be motivated by some form of discrimination. Thus, if a defendant assaults a victim because of the victim’s race, religion, sexual preference, etc., the statutory penalty for the assault may be increased. See, e.g., MINN. STAT. § 609.2231(4) (1990) (racially motivated assault). Although R.A.V. was also charged by an enhancement statute, he did not challenge that statute, and the court did not consider the statute in its decision.

Remarkably, some courts are beginning to apply the reasoning of the R.A.V. majority in holding enhancement statutes unconstitutional. See, e.g., State v. Wyant, 597 N.E.2d 450 (Ohio 1992) (holding enhanced penalty law unconstitutional on the ground that it punishes a defendant’s motive for committing crime); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), cert. granted, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992) (holding enhanced penalty law unconstitutional on the ground that it punishes a defendant’s freedom of thought). But see Dobbins v. State, 605 So. 2d 922 (Fla. Dist Ct. App. 1992) (upholding enhanced penalty on ground that it punishes acts of discrimination rather than targets thoughts on basis of expressive content); State v. Plowman, 838 P.2d 558 (Or. 1992) (upholding enhanced penalty on ground that it proscribes effect of acts rather than actor’s opinion).
likely. It is clear now that all a government needs to do to suppress ideas is create a regulation which is directed at a harm theoretically or facially unrelated to the speech interest to be suppressed by the regulation. An examination of the Renton case and its progeny shows how this is possible.

Renton v. Playtime Theatres, Inc.\textsuperscript{37} considered the constitutionality of a municipal ordinance prohibiting "adult" motion picture theaters from locating "within 1,000 feet of any residential zone, church, park, or school."\textsuperscript{38} In upholding the municipal ordinance, the Court noted that although the ordinance turned on the content of speech ("adult" movies), it did not aim to regulate the speech itself, but the secondary effects often associated with adult theaters, such as prostitution and sexually motivated violence. Finding this as the predominant intent of the Renton ordinance, the Court labeled the ordinance as a content-neutral, time, place and manner regulation justified without reference to the content of the speech. The Court reasoned that Renton's ordinance served the substantial governmental purpose of curbing vice crime, and that the ordinance left ample alternative channels for the showing of adult movies.\textsuperscript{39}

Renton marked the beginning of a stream of Supreme Court decisions which have extinguished the bright-line rule that "any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it."\textsuperscript{40} Beginning with Renton, the Court has allowed a variety of arguably, if not clearly, content-based regulations to pass constitutional muster under an intermediate or low standard of review.

In Boos v. Barry,\textsuperscript{41} a 1988 case considering the constitutionality of a federal statute prohibiting picketing critical of a foreign government within 500 feet of that government's embassy, a plurality of the Court seemed willing to extend the "secondary

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\textsuperscript{37} 475 U.S. 41 (1986).

\textsuperscript{38} Id. at 43.

\textsuperscript{39} Id. at 53-54. Interestingly, the ordinance excluded adult theaters from approximately 94\% of the city of Renton. Most of the remaining land was already occupied by sewage treatment facilities, a race track, an oil storage facility, and a fully developed shopping center. See Steven H. Shiffrin & Jesse H. Choper, The First Amendment 257 (1991).


\textsuperscript{41} 485 U.S. 312 (1988).
effects” test outside the context of low-value speech, and even to political speech. Yet, Justice O’Connor, who was joined by Justices Stevens and Scalia, rejected the state’s argument that the anti-picketing section of the regulation at issue was constitutional since it was aimed at the “secondary effects” of the picketing: “Listeners’ reactions to speech are not the type of secondary effects’ we referred to in *Renton*. . . . The emotive impact of speech on its audience is not a ‘secondary effect.’ Because the [picketing] clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.”

Although only two other Justices agreed with Justice O’Connor’s primary/secondary effects analysis, the use of such an analysis may seem alarming upon closer review. The Court noted at the outset that the anti-picketing clause is content-based, since the determination of whether an individual may picket a foreign embassy or not depends on whether the pickets are critical of the foreign government. After all, the Court noted, “‘content-neutral’ speech restrictions [are] those that ‘are justified without reference to the content of the regulated speech.’” The Court then distinguished the anti-picketing regulation in *Boos* from the regulation in *Renton* by claiming that the justification for the regulation in *Renton*—preventing sexually motivated violent crimes—had nothing to do with the speech being regulated. “The content of the films being shown inside the theatres was irrelevant and was not the target of the regulation.”

True, the stated objective of the regulation in *Renton* was not to censor adult movies but to curb vice crime, presumably motivated by adult movies. Yet, the problem with the analysis offered in *Renton*, as expanded in *Boos*, with the addition of the “primary effects” analysis, is that it “relies on the dubious proposition that a statute which on its face discriminates based on the content of speech aims not at the content but at some secondary effect that does not itself affect the operation of the

42. *Id.* at 320-21.
43. *Id.* at 321.
44. *Id.* at 320.
46. *Id.*
The addition of a "primary effects" analysis does little to relieve the dubious nature of the secondary effects test. Consider the effect of a political assassin's bullet—it is primary to the message behind the assassination, yet the regulation of such conduct is justified despite that message, even though it is inseparable from the message.

The R.A.V. majority picks up on the distinction between primary and secondary effects and uses the distinction to dispose of St. Paul's argument that the ordinance must be considered a regulation of the secondary effects of hate speech. Even so, the majority preserves a variety of politically popular and necessary regulations which, but for the secondary effects exception as set out in Renton and reaffirmed in R.A.V. would fall for the reason that they single out a particular form of unprotected expression for purposes of addressing a particular injury. As the minority points out, the most obvious of these regulations are the Title VII hostile work environment claims based on sexual or racial harassment.

Understanding the primary/secondary effects analysis is as difficult as understanding the Court's conclusions in Barnes v. Glen Theater, Inc., which considered the regulation under an Indiana public indecency statute regulating "totally nude dancing" in adult entertainment facilities. The indecency statute made it a misdemeanor for anyone "knowingly or intentionally, in a public place [to]: (1) engage[] in sexual intercourse; (2) engage[] in deviate sexual conduct; (3) appear[] in a state of nudity; or (4) fondle[] the genitals of himself or another person . . . ." The statute had been construed by the Indiana Supreme Court to mean that "[t]here is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when communication of ideas

47. *Id.* at 336 (Brennan, J., dissenting).
48. "[T]he St. Paul ordinance is not directed to secondary effects within the meaning of Renton. As we said in Boos v. Barry, . . . 'listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton. . . . The emotive impact of speech on its audience is not a 'secondary effect.' R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992).
49. *Id.* at 2557-58 (White, J., concurring) (citations omitted).
is involved.”

On appeal to the United States Supreme Court, the Indiana adult entertainment facilities argued that Indiana could not limit their dancers’ performances by requiring that they wear even a scant amount of clothing, without violating the dancers’ rights under the First Amendment. The State of Indiana, however, argued that the indecency statute was a valid “time, place and manner” regulation which was justified in infringing on any minimal First Amendment interests.

The Court’s plurality decision in Barnes applied an intermediate level of judicial review to the indecency statute, using the O’Brien test in its analysis. A plurality of the Barnes Court felt nude dancing was marginally expressive but not entitled to full First Amendment protection. In applying the four-part O’Brien test, the Court found Indiana had a substantial interest in protecting societal morality and order, and for this reason it was within the state’s power to enact an indecency statute. The Court determined that Indiana’s interest in societal morality and order was unrelated to the suppression of free expression, and that any incidental restrictions the statute imposed on First Amendment rights were justified by the state’s

52. State v. Baysinger, 397 N.E.2d 580, 587 (1979). “Nudity” is defined in the statute as

the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

IND. CODE § 35-45-4-1(b) (1988).

53. See Barnes, 111 S. Ct. at 2460-63 (citing United States v. O’Brien, 391 U.S. 367 (1968)). O’Brien considered the constitutionality of a statute prohibiting the destruction or mutilation of draft registration cards:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O’Brien, 391 U.S. at 376-77.

54. Barnes, 111 S. Ct. at 2461. Chief Justice Rehnquist was joined by Justices O’Connor and Kennedy in the plurality opinion, in which Justices Scalia and Souter concurred. Justice White was joined by Justices Marshall, Blackmun and Stevens in dissent.

55. Id. “Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places. . . .” Id. “This and other public indecency statutes were designed to protect morals and public order.” Id. at 2462.
Justices Scalia and Souter joined in the Court's result but filed separate concurrences which served to confuse the Court's decision. Where the plurality opinion found that the statute's prohibition of nude dancing necessarily brought First Amendment analysis into play, Justice Scalia viewed the statute as a general proscriptive regulation which, not being directed specifically at protectable expression, did not call for First Amendment analysis at all. Justice Scalia argued the statute should be upheld on ground that the state had a rational basis in moral opposition to public nudity for enacting the statute.  

Justice Souter agreed with the plurality opinion that some degree of First Amendment review was necessary in the evaluation of the statute's constitutionality. Justice Souter also employed the O'Brien test in finding that Indiana's statute was permissible, however, he believed the state's interest in prohibiting nude dancing revolved around the "secondary effects" of such entertainment. Justice Souter looked to the Court's decision in Renton and determined that Indiana had a legitimate and substantial governmental interest in preventing prostitution, sexual assaults, and other criminal activity often associated with establishments which provide totally nude dancing as entertainment. Justice Souter determined Indiana's interest in preventing the secondary effects associated with nude dancing establishments was unrelated to the suppression of protectable expression since the "pernicious secondary effects" associated with the establishments are not necessarily the result of the expression of nude dancing.  

Justices Marshall, Blackmun, and Stevens joined Justice White's dissent, which gave much more deference to the expressive characteristics of nude dancing than did the plurality

56. Id. at 2468.

57. Id. (Scalia, J., concurring). "In my view, . . . the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." Id.

58. Id. at 2468 (Souter, J., concurring). "[W]hen nudity is combined with expressive activity, its stimulative and attractive value certainly enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a strip-tease, are integrated into the dance and its expressive function." Id. (Souter, J., concurring).

59. Id. at 2468-69 (Souter, J., concurring).

60. Id. at 2469 (Souter, J., concurring).

61. Id. at 2470 (Souter, J., concurring).
or its concurring opinions. Justice White was quick to suggest that Indiana’s indecency statute was not the general prohibition that Justice Scalia thought, since it would allow for nudity in certain “larger form” theatrical productions, such as “Solome” and “Hair.” Moreover, the dissent stated:

The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. . . . The attainment of [this] goal[. . . depends on preventing an expressive activity.

The Indiana law, as applied to nude dancing targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates.63

Justice White clearly viewed the statute as content-based, calling for stricter judicial scrutiny than the plurality and its concurring opinions were willing to employ. Under strict scrutiny, Justice White felt it was difficult to find the compelling state interest in the context of nude dancing before consenting adults, that would justify the affirmation of the statute.64

The Barnes case illustrates the difficulties, under traditional First Amendment analysis, of distinguishing between expression that “communicates” and other kinds of expression and distinguishing between regulations that are “content-based” and regulations that are “content-neutral.” The Barnes decision represents the full spectrum of possible interpretations that could attach to the regulation of one form of

62. Id. at 2473 (White, J., dissenting). Interestingly, it was Justice Scalia who inquired at oral argument of counsel for the state of Indiana: “Am I correct in my understanding of what Indiana law is? That there is an exception to the nudity law somehow for artistic performances, is that right? . . . Which includes opera but not go-go dancing?” Upon receiving an affirmative answer, Justice Scalia inquired further: “[W]here does that come from? . . . Is it the good-taste clause of the Constitution? How does one draw that line between Salome and the Kitty Cat Lounge?” Transcript of Oral Argument at 3-4, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

63. Barnes, 111 S. Ct. at 2473, 2476 (White, J., dissenting).

64. Id. at 2476 (White, J., dissenting).
"expression."

The Meaningful Distinction—A New Approach

As one can see even through a cursory evaluation of several of the Court's recent First Amendment cases, there is a very fine line between what the Court considers to be permissible content-specific regulation and what it considers to be impermissible content-specific regulation. By introducing an intermediate standard of review with Renton and its progeny, and allowing something less than strict judicial scrutiny for certain content-specific regulations, the Court has created an artificial distinction for suspect regulations which permits courts to find reasons for upholding or rejecting regulations which effectively suppresses free expression.

The R.A.V. majority falls in line with the artificial distinction which has been created by the current Court. To compound the vulnerable position in which the First Amendment is left by Renton and its progeny (including R.A.V.), the majority appears to have abandoned the traditional strict scrutiny analysis. Under the R.A.V. majority's approach, it makes no difference that a community may have a compelling interest in regulating speech based on its content, it may not regulate the speech unless it can attach some removed neutral purpose for the regulation or unless it regulates the entire speech category altogether.

The traditional categories for describing regulations affecting protectable expression, and the categories for describing the expression itself, together with the attendant methods of First Amendment analysis should be reconsidered so that communities like St. Paul may be permitted to address with specificity the actual personal injury and social harm caused by conduct that is based on biased hatred. When a cross is burned in the yard of an African American family, it is not enough simply to charge a perpetrator with criminal damage to property or with terroristic threats, as these charges do not address the actual harm caused by biased hatred.

The current categories and methods of analysis used by the Court are not in touch with the types of First Amendment issues that have come before it recently and are likely to come before it in the future. Under the current approach to First Amendment issues, courts are forced to hang regulations and expression on what they believe to be the appropriate peg. Once pegged as either content-based or content-neutral, courts then mechanically proceed through an analysis which balances the state’s interest in regulating expression against any First Amendment interests. If the regulation happens to address a specific kind of expression, the court will give deference to the First Amendment interest. If, on the other hand, the regulation does not appear to address a specific kind of expression, but rather the manner of expression, or no expression at all, the court effectively gives deference to the regulation.

The First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”\textsuperscript{66} The process currently used by the majority in \textit{R.A.V.} does not adequately provide for protection of speech as contemplated in the First Amendment.

Calling for the initial categorization of a regulation as content-based or content-neutral or somehow deserving of some intermediate classification ignores the purpose of the First Amendment. The initial step in the evaluation of a regulation that purportedly has an impact on protected expression should be to determine the intended purpose of the regulation.\textsuperscript{67} It is

\textsuperscript{66} U.S. Const. amend. I
\textsuperscript{67} It is the intended purpose rather than the motivation of the regulation that should be evaluated. Chief Justice Warren once argued:

What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a “wiser” speech about it.


[T]he only “First Amendment analysis” applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases.
not difficult to draft a content-neutral regulation that intends to suppress protected expression. For example, a close examination of the legislative history behind the regulations involved in *Ward v. Rock Against Racism* and *United States v. O'Brien* reveals regulations which, although classified by the Court as content-neutral, were enacted in response to the very kinds of controversies underlying the litigation.

Looking only to the government’s purpose for enacting a regulation is overly simplistic as a means of evaluating the constitutionality of regulations that effect free expression. However, a “purpose” approach may be a good starting point for an evaluation. Many regulations may be declared constitutional or unconstitutional upon a brief evaluation of the wording of the regulation, its application, and the circumstances surrounding its creation. If this “purpose” evaluation reveals that the government aims to silence or disadvantage expression because it feels the expression is false, critical of the government, or offensive, the regulation should be held

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Id. at 622-23 (Scalia, J., dissenting) (emphasis in original; footnotes omitted); see also Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 698 (1991).

68. 491 U.S. 781 (1989). In *Ward*, the sound regulations at issue were enacted in response to continued complaints of loud rock music each year at the “Rock Against Racism” event. It would appear that the purpose of the regulation was not to suppress the performers’ expression—the regulation did not ban the performance of rock music—but to assert a content-neutral and legitimate governmental interest in keeping music at reasonable sound levels. Of course, the argument may be made that to the extent it is necessary to play rock music loud to express properly a message condemning racism, the expression is inhibited by a regulation calling for lower sound levels. It is hard, however, to argue under the facts of *Ward* that the expression was suppressed by the regulation.

69. 391 U.S. 367 (1968). Examination of the regulation at issue in *O'Brien* reveals a questionable governmental purpose. The regulation which prevented the knowing destruction or mutilation of one’s draft certificate was enacted at a time when there was incredible dissatisfaction with the United State’s involvement in the Vietnam war and burning a draft card had become a well-recognized means of protesting the war. Viewing the facts of *O'Brien* in this context suggests the government’s purpose in enacting the regulation was to silence a very effective means for criticizing the United State’s involvement in Vietnam. Regulations with this kind of purpose should be declared unconstitutional, whether or not they may be classified as content-neutral or content-based; in either case, the effect is to suppress freedom of expression.


71. *See id.* at 272-73.

unconstitutional.

If the regulation does not reveal an illegitimate purpose or reveals only a suspicious purpose, such as in Renton or in R.A.V., the interest of the government should be subject to strict judicial scrutiny. A court should ask whether the regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. In all other cases, where the regulation has a legitimate purpose and does not suspiciously disadvantage expression, the regulation should be upheld, so long as the government’s interest in the regulation is substantial and there are adequate alternative avenues of expression for those claiming that the regulation inhibits their right to free expression.\(^73\)

Finally, a new approach to First Amendment issues should include an analysis of the “expression” itself: does the person claiming First Amendment protection sincerely wish to engage in speech or speech activity? Determining the sincerity of the expression would depend on facts surrounding the expression, such as the speaker’s own statement of purpose and the context and means of the expression. An evaluation of expression in this way would prevent those with negligible or illegal purposes from claiming constitutional protection.\(^74\)

**CONCLUSION**

The R.A.V. decision should be noted for its clear, unambiguous message that communities have a compelling interest in protecting their citizens from acts of racial hatred and bigotry. The R.A.V. decision is far from clear in suggesting how communities might serve that interest, however, and given time, it is likely the R.A.V. decision will be viewed as “an aberration,”

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\(^73\) This standard is comparable to the current O’Brien standard as clarified in Ward v. Rock Against Racism, 491 U.S. 781 (1989). Note, however, that the proposed standard looks to whether there are adequate alternative avenues of expression, rather than to whether the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Id. at 799 (emphasis added) (citation omitted). The deference should always lie with speech interest rather than with governmental convenience.

\(^74\) See, e.g., Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (prohibiting an exception to state statute making the use of peyote illegal for use of the drug in association with religious rituals associated with the Native American Church); State v. Randall, 540 S.W.2d 156 (Mo. Ct. App. 1976) (rejecting the claim for a constitutional exemption to state statute banning use of controlled substances, for use of marijuana, LSD, and hashish by the members of the Aquarian Brotherhood Church).
to borrow Justice Blackmun's description.\textsuperscript{75}

The majority decision is not sound or even helpful to the First Amendment. The \textit{R.A.V.} majority decision will be used in the future, together with cases like \textit{Renton}, \textit{Boos}, and \textit{Barnes} to permit communities to enact regulations that suppress any speech so long as some facially neutral justification can be offered to support the regulation. The suppression of speech appears more rather than less feasible in the wake of \textit{R.A.V.}

First Amendment purists will find this to be a sad irony.

Many of those who would support "hate" crime regulation may even consider themselves First Amendment purists—they do not wish to inhibit the First Amendment's protections. From the point of view of those supporting hate crime regulation, the conduct which would be prosecuted is not speech at all—it is injury. More importantly, the perpetrator of such conduct does not wish to make a statement or to have a discussion. The purpose is to cause injury—and a particular one at that—to the targeted victim.

St. Paul recognizes and honors the guarantees provided by the First Amendment. St. Paul also recognizes its obligation to protect its citizens from specific acts of intimidation, coercion, and harassment, which inflict a unique actual and social harm. It will continue to be St. Paul's position that no act having the intended purpose of causing fear and actual injury to others should find protection behind the First Amendment.
