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The Supreme Court and the Problem of Hate Speech

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Imagine a community that has been traditionally all white. A black family moves into the community. They purchase a house. Some of the neighbors are upset about the arrival of this new family. At first, members of the community are content to show their displeasure by snubbing the new arrivals, but soon the situation changes for the worse. One night, someone places a cross on some public property in front of the black family's home and sets the cross afire.

Afterward, the perpetrators are apprehended and prosecuted. They are charged with violating a local statute that prohibits expressive activities (including cross-burning) that cause anger, alarm, or resentment in individuals who are singled out on the basis of their race, religion, or gender. The perpetrators defend themselves on the ground that the statute violates their First Amendment rights.

In 1992, the Supreme Court considered the analogous case of *R.A.V. v. City of St. Paul* and, in an opinion written by Justice Scalia, declared the challenged statute unconstitutional.[1] That ruling, one of the most important pronouncements of the Rehnquist Court on free speech, caused an enormous stir within constitutional circles and divided many of those who have long viewed themselves as friends of the First Amendment.

The focus of the Court in the *R.A.V.* case was not on the act of cross-burning. Justice Scalia did not suggest that cross-burning itself is constitutionally protected or immune from state regulation. Rather, he objected to the specific statute under which the individuals were prosecuted. In speaking for the Court, Scalia held the statute unconstitutional on its face and ruled that it could not be applied to anyone, whether accused of burning a cross or engaged in any of the other prohibited activities.

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1. 505 U.S. 377 (1992).

In its entirety, the St. Paul ordinance provided:

> 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.[2]

In enacting this measure, the city was trying to regulate the kinds of symbols that could be placed on public or private property and by way of enumeration, mentioned one of the most notorious racist symbols in America—a burning cross, a symbol long associated with the Ku Klux Klan, typically used to convey the view that blacks are not welcome in the community. Clearly, the St. Paul ordinance could be characterized as a regulation of expression.

In judging the validity of the law, Scalia wisely avoided an approach—once heralded by Justice Black—that would have condemned the ordinance simply because it was a regulation of expression or speech. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . ." and, laying the foundation for a certain kind of absolutism, Justice Black insisted again and again that "no law" means "no law."[3]

Once a loyal New Deal Democrat in the Senate, Black was placed on the Court by President Roosevelt during the 1930s and from the very beginning was determined to avoid the pitfalls of *Lochner v. New York*[4] and other decisions of the Supreme Court that wreaked havoc on the New Deal. At the core of Black's judicial philosophy was an aversion to "substantive due process" and the kind of discretion that it provided to judges to strike down laws they found "arbitrary" or "unreasonable."[5] As a result, the Justice rejected any constitutional interpretation that would force the Court to make such open-ended judgments. He sought refuge in literalism,

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2. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

3. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714-20 (1971) (Black, J., concurring); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

4. 198 U.S. 45 (1905).

5. *See* TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 50-51 (1988). For two of the more passionate formulations of this view, see Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting) and Goldberg v. Kelly, 397 U.S. 254, 276-77 (1970) (Black, J., dissenting).

looking for the plain and simple meaning of constitutional provisions, and in the domain of free speech, this aspiration led to an absolutism.

Many justices have sympathized with Black's general quest, and I would include Scalia among them, but the fact remains that Black's First Amendment absolutism never received the support of a majority of the Court. Indeed, over the years, it picked up only one vote—that of Justice William Douglas. Black's literalism obviously was selective, for he read the word "Congress" to embrace both the Executive and the Judiciary. A selective literalism must presuppose some theory to explain which phrases should be given their ordinary meaning and which ones should not, and thus could not be itself a form of literalism. Moreover, the kind of judgments Black so feared necessarily would have to be made in determining whether some forms of human behavior constituted "speech" rather than "action." Surely, he would want the First Amendment to protect, as the Court indeed has held, not just verbal utterances, "speech" as it is ordinarily or literally understood, but also films, novels, parading, and even waving a flag.

Justice Black made a great deal out of the phrase "no law," but was less focused in identifying the laws the First Amendment actually prohibited. This was no trivial oversight. As Alexander Meiklejohn emphasized, what the First Amendment prohibits are laws that abridge "the freedom of speech," not the freedom *to* speak.[6] The phrase "the freedom of speech" implies an organized and structured understanding of freedom, one that recognizes that the state's power over speech is limited but not denied altogether. In contrast to Black's view, the approach of the Court—in *R.A.V.* and elsewhere—has been to permit regulations of speech, but to confine them to the smallest domain necessary to enable the state to conduct its other vital functions.

By its very terms, the St. Paul ordinance seemed to reach very broadly, perhaps too broadly. The Minnesota court was aware of its sweep, and in an effort to bring the ordinance within the scope of regulation traditionally allowed, the state construed the ordinance to be confined to "fighting words." This phrase refers to a category of expression that is likely to provoke an immediate violent reaction by the persons to whom the words are addressed and that also conveys little by way of ideas and thus makes only the most limited contribution to public debate. For these reasons, in one of its early free speech decisions, the Supreme Court of the United

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6. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

States held that "fighting words" are unprotected or, to put it another way, are within the power of the state to suppress.[7]

This interpretation of the St. Paul ordinance narrows its scope, but does not eliminate the First Amendment problem altogether, for as Justice Scalia stressed in *R.A.V.*, "fighting words" are still words. "Fighting words" may be subject to state regulation or even may be suppressed, but because they are a means for conveying an opinion or advancing a position and thus part of the rough-and-tumble of public discourse, one must be sensitive to the *way* they are regulated.

What Scalia found objectionable with the way St. Paul proceeded in its regulation of speech arose from the partiality of the law. Initially, this may seem puzzling since in one sense the St. Paul ordinance was comprehensive. It covered the expressive activities of racists of all persuasions that might arouse alarm or anger in their targets, whether those activities are aimed at whites or blacks. On the other hand, the statute did not cover the activities of those fighting racism—the anti-racists. Obviously, those fighting racism are not about to burn crosses to promote their ideas, but they have their own symbols or appellations that may cause anger, alarm, or resentment in others—their own "fighting words." For example, they might place graffiti on public property accusing their opponents of being Nazis or they might burn the American flag in front of the houses of those they believe harbor racists views. The St. Paul ordinance did not, by its very terms, cover those activities, and from this limitation on its coverage, Justice Scalia concluded that the law discriminated on the basis of viewpoint and thus ran afoul of one of the governing principles of the First Amendment. As Justice Scalia wrote: "St. Paul has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[8]

Underlying the principle banning viewpoint discrimination is an understanding of the First Amendment, now almost axiomatic in the profession, that treats that law as an instrument of democratic self-government.[9] According to this view, the purpose of the First Amendment is to protect the sovereignty of the people to decide how they wish to live

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7. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

8. 505 U.S. at 392. Scalia also objected to the subject covered in that it dealt with racial antagonisms but not, for example, with animosity addressed to organized labor. That objection is more akin to the partiality present in Police Dep't v. Mosley, 408 U.S. 92 (1972), which held a ban on picketing unconstitutional because it exempted labor picketing from its coverage, but seems less central to his decision and its unique First Amendment theory.

9. *See generally* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

their lives. The state is not to make that choice for the people, and even more relevant for our purposes, the state is not allowed to manipulate public debate in a way that effectively determines that choice. The state must remain neutral between competing viewpoints. In Justice Scalia's eyes, St. Paul breached this obligation to remain neutral when it enacted a measure limiting the expressive activities of racists, but not those fighting racism.

Many who have criticized Scalia's decision acknowledge the non-neutrality of the St. Paul ordinance, but justify this differential treatment in terms of the substantive value underlying the state's intervention—equality.[10] It is perfectly permissible, so these critics say, for the city to favor the anti-racists because the Constitution, as represented by the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as all the statutes enacted under those provisions, condemns racism. Those fighting racism could be viewed as furthering the egalitarian goals of the Constitution; they are the soldiers of the Constitution and should be allowed certain advantages in public debate over the proponents of racism. True, the city is not being neutral, but since it is favoring a position that itself is favored by the Constitution, there is no reason for concern.

This critique of the *R.A.V.* decision raises far-reaching questions about the limits of self-governance. Should an individual be able to urge action inconsistent with one of the organizing principles of our constitutional order, and should the First Amendment protect his or her right to do so? There is a tradition in the First Amendment, perhaps best illustrated in the modern period by the hostile reaction of liberals to the anti-Communist crusade of the 1950s, that conceives of the right of self-governance in the broadest terms and answers this question in the affirmative. Everything is up for grabs, even first principles. It is almost as though the First Amendment gives rise to a right of revolution.

The Communists were charged with advocating the violent overthrow of government—a repudiation of the Constitution in its entirety; and liberal critics of McCarthyism argued that this option should be presented to the people, if only so it could be subject to scrutiny and duly rejected. In the

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10. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 193 (1993). Professor Akhil Amar faults the Court for ignoring the Civil War Amendments, principally using the Thirteenth Amendment as the source of the equality value, but stops short of accusing the Court of having erred in its choice of values. Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 151-61 (1992).

end, the Court embraced the liberal position,[11] and those decisions might be marshaled to support *R.A.V.*. On Scalia's behalf, some might well insist that the First Amendment protects the advocacy of racism or, even further, the repudiation of the Civil War Amendments and all the statutes enacted under them. No matter what the issue, the state must not take sides or, more to the point, tilt the debate one way or the other.

Over the years, the Supreme Court has struck a delicate balance between preserving the state's neutrality in public debate and enabling the state to fulfill its police power function. As a result, even at its most liberal moments, the Supreme Court has been measured in its protection of subversive advocacy. Communists were allowed to engage in the general advocacy of revolution, but the Court drew the line when advocacy turned into incitement. Similarly, one could argue that although racists should be able to advocate on behalf of inequality—they can write a book urging repeal of the Civil War amendments or hold a rally on the green proclaiming theories of racial superiority—they should not be entitled to express their views by burning a cross in front of a black family's house at night. Such an expressive activity might be considered a "threat" or "harassment" and treated as comparable to an "incitement"—a speech act that is temporally proximate to a harm that the state has an unquestioned right to restrict. To deny the state the power to interfere with such a speech act is to deny it the power to prevent the harm.

Although all of this is true, it is worth emphasizing again that the Court in *R.A.V.* was making a judgment about the ordinance, not the activity; it may well be that the state has to have the power to suppress cross-burning as part of a comprehensive regulation of threats, harassment, or "fighting words." Nothing in *R.A.V.* precluded that possibility. What the decision turned on was the fact that the St. Paul ordinance was a partial regulation of speech: it covered the "fighting words" of racists, but not comparable expressions of those opposed to racism. It would be as though the state sought to regulate the incitement of Communists but not capitalists.

The liberal position on the Communist cases and Scalia's objection to the partiality of the St. Paul ordinance are premised on a view that accords a very privileged position to free speech. In effect, Scalia is saying that

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11. *See* Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957). For a general discussion of these cases, see HARRY KALVEN, JR., A WORTHY TRADITION 211-26 (1988). *See also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that proscriptions against advocating force are constitutional only when advocacy has become an incitement to imminent lawless action).

debate on all public issues must be uninhibited and wide-open, even when it puts a constitutional value such as equality in jeopardy. The First Amendment is first.[12] The critics of the *R.A.V.* decision have insisted that such an ordering of constitutional values remains unjustified—in the conflict between liberty and equality, it is not clear why liberty should prevail. Such an ordering of values may well accord with classical liberal philosophy, with its exclusive devotion to individual liberty, but contemporary liberalism, especially as forged by the civil rights struggles of the 1960s, is defined by a duality of commitments—to both liberty and equality.

The major premise of *R.A.V.* is thus vulnerable on this score. Yet those who criticized *R.A.V.* on this ground are no more secure in their premises than Scalia; in the conflict between liberty and equality, they assert the priority of equality without much more by way of justification. The upshot is an impasse: liberals divided among themselves. One group asserts the priority of liberty and the other the priority of equality, without providing any principled basis for deciding between them. No wonder disputes over hate speech—and perhaps any number of other free speech controversies that so dominate the headlines today, such as pornography[13] and campaign funding[14]—are so intractable. Liberals are being asked to choose between their defining values.

The thought occurred to me, however, that we might be able to avoid this choice if we consider the St. Paul regulation as a protection of speech. Then we could allow Justice Scalia his major premise—assume the firstness of the First Amendment—and yet find the partiality of the St. Paul regulation acceptable. Such an approach would be predicated on the view that cross-burning does not merely insult blacks and interfere with their right to choose where they wish to live. It also interferes with their speech rights. It discourages them from participating in the deliberative activities of society. They feel less entitled and less inclined to voice their views in the public square and more inclined to withdraw unto themselves. They are silenced as effectively as if the state had intervened to silence them.

Seen from this perspective, the intervention of St. Paul might be analogized to that of a parliamentarian trying to protect the integrity of

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12. This formulation was used by Edmond Cahn during the McCarthy period. Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956). *See also* Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

13. *See* Owen M. Fiss, *Freedom and Feminism*, 80 GEO. L.J. 2041 (1992).

14. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

public debate. The city is trying to insure that the speech rights of black citizens are protected; the ordinance is partial because the city has made the judgment that racists do not require such protection, and indeed that certain of their speech activities—for example, burning a cross, but perhaps not publishing a book or walking down Main Street in white hoods or Nazi uniforms—have to be curbed in order to protect the expressive activities of blacks in the community. St. Paul is silencing some to allow others to speak.

In intervening in this manner, the state is protecting the speech rights of the blacks, and it can do so only by restricting the range of speech acts in which racists are allowed to engage. In favoring the speech rights of blacks in this way, the state is not making a judgment about the merit—constitutional or other—of the views each side is likely to express, through "fighting words" or otherwise, but only that this sector of the community must be heard from more fully if the public is to make an informed choice about an entire range of issues on the public agenda, from affirmative action, to education, to welfare policy. The state is acting as a parliamentarian trying to end a pattern of behavior that silences one group and thus distorts or skews public debate. The state is not trying to usurp the public's right of collective self-determination, but rather to enhance the public's capacity to properly exercise that right.

Admittedly, such intervention is likely to have an effect on the choices of the people. Every regulation of process affects outcome. But this impact on outcome is comparable to the effect on outcome that arises when a parliamentarian insists that all sides be heard. While participants in a meeting may vote differently when they hear all sides of the debate rather than one, this is something to applaud rather than condemn. The principle of democratic self-governance enshrined by the First Amendment does not protect merely choice by citizens, but rather choice made with adequate information and under suitable conditions of reflection.

In an earlier period, First Amendment theorists such as Alexander Meiklejohn and Harry Kalven—the architects of the liberal position on free speech—often used the metaphor of the parliamentarian to define an appropriate role for state regulation of speech.[15] They conceived of society as one gigantic town meeting, and within this framework, defended "time, place, and manner" regulations and explained why the "heckler's veto" was so objectionable. Recently, Professor Robert Post has criticized this use of

15. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-28 (1965); Harry Kalven, Jr., *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 23-25.

the notion of a "town meeting" and the conclusion that the state could be viewed as a parliamentarian. He has insisted that such a view ultimately rests on antidemocratic assumptions.[16]

According to Post, while actual town meetings take place against a background in which the participants agree to an agenda—sometimes implicitly or informally—no such assumptions can be made about civil society. In civil society, no one is ever out of order. Civil society, he argued, can be thought of as a town meeting only if it too has an agenda, but that would require a certain measure of dictatorial action by the state and a disregard of democratic principles. Those principles require that citizens set the public agenda and always be free to reset it.

The notion of a town meeting does indeed presuppose an agenda—there must be some standard of relevance; but agendas, either of actual town meetings or of the more metaphoric type, need not be set by the deliberate action of the participants or imposed by an external force such as the state. They can evolve more organically. In democratic societies, there is always an agenda that structures public discussion—one week nuclear proliferation, the next health care—even though that agenda is not set by anyone in particular.

Of course, the role I envision for the state as parliamentarian is more ambitious than that contemplated by Kalven and Meiklejohn. For the most part, they assumed that the state could discharge its duty as a parliamentarian simply by following something akin to Robert's Rules of Order: a predetermined method of proceeding that does not turn on the substance of what is transpiring or what is being said in the debate, but rather on some universal procedural principle like temporal priority. Indeed, it was Kalven, writing in the early 1970s, who did so much to place the rule against content regulation—the rule invoked by Scalia—at the foundation of the First Amendment tradition.[17] I doubt Kalven would have reified it in the way the Court has since he wrote; but in any event, it seems clear today that the state should not be confined to Robert's Rules of Order when acting as a parliamentarian. A fair-minded parliamentarian must be sensitive to the excesses of advocacy and the impact of such excesses on the fullness of debate. Ugly, hateful speech may force some participants to withdraw and may be as destructive to a full airing of an issue as speaking out of turn.

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16. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1113-19 (1993); *see also* Morris Lipson, *Autonomy and Democracy*, 104 YALE L.J. 2249 (1995).

17. *See generally* KALVEN, *supra* note 11, at 3-236.

In conceiving of the state as a parliamentarian and suggesting that the cross-burning ordinance be seen as an instrument to further the robustness of public debate, I do not mean to ignore or slight the additional impact that cross-burning or similar expressive activities have upon the social standing of various groups. Indeed, I will even acknowledge the possibility that this was the motivating force behind the legislation. However, as some of the most honored cases teach, what is crucial for constitutional analysis is not the actual motive, but the possible justifications.[18] Regardless of the factors that subjectively moved the legislators, a law should be allowed to stand if it can be objectively justified—if it serves legitimate purposes. Although standard First Amendment doctrine requires that the purpose of a regulation have special urgency (heightened scrutiny) and also that the fit between means and ends be more precise than usual (the least restrictive alternative), validity still turns on what might be said in defense of the law—its objective justification, not the subjective motives of the legislators.

Clearly, this mode of analyzing the St. Paul case depends upon specific facts and context. It turns upon a judgment as to whether the speech that is being regulated has a silencing effect and whether the robustness of public debate will be advanced by the state choosing the side that it does. On this score, it is hard to make blanket judgments. Even if the statute is limited to a narrow category of hateful speech such as cross-burning, certain applications of the statute may be unconstitutional because, for example, the speech is aimed at some who would not be silenced, as indeed might be the case if the target is not a member of a disadvantaged group. Then the hate speech may not have a silencing effect, and St. Paul would be unable to justify the application of the ordinance on the ground that it is acting like a parliamentarian. The silencing effects of words do not depend simply on their content, but also on the social standing of those who hear them.

For this reason, a decision in *R.A.V.* upholding the First Amendment rights of the perpetrators of this hateful act might have been justified, but not on the terms of the Court. While I concede that there may be circumstances where hate speech does not have this silencing effect, and thus it would be impossible to justify the action of the state as a parliamentarian, the Court never attended to the consequences of hate speech upon discourse itself and thus never made the empirical inquiry such a theory requires. Seeing only a conflict between liberty and equality and determined to proclaim the priority of liberty, the Court struck down the statute on its face because it was partial. In doing this, the Court failed

18. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

to understand that it was confronted not simply with a conflict between liberty and equality, but also with a conflict within liberty, and that in resolving such conflicts a certain measure of partiality may be acceptable, and indeed necessary.