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Address

The Freedom of Speech*

The Honorable John Paul Stevens†

Throughout history the seeds of intolerance have produced injustice and conflict. In Rouen, France in 1431, a nineteen-year-old woman who wore men's clothes, who fought bravely in the French army, and who insisted that she communicated directly with God, was burned at the stake after she was found guilty of witchcraft and heresy. In Salem, Massachusetts in 1692, Samuel Sewall, a Harvard graduate, a devout man, and a duly elected judge, found nineteen persons, mostly women, guilty of witchcraft—that a capital offense punishable by hanging. Today the weeds of intolerance poison the relations between neighbors in all parts of the globe—in Northern Ireland, in the Holy Land, in Bosnia, in Eastern Germany, in Azerbaijan, and in some parts of the United States. It seems appropriate, therefore, to ask why (or perhaps even whether) the First Amendment of our Constitution should afford extraordinary protection to the apostles of intolerance.

That it does in fact provide such protection is demonstrated by two cases decided by the Supreme Court earlier this year. In Dawson v. Delaware, the Court held that the State had violated the First Amendment by introducing evidence that the defendant was a member of a white racist gang known as the

* Justice Stevens delivered this speech as the inaugural Ralph Gregory Elliot First Amendment Lecture at Yale Law School, October 27, 1992.
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“Aryan Brotherhood” to convince the jury that he deserved the death penalty for robbing and murdering a white woman. Dawson, the Court found, had a constitutional right to associate with others holding similar intolerant beliefs. Because Dawson’s membership had no connection with the crime he had committed, and did not rebut any mitigating evidence that he had offered, the trial court erred by allowing the jury to base a death sentence, in part, on the fact that Dawson had engaged in constitutionally protected conduct.

In R.A.V v. City of St. Paul, the Court held that a juvenile, who apparently was also a white racist, could not be prosecuted under the city’s Bias-Motivated Crime Ordinance for burning a cross on the property of an African-American family. Without condoning the defendant’s actual conduct or the message of intolerance that it conveyed, the Court held that the city ordinance violated the First Amendment because it was under-inclusive—that is to say, it did not abridge enough speech. More precisely, the Court concluded that the ordinance was “facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” In other words, while the use of fighting words to express hostility “on the basis of political affiliation, union membership, or homosexuality” remained permissible, the ordinance unconstitutionally singled out for prohibition expressive conduct that might provoke violence “on the basis of race, color, creed, religion, or gender.”

Early in its opinion in R.A.V, the Court noted that “[f]rom 1791 to the present” our society “has permitted restrictions on the content of speech in a few limited areas,” but explained that the scope of those categories had been narrowed by our decisions since the 1960’s. The opinion, however, has little to say about the development of First Amendment law before 1960, and does not pause to quote the text of the Amendment adopted in 1791. Because this is the first lecture in a series that is intended to focus on that Amendment, it seems appropriate to refer to the Amendment’s text, and to the three dimensions of the immunity that it establishes, before discussing the categorical rule against subject matter regulation that R.A.V announced.

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4. Id. at 1097.
5. Id. at 1098.
7. The St. Paul ordinance read:
   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.
   Id. at 2541.
8. Id. at 2542.
9. Id. at 2547.
10. Id.
11. Id. at 2543.
12. Id.
The First Amendment contains a single sentence that reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.\(^{13}\)

There are three dimensions to most, if not all, immunity rules. First, they provide protection against a specified category of potential harms. Judicial immunity, for instance, protects the judge from damages liability,\(^{14}\) while the statutory immunity granted to certain witnesses protects them from criminal prosecution.\(^{15}\) What the First Amendment protects all of us from is adverse lawmaking by the Congress. Its text, however, does not purport to limit the power of the State of Delaware or the City of St. Paul to regulate or to punish speech.

Second, a rule of immunity provides protection in a specified degree, either absolute or qualified. The judge's immunity from liability for damages is absolute;\(^{16}\) even malicious wrongdoing may be protected.\(^{17}\) Law enforcement officers, in contrast, have only qualified immunity; their knowledge of the law, or lack thereof, may determine their liability.\(^{18}\) As for the First Amendment, its text makes the uncompromising command that "Congress shall make no law . . . abridging the freedom of speech." The imperative tone of that command has an absolute ring; it is far stronger than one that is qualified by exceptions for time, place, and manner regulations\(^{19}\) or for speech that interferes with a compelling state interest (such as the interest in national security),\(^{20}\) or for speech that is harmful to children\(^{21}\) or offensive to captive audiences.\(^{22}\) The plain language of the First Amendment indicates that the Framers intended to establish a rule of absolute immunity.

The third dimension of an immunity rule identifies the category of behavior that it protects. Thus, judicial immunity protects a judge while he is performing judicial services within the scope of his jurisdiction, but not while

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13. U.S. Const. amend. I.
15. See, e.g., 18 U.S.C. § 6002 (1988) (providing that "no testimony or other information compelled under [an immunity] order . . . may be used against the witness in any criminal case").
16. Forrester, 484 U.S. at 227 (limiting immunity to "paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court").
he is out robbing banks or fighting with his neighbors. The particular category of protected human behavior that interests us this afternoon is that embraced within the term “the freedom of speech.”

I emphasize the word “the” as used in the term “the freedom of speech” because the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech. That category could not have been co-extensive with the category of oral communications that are commonly described as “speech” in ordinary usage. For it is obvious that the Framers did not intend to provide constitutional protection for false testimony under oath, or for oral contracts that are against public policy, such as wagers or conspiracies among competitors to fix prices. The Amendment has never been understood to protect all oral communication, no matter how unlawful, threatening, or vulgar it may be. Thus, it seems doubtful that the word “speech” was used in its most ordinary sense.

Instead, it is possible that the word was intended to convey only the alternative definition of the word “speech” given by Noah Webster—a “formal discourse delivered before or to an audience.” That is certainly the meaning of the word “speech” as it is used in the only other place in the Constitution in which it appears—namely, the Speech and Debate Clause of Article I, Section 6. Prior to the adoption of the First Amendment, that Clause of the original Constitution gave absolute protection to the freedom to make some formal speeches—those given by senators and representatives during congressional debates. Conceivably, the First Amendment was specifically intended to provide comparable absolute protection against federal interference with the freedom of speech and debate conducted in town meetings and state legislative assemblies.

This understanding of the category of oral speech originally intended for absolute immunity by the First Amendment would be consistent with the limited character of the writings that the Amendment also protects, at least by its plain terms. The word “press,” though encompassing newspapers, periodicals, and political pamphlets, is by no means a synonym for “all written words.” Moreover, the right to “petition the Government for a redress of grievances” recalls the formal petition of right by which English subjects

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23. Forrester v. White, 484 U.S. 219, 227 (1988) (explaining that because judicial immunity is based on judicial function, it does not apply to all “acts that simply happen to have been done by judges”).

24. As the Court wrote in one opinion:
At the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are “absolutes,” not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49–50 (1961) (citations omitted).

25. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2189 (1986).

sought a waiver of their Monarch's sovereign immunity. The plain language of the First Amendment can be read narrowly, as expressing the Framers' original intent to create an absolute immunity from federal interference with a limited category of freedoms.

This interpretation, though perhaps plausible as an historical matter, cannot fully capture the meaning of the First Amendment read as a whole. First, even assuming that the draftsmen of the Amendment focused their attention on a specific set of concerns, they used words that identify and express a faith in principles of tolerance and resistance to authority that bespeak a broader concept of liberty. Moreover, the several clauses that are juxtaposed in the text of the First Amendment illuminate one another and combine to form a whole larger than its parts. There is an obvious connection, for instance, between freedom of speech and freedom of the press, and of course, the exercise of the right to petition the government presupposes a right to speak freely in opposition to government policy. And that right, in turn, presupposes the same freedom of conscience that is protected by the Religion Clauses. Thus, when Justice Jackson referred to the "freedom to be intellectually and spiritually diverse" in the second flag salute case, he was construing the central meaning of the entire Amendment. As he wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."  

It is familiar learning that the freedom to reject orthodoxy in matters of religion or politics is now much broader than that originally intended by the Framers of the Constitution. As we pointed out in *Wallace v. Jaffree*:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

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29. *Id.* at 642.
31. *Id.* at 52-53 (footnotes omitted).
The category of expression embraced by the term "the freedom of speech" has undergone parallel change and expansion as it has been tested in the crucible of litigation. Even if the concept originally embraced little more than matters that were appropriate subjects of debate at a New England town meeting, and even if the dictionary definition of the word "speech" has not changed since 1791, it is now settled that constitutionally protected forms of communication include parades, dances, artistic expression, picketing, wearing arm bands, burning flags and crosses, commercial advertising, charitable solicitation, rock music, some libelous false statements, and perhaps even sleeping in a public park.

It is significant that much of this expansion came about as a result of the Court's decision that the word "liberty" as used in the Fourteenth Amendment includes the freedoms protected by the First Amendment. In this sense, the development of what we often think of as First Amendment law is in fact linked to the broader doctrine that bears the once unpopular name of "substantive due process." In retrospect, this doctrinal watershed seems almost a foregone conclusion; once the Court decided in the early 1920's that the individual interest in teaching (and having children learn) a foreign language, and the interest of Catholic parents in having their children educated in a parochial school, were aspects of liberty substantively protected by the Due Process Clause of the Fourteenth Amendment, it was only a small doctrinal step to conclude that the freedom of speech was also a component of liberty protected by that Clause. At the time, however, the textual basis for incorporation was eminently debatable, as Justice Brandeis' opinion in Whitney v. California makes clear:

34. Miller v. California, 413 U.S. 15, 24 (1973) (exempting works with "artistic value" from definition of obscenity).
45. See Adamson v. California, 332 U.S. 46, 66-68 (1947) (Frankfurter, J., concurring). But see id. at 68-123 (Black, J., dissenting) (suggesting that Fourteenth Amendment's Privileges or Immunities Clause protects against state infringement of individual liberties enumerated in the Bill of Rights); Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) (arguing that Privileges or Immunities Clause incorporates Bill of Rights restrictions against states).
48. 274 U.S. 357 (1927).
Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.\textsuperscript{49}

That the evolution of the right to free speech comes by way of the Due Process Clause has significant implications for all three dimensions of First Amendment immunity. Most obviously, the contrast between the text of the First Amendment and that of the Liberty Clause affects the first dimension, specifying the type of harm against which protection is afforded. While the First Amendment protects only against lawmaking by Congress, the text of the Liberty Clause extends to censorship by state and municipal governments, as well. The textual differences between the two provisions can also explain an expansion of the third dimension, identifying the category of behavior protected. The breadth of the interests and principles evoked by the term "liberty" extends far beyond the area of political debate, or indeed, the field of oral and written expression, to encompass the kinds of expressive conduct that now enjoy First Amendment immunity.

Perhaps most important, however, and most often overlooked, is the fact that when the Liberty Clause became the source of an immunity rule greatly expanded in two dimensions, it also had a critical impact on the third dimension, or the quality of the immunity that had been defined in 1791. Whereas the First Amendment sets forth an absolute prohibition against abridgement of "the" freedom of speech, the Fourteenth Amendment's protection against state deprivations of liberty is, by its terms, a qualified immunity, prohibiting only deprivations "without due process of law."\textsuperscript{50}

Of course, this limitation is not without meaning; just as due process in a judicial trial includes a requirement that a criminal conviction be supported by evidence,\textsuperscript{51} due process in the statutory context requires that a deprivation rest on an acceptably rational predicate.\textsuperscript{52} Nevertheless, when the permissibility of a deprivation depends on the presence or absence of "due process"—whether measured by procedural fairness or by the adequacy and

\textsuperscript{49} Id. at 373 (Brandeis, J., concurring).
\textsuperscript{50} U.S. CONST. amend. XIV, § 1.
\textsuperscript{51} Jackson v. Virginia, 443 U.S. 307 (1979); see Schad v. Arizona, 111 S. Ct. 2491, 2497 (1991) ("Thus it is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Speiser v. Randall, 357 U.S. 513, 523 (1958) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)), that no person may be punished criminally save upon proof of some specific illegal conduct.").
\textsuperscript{52} Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that ordinance limiting occupancy of housing unit to members of single family violates Due Process Clause because it does not have sufficiently rational basis).
legitimacy of the basis for the deprivation—an element of judgment is necessarily injected into the constitutional calculus. Inevitably, what began as a categorical black-letter prohibition gives way to a more context-specific balancing of competing interests.

Scholars, and judges as well, have sometimes assumed that two of the dimensions of First Amendment immunity could be reshaped to expand its coverage many times over, without engendering a significant qualification of the absolute character of its protection. Their attempts to define black-letter rules that treat each dimension of First Amendment immunity in isolation are characteristic of both legislative and academic craftsmanship. Where they come up short is in failing to acknowledge the interrelationships among the three dimensions, and, especially, the fact-specific inquiry demanded by introduction of a qualified form of immunity. Once this dynamic is recognized, it should come as no surprise that First Amendment law has developed into an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication.

In other areas of the law, after all, judges have frequently reminded us that their work involves more than the logical application of general propositions to particular facts; instead, in the crucible of litigation, those facts often reshape the very propositions that have been applied to them. In considering the constitutionality of a Massachusetts statute requiring a street railway company to offer students half-fare tickets, for instance, Justice Holmes noted that "the great constitutional provisions for the protection of property are not to be pushed to a logical extreme."53 In his dissent in the Northern Securities case, he observed that some leading cases were called "great," not because "of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest . . . . [that exercises] a kind of hydraulic pressure" distorting even well-settled principles of law.54 He also agreed with the first Justice White's observation that "to push propositions to the extreme to which they naturally lead is often an unsafe guide."55

More recently, the Court has reaffirmed its understanding that categorical rules are, as a practical matter, often of limited utility. Discussing standing to bring an antitrust treble damages action, for example, the Court noted that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances."56 Some twenty years ago, in an article discussing one aspect

55. Id. at 397.
of the body of case law interpreting the judge-made doctrine of sovereign immunity, a brilliant scholar summarized this point. After identifying a conflict between broadly worded statements in some opinions and the accumulated mass of decisional law, then-Professor Scalia correctly concluded that in such a "conflict, it is the general rather than the specific, the theoretical rather than the practical, the abstract thesis rather than the historical actuality, which will yield."57 "Which," he continued, "leads, not inevitably but also not unnaturally, to a concluding observation concerning the difficult role of the scholar in the common-law system. . . . [T]he common-law scholar, unlike his civil-law counterpart, must derive his unifying principles from the case law instead of imposing them upon it."58

There are good reasons for heeding that admonition in First Amendment cases. Once we accept the fact that the Due Process Clause introduces a new element into the equation—specifically, the need to evaluate the legitimacy and adequacy of a state's interests in abridging speech—we enter a realm in which sensitivity to context becomes critical. While black-letter rules have their appeal as a means of deciding cases, they also carry the risk that specific facts may be discounted and, as a result, that deserving speech may be left unprotected while unimportant speech is overprotected.

Nevertheless, Professor Scalia's admonition has not received the attention it deserves. Despite the fact that the development of First Amendment law during the twentieth century is entirely the product of judicial lawmaking rather than the legislative process, scholars and opinion writers have displayed an almost hypnotic fascination with the endeavor to explain and to organize that development in rigidly defined compartments.59

Thus, Justice Roberts' famous dictum, joined only by Justice Black, in Hague v. C.I.O., about the use of streets and public places that have been held in trust since ancient times "for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"60 is the source of a complex three-tiered doctrine that differentiates between quintessential public forums, limited purpose semi-public forums, and public property that serves no traditional communicative purpose.61 In 1968, the question whether the Amendment protected the public burning of a draft card gave rise to a newly crafted four-pronged test to apply to government regulation of expressive

58. Id. at 918.
59. For discussions of the many issues raised by the categorical approaches to First Amendment law that are taken by various scholars, see Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265 (1981) and Pierre J. Schlag, An Attack on Categorical Approaches to Freedom of Speech, 30 UCLA L. Rev. 671 (1983).
60. 307 U.S. 496, 515 (1939).
conduct. The Court uses another four-part analysis to evaluate the regulation of commercial speech, and a three-pronged standard to define obscenity. Moreover, cutting across the entire spectrum of speech are special black-letter rules condemning prior restraints and content-based regulations, protecting false and defamatory statements about public figures, and placing fighting words and deceptive advertising in disfavored categories.

My experience on the bench has convinced me that these categories must be used with caution and viewed with skepticism. Too often, they neither account for the facts at issue nor illuminate the interests at stake. For example, with respect to the three types of public forums, neither the distinctions between the different tiers, nor the significance of placing a communication in one tier rather than another is entirely clear. Thus, although it was once assumed that virtually absolute immunity attached to speech in a true public forum, that label may in fact guarantee nothing more than freedom from discriminatory treatment. Moreover, the doctrine does not and cannot explain why an airport must tolerate leafletting and pure oral advocacy, or why a homeowner may not allow his neighbors to leave unstamped messages in his mailbox. Because I thought that the discussion of the public forum doctrine in the United States Postal Service case tended to obfuscate rather than clarify the issues, I tried to focus on the relative importance of the governmental interest in avoiding mail box clutter, on the one hand, and the private interest in facilitating convenient

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62. The four-pronged test for conduct is derived from these words:
Whatever imprecision inheres in these terms, we think it clear that 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.

63. In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

69. Friedman v. Rogers, 440 U.S. 1, 8-16 (1979).
communication in a neighborhood, on the other, instead of entering the debate among my colleagues as to whether or not a mailbox is a public forum.\textsuperscript{74}

Similarly, our cases involving commercial speech illustrate that a focus on abstract categories and broad rules can cause us to lose sight of the practical impact of our holdings. In 1942, the Court considered the validity of a New York City ordinance that prohibited the distribution of handbills containing commercial advertising while permitting handbills devoted to "information or a public protest."\textsuperscript{75} The case involved a handbill with an advertisement printed on one side and a protest against the City's refusal to provide wharfage facilities for the respondent's submarine on the other. It took the Court only a page and a half to conclude that the First Amendment afforded no protection for the distribution of the hybrid handbill. In 1976, however, the Court decided that price advertising by druggists was protected by the First Amendment, without deciding whether the quality of that protection was the same as the protection afforded all other speech.\textsuperscript{76} Two years later, in \textit{Ohralik v. Ohio State Bar Ass'n},\textsuperscript{77} the Court concluded that commercial speech belongs in a separate, less protected category "commensurate with its subordinate position in the scale of First Amendment values."\textsuperscript{78} In one attempt to define that category, the Court described commercial speech as "expression related solely to the economic interests of the speaker and its audience."\textsuperscript{79} Because I thought it "important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed,"\textsuperscript{80} I expressed this reservation:

Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.\textsuperscript{81}

\textsuperscript{74} Id. at 152-55 (Stevens, J., dissenting).
\textsuperscript{75} Valentine v. Chrestensen, 316 U.S. 52, 53 (1942).
\textsuperscript{77} 436 U.S. 447 (1978).
\textsuperscript{78} Id. at 456.
\textsuperscript{80} Id. at 579 (Stevens, J., concurring in judgment).
\textsuperscript{81} Id. at 579-80.
Perhaps most striking with regard to abstract categories is the Court's effort to lay down a black-letter rule involving content-based regulation of speech. A city ordinance giving preferential treatment to union pickets involved in labor disputes with schools prompted Justice Marshall's eloquent statement condemning all regulation of speech based on content: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."\(^8\) Although this statement is often cited as a proposition of law, it is perhaps more accurately described as a goal or an ideal, for the Court's decisions do, in actuality, tolerate quite a bit of content-based regulation.

That the Court routinely departs from the purported rule against content regulation is beyond dispute. Most recently, in *Burson v. Freeman*,\(^8\) the Court upheld a Tennessee statute imposing a content-based ban on political speech within 100 feet of polling places on election day. The regulation at issue in *Burson*, it should be noted, extended not only to political speech, but also to quintessential public forums such as sidewalks,\(^4\) both of which are traditionally afforded the most comprehensive of First Amendment immunities. A decade ago, in *New York v. Ferber*,\(^5\) the Court bluntly stated that "it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, 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."\(^8\)

Perhaps most interesting is the degree to which some decisions departing from the rule depart also from the spirit animating Justice Marshall's defense of content-neutrality, which draws, I think, from Justice Jackson's understanding that the First Amendment protects centrally against the imposition of an official orthodoxy.\(^7\) Two terms ago, for instance, in *Rust v. Sullivan*,\(^8\) the Court upheld a regulation prohibiting employees of federally funded family planning clinics from even discussing the abortion option with needy women, requiring them instead to steer pregnant women toward prenatal care or adoption services. In that case, I think it is fair to say, the Court was not faithful to either the letter or the spirit of the idea expressed by Justice Marshall.

There are other decisions, however, that depart from the prohibition on content-based regulation without undermining its central goals. They do so by

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82. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
84. Id. at 1850 n.2.
86. Id. at 763–64.
87. See supra text accompanying notes 28-29.
supplementing, if not replacing, the black-letter rule with a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech. In libel cases, for example, courts consider the content of allegedly false criticisms of public figures to determine whether they are made with "malice" as specially defined in *New York Times Co. v. Sullivan*. Similarly, in the context of public education, the officials who operate major colleges and universities are routinely permitted to make countless decisions based on the content of communicative materials when they are performing their learning and teaching missions.

The difficulties occasioned by a black-letter approach to content-based regulation are perhaps most vividly illustrated by the Court's efforts to deal with obscenity. Faced with a purportedly unqualified prohibition on regulating speech by reference to content, the Court responded by attempting to remove obscenity entirely from the scope of the First Amendment, cabining it in a special category of unprotected speech. This categorical approach, of course, generated its own problems, primarily of the definitional variety.

It was left to Potter Stewart, one of our wisest judges and strongest defenders of First Amendment values, to address the problem most memorably. Though he accepted a black-letter rule distinguishing protected from unprotected speech, Justice Stewart resisted the Court's efforts to define unprotected obscenity, first with one three-pronged definition and then with another. Finally, focusing directly on the ultimate issue in his terse opinion in *Jacobellis v. Ohio*, Justice Stewart noted the difficulty of the "task of trying to define what may be indefinable," but then concluded, "I know it when I see it, and the motion picture involved in this case is not that."

Later, Justice Stewart took issue with the refusal to apply this categorical approach to speech that is indecent, but not obscene. In his dissenting opinion in *Young v. American Mini Theatres*, he correctly stated what was then regarded as the Court's alarming holding:

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit non-obscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

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92. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
93. *Id.* Justice Stewart expressed a similarly perceptive judgment in *Furman v. Georgia*, when he observed that the death sentences under review "are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. 238, 309 (1972) (Stewart, J., concurring).
95. *Id.* at 84.
The two established principles of First Amendment law to which Justice Stewart referred were first, the notion that as long as vulgar or offensive speech was not obscene, it was no less worthy of constitutional protection than any other speech, and second, the proposition that the content of protected speech cannot provide an acceptable basis for its regulation. There was unquestionably ample support for both of these propositions in prior opinions; indeed, although Justice Powell concurred in the Court’s judgment, he did not dispute either proposition. Thus, as not infrequently happens in difficult cases, two wise judges concluded that the same black-letter rules supported opposite results.

In my opinion for the plurality, I questioned the basic categorical approach underlying the obscenity cases: that speech can be divided by a bright line into protected and unprotected categories, and that all speech deemed protected is entitled to immunity of the same quality. I think it was my attempt to emphasize this latter point that most offended Justice Stewart. After explaining that the Detroit ordinance was viewpoint neutral and did not reduce the total quantity of speech, I attempted to persuade the reader of a proposition that seems obvious to me, namely that neither all speech, nor even all protected speech, has the same value. To that end, I wrote this much maligned paragraph:

Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire’s immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the...

96. Id. at 85.
97. Id. at 85-86.
98. See sources cited id. at 84-86 and footnotes therein.
99. Id. at 73 (Powell, J., concurring).
100. While I expressed skepticism about the integrity of the rule against content, or subject matter, discrimination, I reaffirmed without qualification or hesitation the Court’s consistent disapproval of viewpoint discrimination. For emphasis I cited a remark attributed to Voltaire as characterizing our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, [Voltaire] said: “I disapprove of what you say, but I will defend to the death your right to say it.” The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Id. at 63.
content of these materials as the basis for placing them in a different classification from other motion pictures.\textsuperscript{101}

Some of the criticism of the opinion, including that found in Justice Stewart's dissent, fairly stated that the willingness to go to war provides a most unsatisfactory standard for defining the boundaries of a protected category of speech.\textsuperscript{102} In response, I might have suggested only that it was not the first time an attempted rhetorical flourish had been mistaken for a proposition of law. And, as a postscript, I note that after Justice Stewart left the Court, the Court itself, in an opinion I did not join, acknowledged that the category of protected speech allows for gradation, and found that the expression of editorial opinion on matters of public importance is the kind of communication "entitled to the most exacting degree of First Amendment protection."\textsuperscript{103} The quality of immunity, in other words, was treated not as an absolute, but rather as a matter of degree.

In sum, it seems to me that the attempt to craft black-letter or bright-line rules of First Amendment law often produces unworkable and unsatisfactory results, especially when an exclusive focus on rules of general application obfuscates the specific facts at issue and interests at stake in a given case. I offer this observation not only as a matter of academic interest, but also as a practical guide, for advocates, as well as scholars and judges, may emphasize legal abstractions at the expense of facts that could win a case. Indeed, a litigant's misplaced reliance on propositions of law instead of the special facts of the case may snatch defeat from the jaws of victory.

The \textit{Pacifica} case—in which the Court upheld a Federal Communications Commission order declaring that an indecent but not obscene broadcast was unlawful—illustrates the point.\textsuperscript{104} Ever since the case was argued, I have thought the result might have been different if the broadcaster had simply contended that the particular order was erroneous because the evidence of actual or probable offense to the listening audience was so meager. Instead, however, the station took the position that the Commission was entirely without power to regulate indecent broadcasting, whatever the surrounding circumstances. Under that view, any program, no matter how inappropriate for children, could have been targeted at juvenile audiences so long as it was permissible fare for adults. Instead of attempting to sell the Court such a rigid

\begin{footnotes}
\item[101] \textit{Id.} at 70–71.
\item[102] \textit{Id.} at 86.
\item[103] \textit{FCC} v. \textit{League of Women Voters}, 468 U.S. 364, 375-76 (holding that ban on editorializing by noncommercial television and radio stations receiving Corporation for Public Broadcasting funds was unconstitutional).
\end{footnotes}
and unattractive proposition of law, adopting a less ambitious strategy might have better served the interests of both the litigants and the law.  

With this skepticism about black-letter First Amendment rules as background, I return to R.A.V., the cross-burning case. In R.A.V., the Court crafted yet another abstract, bright-line rule, this one protecting speech that a state could, if it wished, prohibit entirely. Under R.A.V., speech that remains proscribable as a general matter, like fighting words, may not be regulated on a selective basis; the state must prohibit all such speech, or it may prohibit none. I wrote separately in that case because I was convinced that the St. Paul ordinance was invalid on familiar overbreadth grounds—in my opinion, it prohibited a significant amount of protected speech—and because I could not accept the Court's new categorical approach to expressive conduct that is otherwise proscribable.

In holding that even fighting words, formerly believed to fall entirely outside the scope of the First Amendment, are protected by an absolutist rule against content-based regulation, R.A.V. significantly expands one dimension of First Amendment immunity by adding to the category of behavior it reaches. At the same time, the Court purports to extend to this entire category the same absolute level of protection or quality of immunity. What I have already said is sufficient to explain my lack of confidence that the Court's new black-letter rule will survive the test of time. I shall, however, add some further thoughts about certain aspects of the R.A.V. approach.

First, I must say that I think the Court was quite correct in acknowledging that labeling certain communications "fighting words" or "obscenity" does not render them "entirely invisible" to the First Amendment. This recognition of the limits of the categorical approach is, it seems to me, long overdue. It is also consistent with the fact that six members of the Supreme Court have expressed the view that criminal obscenity prosecutions are unconstitutional, with the Court's holding in Stanley v. Georgia, protecting the possession of obscene materials; and with the majority's inability to fashion a single rationale for refusing to clothe nude dancing with constitutional protection.
Moreover, while I am unpersuaded by the Court's attempt to read the St. Paul ordinance as viewpoint discriminatory, the Court surely was correct in distinguishing between content and viewpoint discrimination, and identifying each as an independent basis for challenging the ordinance. The distinction is vital, because it goes to the animating principles of the First Amendment. For instance, while the First Amendment does not prevent a state from regulating deceptive advertising by lawyers without also regulating other professions, it plainly prevents a state from conditioning employment as a public defender on agreement with the views of the dominant political party. When official power is used to prescribe what shall be orthodox in politics and matters of opinion, and to force citizens to adhere to those views, then the central purpose of the Amendment is threatened.

Where R.A.V. falters, I think, is in failing to follow through on its insight that content discrimination is not the same as viewpoint discrimination, and that not all content regulations are alike. Instead, the Court announced a broad rule that would invalidate all regulation of "otherwise permitted speech solely on the basis of the subjects the speech addresses." This black-letter approach simply cannot take account of the fact that subject-matter regulations do not implicate the same concerns as viewpoint regulations, and do not give rise to the same presumption of invalidity.

Nor can the Court's black-letter rule accommodate fact-specific inquiry into the character of the expression at issue, which should be—and always has been—relevant to the validity of a content-based regulation. Committed to a rigid rule of general application, the Court in R.A.V. could not fully consider the precise nature of the expression in question, and under what circumstances cross-burning can be said to constitute "speech" for First Amendment purposes. It seems fair to infer, after all, that this is not the kind of "speech" the Framers considered when they decided to provide

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117. Branti v. Finkel, 445 U.S. 507 (1980). As the percentage of the labor market represented by public employees grows larger and larger, so does the importance of protecting this freedom. As I suggested twenty years ago:

Of greater significance is the fact that as the number of employees affected is increased, the importance of preserving their First Amendment freedoms likewise grows. Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.

Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972).
118. 112 S. Ct. at 2542.
119. See, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989) (expressive conduct may be regulated more freely than written or oral communication).
constitutional protection to "the freedom of speech." Surely cross-burning is
not a species of formal debate; nor is it even a form of oral expression.

By its terms, R.A.V. extends a kind of absolute immunity from content-
based regulation to "otherwise permitted speech." Use of the phrase
"otherwise permitted speech," however, does not address the distinction
between speech and conduct. While it no doubt encompasses some expressive
conduct, I am sure that there are other forms of such conduct that fall outside
its scope. When Charlotte Corday murdered Jean Paul Marat in his bathtub, for
instance, she dramatically expressed her opposition to the French
Government, but we would not regard her expressive conduct as protected
speech. If Dawson had murdered an African-American to publicize his racist
views, I suppose his membership in the White Aryan Brotherhood would have
been admissible at his capital sentencing hearing without raising any question
about protected speech.

Indeed, in a different context, the Court has recognized that conduct is not
clothed with special protection simply because it is linked to expression of a
particular viewpoint. Quite to the contrary, in Griffin v. Breckenridge, the
Court found that certain assaults were actionable under the Ku Klux Klan
Act only if they were motivated by "some racial, or perhaps otherwise
class-based, invidiously discriminatory animus." At no point was it
suggested that the statute unconstitutionally prohibited white racists from
expressing their beliefs in their preferred manner. Even though the
communication of intolerant messages of hate may constitute protected
"speech," some harmful conduct that intentionally communicates the same kind
of message may not be speech at all.

Whether a particular act or message is more appropriately deemed
"speech" or "conduct," and whether it is entitled to First Amendment
protection, turns on context as well as content. Of particular importance
is the audience to which the message is directed. A formal address to a
legislative assembly is always protected speech; a casual oral conversation
between two strangers is less clearly so. While a cross-burning as part of a
public rally in a stadium may fairly be described as protected speech,
burning the same cross on the front lawn of an unfriendly neighbor has an
entirely different character. Neither a trespass on private property nor an assault against an individual need be characterized as “speech” in the constitutional sense.

With respect to fighting words based on race, gender, and religion, the identity of the speaker, as well as of the target, may also be a part of the relevant context. We should at least consider the possibility that racial, religious, and gender-based invectives can cause distinct and especially grievous injury, particularly when used by members of a powerful group against an individual already disadvantaged by a hostile environment. Most obviously, it is in that posture that an epithet comes closest to a threat, by evoking the ever-present specter of bias-motivated violence, and, with it, real fear in the recipient.128

In its opinion in \textit{R.A.V.}, the Court did tell us how it would decide a few hypothetical cases. Nevertheless, the contours of its new category—“otherwise permitted speech”—are sufficiently ambiguous to require clarification through the process of case-by-case adjudication. Particularly with respect to “hybrids,” like the burning of draft board records to send a political message, or the intermingling of hate messages with implied threats or other tortious conduct, these judgments will be difficult and complex, and must be informed by attention to context-specific factors. That is why it is wiser to argue and decide one case at a time, using an occasional rhetorical flourish to emphasize a point, than it is to attempt to craft absolute propositions of law to answer a host of questions that have not yet been tested in adversary litigation.

In closing, I return to the question I posed at the beginning: whether, and why, our Constitution should be tolerant of intolerance. From what I have said so far, I suspect it is clear why I would suggest that the more relevant question is when, and under what circumstances, intolerant expressions merit protection. If the intolerance is expressed in the course of a public dialogue protected by the Speech and Debate Clause of the Constitution, or even in a public gathering where speech is not intermingled with actual or threatened harmful conduct, then the question is adequately answered by our commitment to open discussion as an antidote to plain error. Exposure to sunshine and fresh air can work wonderful changes in even the ugliest seeds.

The more difficult question arises when intolerant speech is associated with some form of expressive conduct. In those cases, we must forgo the appeal of the absolute or bright-line rule, and rely instead on attention to detail and sensitivity to context. As Professor Matsuda explained in discussing the same problem, “This is not an easy legal or moral puzzle, but it is precisely

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in these places where we feel conflicting tugs at heart and mind that we have
the most work to do and the most knowledge to gain."\textsuperscript{129}

A rule that mandates tolerance of offensive speech—that is to say, speech
that conveys offensive messages—need not extend the same degree of
tolerance to offensive conduct. It is nevertheless essential that any analysis of
the difficult and close cases that arise in this area give full effect to the many
dimensions of the idea of freedom. "The First Amendment presupposes that the
freedom to speak one's mind is not only an aspect of individual liberty—and
thus a good unto itself—but also is essential to the common quest for truth and
the vitality of society as a whole."\textsuperscript{130} The arguments advanced by Justice
Brandeis in his separate opinion in \textit{Whitney v. California}\textsuperscript{131} merit repetition:

Those who won our independence believed that the final end of
the State was to make men free to develop their faculties; and that in
its government the deliberative forces should prevail over the
arbitrary. They valued liberty both as an end and as a means. They
believed liberty to be the secret of happiness and courage to be the
secret of liberty. They believed that freedom to think as you will and
to speak as you think are means indispensable to the discovery and
spread of political truth; that without free speech and assembly
discussion would be futile; that with them, discussion affords
ordinarily adequate protection against the dissemination of noxious
doctrine; that the greatest menace to freedom is an inert people; that
public discussion is a political duty; and that this should be a
fundamental principle of the American government. They recognized
the risks to which all human institutions are subject. But they knew
that order cannot be secured merely through fear of punishment for
its infraction; that it is hazardous to discourage thought, hope and
imagination; that fear breeds repression; that repression breeds hate;
that hate menaces stable government; that the path of safety lies in the
opportunity to discuss freely supposed grievances and proposed
remedies; and that the fitting remedy for evil counsels is good ones.
Believing in the power of reason as applied through public discussion,
they eschewed silence coerced by law—the argument of force in its
worst form. Recognizing the occasional tyrannies of governing
majorities, they amended the Constitution so that free speech and
assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free
speech and assembly. Men feared witches and burnt women. It is the
function of speech to free men from the bondage of irrational
fears.\textsuperscript{132}

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\textsuperscript{129} Matsuda, \textit{supra} note 128, at 2381.
\textsuperscript{131} 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
\textsuperscript{132} Id. at 375-76 (citation omitted).
\end{flushleft}
Let us hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance—a value protected by every clause in the single sentence called the First Amendment.