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THE HATE SPEECH CASE: A PYRRHIC VICTORY FOR FREEDOM OF SPEECH?

G. Sidney Buchanan*

I. INTRODUCTION

Viewed superficially, the Supreme Court’s recent “hate speech” decision in R.A.V. v. City of St. Paul,1 may appear to constitute a victory for freedom of speech. Viewed more probingly, R.A.V. sends forth decidedly mixed signals and may, on balance, damage free speech values. This curious, even paradoxical, result is caused by the reasoning contained in Justice Scalia’s majority opinion for the Court.2 If the Court applies Scalia’s reasoning in subsequent hate speech cases, free speech values may suffer.

This Article explores the ornate conceptual castle that Scalia has constructed in his majority opinion in R.A.V. After setting forth the facts in R.A.V. and the holding of the Court, this Article contends that Scalia’s opinion errs in two important ways. First, the opinion restricts unduly the power of government to regulate the several categories of speech that the Court has characterized as wholly unprotected

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2. Id. at 2541.
speech, e.g., obscenity, child pornography, fighting words, and "violence advocacy." Second, and more fundamentally, the opinion suggests that government, on the basis of "word-form choice" rather than substantive content, may prohibit "fighting words that are directed at certain persons or groups . . . ." While the first error may create some discomfort for government, the second error more than compensates for the first and, if acted upon in future decisions, poses a significant threat to free speech values as previously articulated by the Court.

II. R.A.V. v. City of St. Paul: The Facts, Court Holdings, and Supreme Court Rationale

A. The Facts and Court Holdings

In the predawn hours of June 21, 1990, R.A.V., a juvenile, and several other teenagers allegedly burned a crudely-made cross inside the fenced yard of a black family. For engaging in this conduct, the city of St. Paul, Minnesota, prosecuted R.A.V. under the St. Paul Bias-Motivated Crime Ordinance, which provides:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V. moved to dismiss this prosecution "on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content-based and therefore facially invalid under the First Amendment." The state trial court granted this motion, but the Minnesota Supreme Court reversed.

3. Id. at 2542-47.
9. Id. at 2548 (emphasis added).
10. Id. at 2541.
11. ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).
12. R.A.V., 112 S. Ct. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).
14. Id.

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With respect to R.A.V.'s overbreadth claim, the state supreme court limited the reach of the hate-speech ordinance to conduct that amounts to "fighting words," e.g., "conduct that itself inflicts injury or tends to incite immediate violence ... " So limited, the ordinance reached only expression "that the first amendment does not protect." With respect to R.A.V.'s selective content claim, the state supreme court held that the ordinance was not impermissibly content-based because "the 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." The United States Supreme Court granted certiorari and unanimously reversed the decision of the Minnesota Supreme Court, holding that the St. Paul ordinance is facially invalid under the First Amendment.

B. The Supreme Court Rationale

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas, wrote the majority opinion for the Court. Justice White, joined by Justices Blackmun and O'Connor, wrote a separate opinion concurring only in the judgment. Justice Stevens joined the White opinion, except for Part I-A of that opinion.

The Court majority expressly declined to consider R.A.V.'s overbreadth claim. Instead, the majority based its holding on R.A.V.'s contention "that in [punishing only some fighting words and not others], even though it is a subcategory, technically, of unprotected conduct, [the ordinance] still is picking out an opinion, a disfavored

15. Id. (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)).
17. Id. at 2541-42 (quoting Welfare of R.A.V., 464 N.W.2d at 511).
20. Id. at 2541-50.
21. Id. at 2550-60.
22. Id. at 2550. In addition to the opinions cited in the text, Justice Blackmun wrote a separate opinion concurring only in the judgment, and Justice Stevens wrote a separate opinion concurring only in the judgment, Part I of which Justices White and Blackmun joined. Id. at 2560-71.
23. Id. at 2542. The Court majority stated that "[i]n construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of Chaplinsky." Id. (citations omitted).
message, and making that clear through the State.” More precisely, the majority held that the hate-speech ordinance “is facially unconstitutional” because it regulates speech on the basis of its content, i.e., “the ordinance is directed at expression of group hatred.”

Having characterized the hate-speech ordinance as content-selective, the Court majority rejected the further contention that the ordinance is “justified because it is narrowly tailored to serve compelling state interests.” While conceding that “help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination” constitutes a compelling governmental interest, the Court held that the content-selective St. Paul ordinance was not narrowly tailored to serve that interest:

The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

In reaching this conclusion, the Court majority did not tie its approach to the question of whether the St. Paul ordinance was limited in its reach to “fighting words,” a species of unprotected speech. The Court assumed for purposes of argument that the ordinance was so limited; it then applied to the content-based regulation of that speech the same strict scrutiny standard normally applied to content-based regulation of protected speech. A later section of

24. Id. at 2542 n.3 (alteration in original) (quoting Transcript of Oral Argument, at 8).
25. Id. at 2542, 2547.
26. Id. at 2548.
27. Id. at 2549.
28. Id.
29. Id. at 2550 (footnote omitted).
30. In Gooding v. Wilson, 405 U.S. 518 (1972), the Court limited the category of fighting words “to words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” Id. at 524 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (citations omitted)). As so defined, the category of fighting words would appear to include individually targeted epithets, but not group targeted epithets. Compare, for example, “John, you are a scum” with “all men are scum.”
32. Id. at 2549-50.
this Article\textsuperscript{33} criticizes this aspect of Scalia's opinion as unduly restricting the power of government to regulate unprotected speech.

More ominous for free speech values is a second aspect of Scalia's opinion. In striking down the St. Paul ordinance, the Court majority stated:

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be \textit{facially} valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy."\textsuperscript{34}

This passage suggests that government, on the basis of "word-form choice" rather than substantive content, may prohibit "fighting words that are directed at certain persons or groups . . . ."\textsuperscript{35} Again, a later section of this Article\textsuperscript{36} strongly criticizes this notion as posing a significant threat to free speech values and as constituting a marked departure from previous Court decisions.\textsuperscript{37}

In his concurring opinion, Justice White, joined by Justices Blackmun and O'Connor and largely by Justice Stevens, stated succinctly: "I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there."\textsuperscript{38} The White opinion then described the majority opinion as "cast[ing] aside long-established First Amendment doctrine,"\textsuperscript{39} as "adopt[ing] an untried theory,"\textsuperscript{40} and as using reasoning that "is transparently wrong."\textsuperscript{41} Justice White followed this harsh criticism with a lengthy critique of the majority opinion's rationale.\textsuperscript{42}

\begin{footnotesize}
\begin{enumerate}
\item[33.] See infra part III.
\item[34.] \textit{R.A.V.}, 112 S. Ct. at 2548 (quoting \textit{In re Welfare of R.A.V.}, 464 N.W.2d 507, 508, 511 (Minn. 1991)).
\item[35.] \textit{Id}.
\item[36.] See infra part IV.
\item[37.] See especially Cohen v. California, 403 U.S. 15 (1971). In Cohen, the Court treated selective regulation of word form choice in the same manner as selective regulation of idea choice. \textit{Id} at 24-26. The Cohen Court recognized that "words are often chosen as much for their emotive as their cognitive force." \textit{Id} at 26.
\item[38.] \textit{R.A.V.}, 112 S. Ct. at 2530.
\item[39.] \textit{Id} at 2551.
\item[40.] \textit{Id}.
\item[41.] \textit{Id}.
\item[42.] \textit{Id} at 2551-58. Primarily, White criticizes Scalia's undermining of the principle that certain categories of speech are unprotected in the sense that such categories contain no
\end{enumerate}
\end{footnotesize}
After smiting the majority opinion, hip and thigh, Justice White
turned to the merits and concluded, "I agree with petitioner that the
ordinance is invalid on its face. Although the ordinance as construed
reaches categories of speech that are constitutionally unprotected, it
also criminalizes a substantial amount of expression that—however
repugnant—is shielded by the First Amendment."43 Reviewing the
Minnesota Supreme Court's construction of the hate speech ordinance,
White understood "the [state] court to have ruled that St. Paul may
constitutionally prohibit expression that 'by its very utterance' causes
'anger, alarm or resentment.'"44 That construction, reasoned White,
reaches a substantial amount of constitutionally protected speech,
because the "mere fact that expressive activity causes hurt feelings,
offense, or resentment does not render the expression unprotected."45
Even though the ordinance had some legitimate application to fighting
words, a category of unprotected speech, its attempted prohibition of
a substantial amount of protected speech rendered the ordinance "fa-
tally overbroad and invalid on its face."46

III. REGULATING UNPROTECTED SPEECH
   A. The Traditional View

As stated by Justice White’s concurring opinion, "[t]his Court's
decisions have plainly stated that expression falling within certain
limited categories so lacks the values the First Amendment was de-
dsigned to protect that the Constitution affords no protection to that
expression."47 White then cites child pornography and obscenity as
eamples of "discrete categories of expression [that are] proscribable
on the basis of their content."48 Moreover, implicit in the White
opinion is the assumption that "fighting words" is also a category of

expressive elements worthy of constitutional protection under the First Amendment. As stated
by White, "[t]his Court’s decisions have plainly stated that expression falling within certain
limited categories so lacks the values the First Amendment was designed to protect that the
Constitution affords no protection to that expression." Id. at 2551.
43. Id. at 2559.
44. Id.
45. Id.
46. Id. at 2560.
47. Id. at 2551.
48. Id. at 2552. Moreover, White noted "the Court has observed that ‘[l]eaving aside the
special considerations when public officials [and public figures] are the target, a libelous
publication is not protected by the Constitution.’" Id. (quoting New York v. Ferber, 458 U.S.
747, 763 (1982)) (alterations in original) (citations omitted).
unprotected speech. 49

All of these categories are content based. But the Court has held that [sic] First Amendment does not apply to them because their expressive content is worthless or of de minimis value to society. . . . We have not departed from this principle, emphasizing repeatedly that, "within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." 50

This categorization approach, argued White, "has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need." 51

Under the traditional categorization approach described by Justice White, if expression falls within a category of wholly unprotected speech, such expression may be regulated by government on the same basis as if it constituted non-expressive conduct. 52 The expression is not regarded as containing any expressive element worthy of constitutional protection under the First Amendment. 53 As in the case of all governmental regulations, regulation of unprotected speech may still violate other constitutional prohibitions, such as those contained in the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. 54 But, and

49. In describing fighting words, White states that "[f]ighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury." Id. at 2553.
50. Id. at 2552 (quoting Ferber, 458 U.S. at 763-64) (citation omitted) (alterations in original).
52. Id.
53. See id. In relation to categories of unprotected speech, Justice White states that "[a]ll of these categories are content based. But the Court has held that First Amendment [sic] does not apply to them because their expressive content is worthless or of de minimis value to society." Id. at 2552.
54. See id. at 2543. On this point, Justice White states:
Although the First Amendment does not apply to categories of unprotected speech, such as fighting words, the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest. A defamation statute that drew distinctions on the basis of political affiliation or "an ordinance prohibiting only those legally obscene works that contain criticism of the city government," would unquestionably fail rational basis review.
Id. at 2555-56 (citation omitted).
crucially, the First Amendment creates no independent free speech basis for attacking governmental regulation of unprotected speech.\textsuperscript{55}

As a practical matter, therefore, governmental regulation of unprotected speech will normally be subjected to a highly lenient "rational basis" level of scrutiny, the level of scrutiny applied in the areas of "old" equal protection and economic substantive due process.\textsuperscript{56} Under this level of scrutiny, government "wins" if it is pursuing a rational goal by a rationally related means.\textsuperscript{57} If governmental regulation of unprotected speech employs a suspect or quasi-suspect classification, or significantly impairs a fundamental right, higher levels of scrutiny will be triggered in the areas of equal protection, or due process, or both.\textsuperscript{58} Again, however, these higher levels of scrutiny will be generated independently by equal protection or due process concerns and not by First Amendment free speech concerns.\textsuperscript{59}

\textsuperscript{55} See id. at 2552. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), for example, the Supreme Court held that "the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded." Id. at 69. In other words, once the Court affirmed in Miller v. California, 413 U.S. 15 (1973), that "obscene material is unprotected by the First Amendment," id. at 23, the Court in Paris applied rational basis scrutiny to the state of Georgia's regulation of the distribution of obscene material to consenting adults in "adult theaters" and did not consider further the expressive elements of that material under the first amendment. Paris, 413 U.S. at 57-69.

56. In New Orleans v. Duke, 427 U.S. 297, 303 (1976), the Court, in a per curiam opinion stated: "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." See also G. Sidney Buchanan, State Authorization, Class Discrimination, and the Fourteenth Amendment, 21 Hous. L. Rev. 1, 5-6 & nn.18-25 (1984) (providing a detailed description of the higher levels of scrutiny triggered by classifications based on race, national origin, alienage, gender, or illegitimacy).


58. For example, a law prohibiting obscene utterances only when spoken by blacks is based on a suspect classification, i.e., race, Loving v. Virginia, 388 U.S. 1, 11 (1967), and a law prohibiting obscene utterances only when spoken by those seeking to acquire and use contraceptive devices is based upon the exercise of a fundamental right, i.e., the right of privacy, Carey v. Population Serv. Int'l, 431 U.S. 678, 685-88 (1977).

59. In R.A.V., Scalia poses the hypothetical passage of "an ordinance prohibiting only
B. The Scalia View: The Traditional View Rejected

If it does nothing else, Justice Scalia's opinion in R.A.V. v. City of St. Paul blurs the distinction between protected and unprotected speech. Scalia first rejects the proposition that unprotected speech contains no expressive element worthy of constitutional protection under the First Amendment. Instead, he argues that content-based regulation of unprotected speech does implicate free speech concerns and that certain content-based regulation of unprotected speech, e.g., the St. Paul hate-speech ordinance, may be invalidated on first amendment free speech grounds. Indeed, Scalia expressly assumes, "arguendo, that all of the expression reached by the [St. Paul] ordinance is proscribable under the 'fighting words' doctrine . . . ." That assumption granted, Scalia concludes "that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

Clearly, then, Scalia's opinion employs a First Amendment content-discrimination analysis to invalidate an ordinance that he assumes applies only to unprotected speech. Moreover, as previously noted, Scalia's opinion applies to the St. Paul ordinance the same strict scrutiny standard normally applied to content-based regulation of those legally obscene works that contain criticism of the city government . . . ." 112 S. Ct. at 2543. He then asserts that the main reason why such an ordinance would not be rational "is that it violates the First Amendment" because it is content-based. Id. at 2543-44 n.4. To this analysis, White replied:

The majority is mistaken in stating that a ban on obscene works critical of government would fail equal protection review only because the ban would violate the First Amendment. While decisions [of this Court] recognize that First Amendment principles may be relevant to an equal protection claim challenging distinctions that impact on protected expression, there is no basis for linking First and Fourteenth Amendment analysis in a case involving unprotected expression. Certainly, one need not resort to First Amendment principles to conclude that the sort of improbable legislation the majority hypothesizes is based on senseless distinctions.

Id. at 2556 n.9 (citations omitted).

60. Id. at 2543. Scalia states: "Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of [unprotected] expression, so that the government 'may regulate [them] freely.'" Id. (citations omitted) (second alteration in original).

61. Id. at 2544. With respect to categories of unprotected speech such as fighting words, Scalia argues: "We have not said that [such categories] constitute 'no part of the expression of ideas,' but only that they constitute 'no essential part of any exposition of ideas.'" Id. (citation omitted).

62. Id. at 2542.

63. Id.
protected speech.\textsuperscript{64} To that extent, therefore, Scalia’s opinion not only blurs the distinction between protected and unprotected speech; it obliterates that distinction. When Scalia states that the “dispositive question in this case . . . is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests,”\textsuperscript{65} he is framing the issue exactly as the Court would frame it in a case involving the content-based regulation of protected speech.\textsuperscript{66}

Apparently reluctant to eliminate all distinctions between protected and unprotected speech, Scalia’s opinion asserts:

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination “rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace . . . .” But content discrimination among various instances of a class of proscribable speech often does not pose this threat.\textsuperscript{67}

Scalia then fashions an intricate conceptual maze describing three instances in which content-based regulation of unprotected speech is constitutionally permissible: First, “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”\textsuperscript{68} Second, “[a]nother valid basis for according differential treatment to even a content-defined subclass of

\textsuperscript{64} Id. at 2549-50.

\textsuperscript{65} Id. at 2550.

\textsuperscript{66} In Boos v. Barry, 485 U.S. 312 (1988), the Court invalidated a provision of the District of Columbia Code that prohibited, within 500 feet of a foreign embassy, the display of any sign that tends to bring the foreign government into public odium or public disrepute. Describing this as a content-based restriction on political speech in a public forum, the Boos Court stated:

Our cases indicate that as a content-based restriction on political speech in a public forum, [the law before us] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

\textit{Id.} at 321 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)). This is the same standard that Scalia applies to the regulation of unprotected speech in R.A.V.

\textsuperscript{67} \textit{R.A.V.}, 112 S. Ct. at 2545 (citations omitted).

\textsuperscript{68} Id. at 2545. To illustrate this exception, Scalia notes that a “State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages.” Id. at 2546.
proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech." Finally, Scalia suggests generally that content-based regulation of unprotected speech is valid "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."}

Scalia thus crafts three exceptions to his general proposition that government may not regulate even unprotected speech on a content-selective basis. It is beyond the purpose of this Article to explore the conceptual intricacies of these exceptions. It is enough to say that the three exceptions take some of the sting out of the original proposition. They do so, however, in a way that adds unnecessary complexity to an area of constitutional law that is already sufficiently complex. In the next subsection, I elaborate why the Scalia approach, both in its general proposition and its exceptions, is an ill-advised and clumsy tool for determining the power of government to regulate

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69. Id. at 2546 (citations omitted). Here, Scalia states that a "State could, for example, permit all obscene live performances except those involving minors." Id. Or, as a further example, "sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." Id. Scalia's reference to "secondary effects" stems from the Court's holding in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In Renton, the Court sustained an ordinance of the city of Renton, Washington, "that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school." Id. at 43. In route to its decision, the Court characterized the Renton ordinance as content neutral because it "is aimed at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." Id. at 47. A majority of the Court has yet to extend the secondary effects analysis into subject matter areas other than the regulation of adult theaters, and the use of this technique to transform content-selective regulations into content-neutral regulations was strongly criticized by Justice Brennan in his concurring opinion in Boos v. Barry, 485 U.S. 312, 335-37 (1988). Scalia's extension of the secondary effects analysis to cases involving the regulation of unprotected speech represents still another confusing aspect of his majority opinion in R.A.V.

70. R.A.V., 112 S. Ct. at 2547. This third exception is mushy in the extreme and is described by Justice White as "a catchall exclusion to protect against unforeseen problems, a concern that is heightened here given the lack of briefing on the majority's decisional theory." Id. at 2558.

71. As described by Justice White in his concurring opinion in R.A.V: 

[the Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case, . . . or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.]

R.A.V., 112 S. Ct. at 2556 (citation omitted).
unprotected speech.

C. The Scalia View: The Wrong Approach

In relation to unprotected speech, Scalia’s view is wrong primarily because it is unnecessary. It is not necessary to import into governmental regulation of unprotected speech the complex conceptual refinements now employed by the Court in cases involving governmental regulation of protected speech.72 Traditionally, the very purpose of creating categories of unprotected speech is to free those categories from the analysis used in protected speech cases.73 Other prohibitions of the Constitution, such as those contained in the Due Process and Equal Protection Clauses,74 provide adequate protection against governmental action that regulates unprotected speech on an arbitrary or discriminatory basis. No pressing need exists to entangle this area of the law in the conceptual intricacies of protected speech analysis.

More fundamentally, there is a legitimate role for the categorization approach in free speech analysis.75 There are existing categories

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72. In relation to government regulation of unprotected speech, I agree fully with White’s description of Scalia’s opinion in R.A.V.: “As I see it, the Court’s theory does not work and will do nothing more than confuse the law. Its selection of this case to rewrite First Amendment law is particularly inexplicable, because the whole problem could have been avoided by deciding this case under settled First Amendment principles.” 112 S. Ct. at 2558.

73. As stated by Justice White in New York v. Ferber, 458 U.S. 747 (1982), certain categories of speech may be characterized as unprotected in those instances in which “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.” Id. at 763-64. See generally GERARD GUNTER, CONSTITUTIONAL LAW 1069-70 (12th ed. 1991). Gunther notes that under the categorization approach, courts evaluate the strengths and weaknesses of both the speech and government sides of the ledger before consigning the speech in question to a category of unprotected speech. Id. For example, in defining “child pornography” as a category of unprotected speech, the Ferber Court first described the government’s interest in “prevent[ing] the sexual exploitation and abuse of children” as “an objective of surpassing importance,” Ferber, 458 U.S. at 757, and then characterized as “exceedingly modest, if not de minimis” the “value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct.” Id. at 762.


of speech of which it may be said "that within the confines of the
given [category], the evil to be restricted so overwhelmingly out-
weighs the expressive interests, if any, at stake, that no process of
case-by-case adjudication is required." Admittedly, the categoriza-
tion approach, if applied too sweepingly, can threaten free speech
values by removing too much expression from the safeguards of
protected speech analysis. This danger, however, does not justify the
practical elimination of the categorization approach.77

By blurring the distinction between protected and unprotected
speech, Justice Scalia undermines the utility of the categorization
approach in free speech analysis. Once the Court determines that
certain speech falls within one of the categories of unprotected
speech, such as fighting words, free speech analysis should end. Then
the speech in question should be regarded as containing no expressive
element worthy of constitutional protection under the First Amend-
ment.78 If this is not the case, what is the point in creating and de-
fining categories of unprotected speech in the first place? Instead, it

76. Ferber, 458 U.S. at 763-64.
77. I agree generally with the analysis of Professor Frederick Schauer:
   Categorization, in the sense of treating different forms of speech differently,
   this is not necessarily speech restrictive. It is inconceivable that we will ignore
   such well-established governmental concerns as safety, reputation, protection against
   fraud, and protection of children . . . . Certain state interests are inevitably going
to be recognized, and the alternatives then are diluting those tests that are valuable
precisely because of their strength, or formulating new tests and categories that
leave existing standards strong within their narrower range.

   . . . A narrow but strong First Amendment, with its strong principle univer-
sally available for all speech covered by the First Amendment, has much to be
said for it. First Amendment protection can be like an oil spill, thinning out as it
broadens. But excess precautions against this danger might lead to a First Amend-
ment that is so narrow as to thwart its major purposes.

Schauer, Codifying the First Amendment, supra note 75, at 314-15 (footnote omitted). Schauer
endorses "the Court's continuing recognition of the diversity of speech and the diversity of
state interests. It is unrealistic to expect that one test, one category, or one analytical
approach can reflect this diversity." Id. at 315. With Schauer, I believe that a careful and
limited use of the categorization approach aids the Court in recognizing the diversity of
speech and governmental interests involved in free speech analysis.

78. As noted by White in his concurring opinion in R.A.V.:
   It is inconsistent to hold that the government may proscribe an entire category of
speech because the content of that speech is evil, . . . but that the government
may not treat a subset of that category differently without violating the First
Amendment; the content of the subset is by definition worthless and undeserving
of constitutional protection.

R.A.V., 112 S. Ct. at 2553 (citation omitted).
would be better to eliminate, entirely, all categories of unprotected speech and to subsume those categories under a general balancing approach applicable to all forms of expression.79 Rather than muddy the waters, as I believe Scalia has done, I would preserve intact the categorization approach for the relatively few forms of expression that make its application desirable.

IV. REGULATING GROUP EPITHETS

If Justice Scalia's opinion moderately restricts the power of government to regulate unprotected speech, that free speech gain, slight at best,30 is more than offset by his suggestions concerning the power of government to regulate group epithets.81 Although these suggestions in R.A.V. are dicta, if these suggestions are acted upon in future Court holdings, free speech values will suffer significantly. To understand why this is so, it is necessary to examine briefly the legacy of two important Supreme Court decisions, the Court's 1952 decision in

79. In fact, for reasons advanced by Professor Frederick Schauer, I believe that it is not practicably possible for the Supreme Court to frame a unitary approach to all free speech problems. In approving generally the categorization approach employed by the Court in Ferber, Schauer states:

Ferber reflects the Court's continuing recognition of the diversity of speech and the diversity of state interests. It is unrealistic to expect that one test, one category, or one analytical approach can reflect this diversity. As the First Amendment is broadened to include the hitherto uncovered, diversity within the First Amendment increases. In addressing different problems separately, the Court is doing nothing more than following the common law model. Contract and tort are distinct because they address different concerns, and changes in the world and the broadening of the First Amendment make it likely that it will encompass problems as diverse as the difference between tort and contract. A unitary approach is likely to be both counterproductive and futile.

Schauer, Codifying the First Amendment, supra note 75, at 315.

80. Because of the intricate complexity of Scalia's approach to governmental regulation of unprotected speech, I believe that the "speech gain" referred to in the text is virtually non-existent.

81. For example, in his opinion for the Court in R.A.V., Scalia, in describing the St. Paul ordinance, states:

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy."

112 S. Ct. at 2548 (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 508, 511 (Minn. 1991)). The implications of this suggestion are developed in the remaining part of this section of the text.
Beauharnais v. Illinois\textsuperscript{82} and its 1971 decision in Cohen v. California.\textsuperscript{83}

A. The Legacy of Beauharnais v. Illinois:
Is Group Libel Unprotected Speech?

In Beauharnais v. Illinois,\textsuperscript{84} the United States Supreme Court sustained an Illinois group libel law that prohibited the publishing, selling, or exhibiting in any public place of any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.\textsuperscript{85}"

The Illinois law was sustained as applied to a leaflet circulated by the White Circle League; the leaflet called upon white people to unite, and warned that if "persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.\textsuperscript{86}"

In upholding the Illinois law, the Court stated that "[l]ibelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'\textsuperscript{87}" Intervening Court decisions in the areas of personal libel,\textsuperscript{88} offensive speech,\textsuperscript{89} fighting words,\textsuperscript{90} and violence advocacy\textsuperscript{91} raise serious questions concerning the continuing vitality of the Beauharnais decision. For example, the Seventh Circuit Court of Appeals has stated that, in light of these intervening decisions, "[i]t may be questioned . . . whether the tendency to induce

\begin{itemize}
  \item \textsuperscript{82} 343 U.S. 250 (1952).
  \item \textsuperscript{83} 403 U.S. 15 (1971).
  \item \textsuperscript{84} 343 U.S. 250 (1952).
  \item \textsuperscript{85} \textit{Id.} at 251 (citing ILL. CRIM. CODE § 224a, ILL. REV. STAT. ch. 38, div. 1, § 471 (1949) (repealed 1962)).
  \item \textsuperscript{86} Beauharnais, 343 U.S. at 252.
  \item \textsuperscript{87} \textit{Id.} at 266. Clearly, the Court is saying here that group libel is a form of unprotected speech and that its regulation is, therefore, not subject to the stricter standards applied to the regulation of protected speech. That this is so is made even more clear by the Court's subsequent statement. "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances [i.e., the presence of a clear and present danger]. Libel, as we have seen, is in the same class." \textit{Id.}
  \item \textsuperscript{88} New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
  \item \textsuperscript{89} Cohen v. California, 403 U.S. 15 (1971).
  \item \textsuperscript{90} Gooding v. Wilson, 405 U.S. 518 (1972).
  \item \textsuperscript{91} Brandenburg v. Ohio, 395 U.S. 444 (1969).
\end{itemize}
violence approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today."\(^92\) Two Supreme Court justices have noted, however, that "*Beauharnais* has never been overruled or formally limited in any way."\(^93\)

If group libel may be defined as a defamatory falsehood regarding a group or class of persons, e.g., "blacks are criminally inclined" or "women are too emotional for positions of authority," no Supreme Court decision since *Beauharnais* has recognized group libel as a separate category of unprotected speech. Clearly, group libel is not violence advocacy as defined in *Brandenburg v. Ohio*;\(^94\) much group libel does not urge imminent lawless action under circumstances in which such action is likely to occur. Nor does group libel constitute fighting words as defined in *Gooding v. Wilson*;\(^95\) group libel is not limited to individually targeted epithets as required by *Gooding*. As defined respectively by the Court in *Miller v. California*\(^96\) and *New York v. Ferber*,\(^97\) obscenity and child pornography embrace significantly different forms of expression than group libel. Finally, the

\(^92\) Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The *Collin* Court grappled with the various ordinances enacted by the Village of Skokie, Illinois, designed to prevent Nazi demonstrators from demonstrating peacefully in Skokie, a Chicago suburb containing a large Jewish population, including several thousand survivors of the Nazi holocaust in Europe. In general, the Court invalidated the ordinances on free speech grounds. *Id.* at 1207.

\(^93\) Smith v. Collin, 439 U.S. 916 (1978) (Blackmun, J., joined by Rehnquist, J., dissenting from the Court's denial of an application for stay of mandate of the order of the Circuit Court in *Collin*, 578 F.2d 1197); see supra note 92.

\(^94\) 395 U.S. 444 (1969). In *Brandenburg*, the Court defined advocacy of unlawful action as unprotected speech only if the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. However, group libel will often be expressed in a form and under circumstances that do not meet the *Brandenburg* test.

\(^95\) 405 U.S. 518 (1972). In *Gooding*, the Court defined "fighting words" as words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Id.* at 524 (quoting Chaplinsky v. *New Hampshire*, 315 U.S. 568, 573 (1942)). Here, the stress is on individually targeted epithets; group libel and group epithets are targeted at the class characteristics, e.g., race, gender, religion, etc., of a group of persons and, generally, not at the individual characteristics of a particular person. Admittedly, the distinction between individually targeted and group targeted epithets can blur at the edges, but the distinction has, or at least should have, constitutional significance in defining categories of unprotected speech. It is this distinction that Scalia's *R.A.V.* opinion threatens to destroy.

\(^96\) 413 U.S. 15 (1973). To take just one of the strands of the *Miller* Court's three-strand definition of obscenity, it is clear that much group libel, "taken as a whole," would have no significant appeal to the "prurient interest" of anyone. *See id.* at 24.

\(^97\) 458 U.S. 747 (1982). In *Ferber*, the Court defined child pornography as "limited to works that *visually* depict sexual conduct by children below a specified age." *Id.* at 764. Obviously, group libel and group epithets are generally not so limited.
Court's encounters with libel in the cases beginning with New York Times Co. v. Sullivan\(^98\) involved libel directed at individuals and not at groups.

Obviously, the exclusion of group libel from the preceding categories of unprotected speech does not preclude the Court from recognizing group libel as a separate and additional category of unprotected speech. In recent years, some scholars have urged the Court to fashion a category of unprotected speech embracing defamatory words directed at groups or classes of persons, especially when the speech is geared to such immutable class traits as race, national origin, or gender.\(^99\) Other scholars have opposed, or at least questioned, the recognition of such a category of unprotected speech.\(^100\) In a recent article entitled, White Liberal Looks At Racist Speech,\(^101\) Professor Peter Linzer describes in some detail both sides of this ongoing “hate speech” debate.\(^102\) For basically the same reasons persuasively advanced by Professor Linzer,\(^103\) I side with those who oppose the

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\(^98\) 376 U.S. 254 (1964). In considering defamatory falsehoods directed at public officials, the Sullivan Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80. Clearly, Sullivan and its progeny were concerned with libel directed at individuals and not at groups. Justice Scalia concedes this point in R.A.V. when he states that “[o]ur decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions for defamation.” 112 S. Ct. at 2543 (citing, in addition to Sullivan, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

\(^99\) See, e.g., Richard Delgado, \textit{Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling}, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mary E. Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 ST. JOHN’S L. REV. 119 (1991); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 MICH. L. REV. 2320 (1989). In her article, Professor Matsuda proposed that we consider “racist hate messages” as unprotected speech if three characteristics are present: “1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading.” Id. at 2357.


\(^101\) Linzer, supra note 100.

\(^102\) Id. at 204-30.

\(^103\) In arguing against the creation of a category of unprotected speech for defamatory group epithets, Professor Linzer notes that such a category involves two slippery slopes. First, it is hard to limit the groups whose defamation would trigger the category, i.e., how far
recognition of a new hate speech category of unprotected speech.104

Judicially, the current Supreme Court has not resolved the am-

bivalence created by Beauharnais and later Court decisions105 that

appear to conflict with the Beauharnais premise that group libel con-

stitutes a form of unprotected speech. In a 1985 decision, American

Booksellers Association, Inc. v. Hudnut,106 the Seventh Circuit Court

of Appeals invalidated an Indianapolis ordinance that prohibited ""the

graphic sexually explicit subordination of women, whether in pictures

or in words . . . .""107 The circuit court reasoned:

The ordinance discriminates on the ground of the content of the

speech. Speech treating women in the approved way—in sexual

encounters ""premised on equality""—is lawful no matter how sexual-

ly explicit. Speech treating women in the disapproved way—as

submissive in matters sexual or as enjoying humiliation—is unlawful

no matter how significant the literary, artistic, or political qualities

of the work taken as a whole. The state may not ordain preferred

viewpoints in this way. The Constitution forbids the state to declare

one perspective right and silence opponents.108

The Supreme Court summarily affirmed the circuit court's deci-

sion.109 In substance, the Indianapolis ordinance prohibited a particu-

lar type of group epithet, words or pictures defaming women as a

class in sexual matters.110 Thus, the Supreme Court's summary affir-

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104. For a thoughtful and challenging discussion of the hate speech issue in the context

of international treaties and conventions, see Jordan J. Paust, Rereading the First Amendment

in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility, 43 RUTGERS


105. See supra notes 88-98 and accompanying text.

106. 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

107. Id. at 324 (quoting INDIANAPOLIS CODE § 16-3(g) (1984)).

108. Id. at 325 (citation omitted).


110. The Circuit Court of Appeals' decision noted expressly that the speech prohibited by
mance of the lower court's decision evidences an unwillingness to recognize group epithets or group libel as a separate category of unprotected speech.

Until the Court's decision in R.A.V., therefore, the precedential vitality of Beauharnais was waning. Justice Scalia's R.A.V. opinion, however, breathes new life into the dying patient. In listing the "limited areas" in which the Court "has permitted restrictions upon the content of speech," Justice Scalia lists "defamation" after citing Beauharnais. While he concedes that later decisions, i.e., New York Times Co. v. Sullivan and its progeny, "have narrowed the scope of the traditional categorical exceptions for defamation," citation to Beauharnais in the context of listing categories of unprotected speech suggests his unwillingness to repudiate explicitly Beauharnais' major premise: group libel is unprotected speech. Until that major premise is expressly repudiated, important free speech values are at risk.

In addition to the confusion engendered by Justice Scalia's citation to Beauharnais while listing categories of unprotected speech, Justice Scalia compounds the problem in his later analysis of the St. Paul ordinance:

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." What does this mean? Is there a category of fighting words directed at "certain groups" that Justice Scalia would label unprotected?

the ordinance was not limited to obscenity. Hudnut, 771 F.2d at 324-25.
112. Id.
113. Id. (citing Beauharnais v. Illinois, 343 U.S. 250 (1952)).
115. R.A.V., 112 S. Ct. at 2543.
116. Beauharnais, 343 U.S. at 250. Writing for the Court, Justice Frankfurter stated that "[]libelous utterances [are] not . . . within the area of constitutionally protected speech." Id. at 266.
117. R.A.V., 112 S. Ct. at 2548 (quoting In re Welfare of R.A.V, 464 N.W.2d. 507, 508, 511 (Minn. 1991)).
ed speech? To understand the significance of Justice Scalia’s statement, we must turn to another line of Supreme Court cases dealing with offensive speech, beginning with the Court’s 1971 decision in *Cohen v. California*.

**B. The Legacy of *Cohen v. California*: May Government Regulate “Word Form Choice” on the Basis of Its Offensiveness?**

On April 16, 1968, Paul Robert Cohen was observed in a corridor of the Los Angeles County Courthouse wearing a jacket plainly bearing the words, “Fuck the Draft.” He was thereafter tried and convicted in the Los Angeles Municipal Court for violating that part of the California Penal Code which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, ... by ... offensive conduct ...” On appeal, however, the Supreme Court reversed Cohen’s conviction.

*Cohen* and later offensive speech cases required the Court to confront squarely the question of what governmental interests are sufficiently strong to justify regulation of protected speech on the basis of its content. Justice Harlan, writing for the *Cohen* Court, prefaced his approach to this question by noting that “the State certainly lacks power to punish Cohen for the underlying content of the message the inscription [on his jacket] conveyed.” Justice Harlan went on to state the issue in *Cohen*:

> It is whether California can excise, as “offensive conduct,” one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

In rejecting the state court’s “violent reaction” theory, Justice Harlan stressed that the fear of a hostile reaction to a speaker’s cho-
sen form of expression is not, by itself, a sufficiently strong governmental interest to justify suppression of speech.\textsuperscript{125}

Turning to the interest of the state as guardian of public morality, the Cohen Court held that government may not prohibit any form of expression merely to maintain what it regards "as a suitable level of discourse within the body politic."\textsuperscript{126} Noting the usual rule that government may not direct the form or content of individual expression, Justice Harlan asserted that when a society recognizes open debate as a fundamental value, some degree of verbal tumult or discord may be a necessary side effect.\textsuperscript{127} Justice Harlan also recognized that behind government's general concern with preserving a "suitable level" of public discourse lies a more particularized concern with protecting the public against words that wound or offend the sensibilities of listeners.\textsuperscript{128} But, as a basis for justifying content-selective regulation, Harlan tightly confined government's interest in protecting audience sensitivities to those instances in which "substantial privacy interests are being invaded in an essentially intolerable manner."\textsuperscript{129} Any broader view of government's authority, he reasoned, would allow a majority to silence dissidents according to the majority's personal biases.\textsuperscript{130} Cohen's jacket did not constitute an intolerable invasion of privacy because people confronted with it in the Los Angeles courthouse "could effectively avoid further bombardment of their sensibilities simply be averting their eyes."\textsuperscript{131}

\begin{flushright}
\textsuperscript{125} Id. at 23. As expressed by Justice Harlan in Cohen: We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with expletions like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

\textit{Id.}

\textsuperscript{126} Id.

\textsuperscript{127} Id. at 24-25. In this connection, Harlan stated "[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." Id. at 25.

\textsuperscript{128} Id. at 21, 23-25; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting that certain words "by their very utterance inflict injury").

\textsuperscript{129} Cohen, 403 U.S. at 21.

\textsuperscript{130} Id.

\textsuperscript{131} Id.
\end{flushright}
In Cohen, therefore, Justice Harlan takes the position that offensiveness rooted in a speaker’s chosen form of expression (the speaker’s “word form” choice) does not itself justify content-selective regulation of protected speech. Moreover, Justice Harlan clearly views regulation of a speaker’s word form choice as a content regulation problem. For Justice Harlan, government engages in content-selective regulation when it proscribes the form of a speaker’s words just as much as when it proscribes the substantive content of the message itself. This is so, he explains, because much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explanation, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often by the more important element of the overall message sought to be communicated.  

Justice Harlan is, in effect, distinguishing between a speaker’s word form choice and his chosen method of communication. For example, Cohen’s word form choice for expressing his opposition to the draft was the phrase, “Fuck the Draft”; he might have said, “I hate the draft.” His chosen method of communication was to have his message printed on his jacket; he might have chosen to communicate his message by banner, handbill, megaphone, sound truck, newspaper, radio, or television. The Cohen holding makes clear that government’s regulation of a speaker’s chosen method of communication implicates different and stronger governmental interests than government’s regulation of word form choice.

122. Id. at 26.
123. For example, in Kovaec v. Cooper, 336 U.S. 77 (1949), the Court sustained a Trenton, New Jersey ordinance which prohibited the use within the city of “any device known as a sound truck, loud speaker or sound amplifier... which emits therefrom loud and raucous noises...” Id. at 78 (citing TRENTON, N.J. CITY ORDINANCE No. 430 (1946)). In concurrence, Justice Jackson stated:
I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of “communication of ideas.”
The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.
Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.
Id. at 97. Kovacs is a classic illustration of a governmental regulation of a speaker’s method
Supreme Court decisions after Cohen reaffirmed the Cohen holding that governmental regulation of a speaker’s word form choice constitutes a selective regulation of speech content in the same manner as governmental regulation of the underlying substantive message that the speaker is seeking to convey. In the period after Cohen, Justice Stevens, in several opinions, argued that word form choice is simply a method of communication choice, i.e., word form choice is like choosing a sound truck for the purpose of conveying the speaker’s message. In that same period, the Court majority continually and decisively rejected Stevens’s attempt to amalgamate word form choice with method of communication choice. Indeed, in a series of cases culminating with the Court’s 1980 decision in Consolidated Edison Co. v. Public Service Commission, the Court majority had firmly established the following two propositions. First, governmental regulation of word form choice involves selective-content regulation in the same manner as governmental regulation of idea choice. Second, the offensiveness of speech, whether it proceeds from word form choice or idea choice, or both, is not by itself a sufficiently compelling interest to justify the selective-content regula-

of communication as distinguished from the speaker’s word form choice.

134. See supra note 122 and cases cited therein.

135. In an earlier article, I describe in detail the Supreme Court's offensive speech saga in the line of cases running from Cohen through Erznoznik, American Mini Theatres, Pacifica, and finally to Edison. G. Sidney Buchanan, Toward a Unified Theory of Governmental Power to Regulate Protected Speech, 18 CONN. L. REV. 531 (1986) [hereinafter Buchanan, Unified Theory]. In that article, I stress that a Court majority, in the Cohen to Edison line of cases, continually rejected the attempts of Justice Stevens to amalgamate word form choice with method of communication choice and continually affirmed the proposition that regulation of word form choice constitutes a content-selective regulation of speech and should, therefore, be judged by the standards applicable to that type of regulation. Id. at 541-57.

136. For example, in Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980), Justice Stevens, in his concurring opinion, stated that a communication may be offensive either because of its form, "perhaps because it is too loud or too ugly in a particular setting," or because of its message. Id. at 547-48 (citing Kovacs v. Cooper, 336 U.S. 77, 97, 105 (1949) in relation to "loud," and FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978), in relation to "ugly"). In Edison, Justice Stevens concluded that the particular regulation at issue was based on the substantive message of the speaker; accordingly, he joined in the Court’s judgment invalidating the regulation. 447 U.S. at 546-48. But, the striking aspect of Stevens’s opinion is his patent effort to amalgamate method of communication choice, "it is too loud," with word form choice, "[it is] too ugly." It is also significant that no other justice joined Justice Stevens’s opinion in Edison; in his effort to amalgamate word form choice with method of communication choice, Stevens was writing only for himself.

137. See supra notes 135-36.


139. See id. at 530-44.
tion of speech. 140

For the reasons advanced by Justice Harlan in his Cohen opinion, 141 word form choice is an indispensable part of a vital and durable right of free speech. As stressed by Justice Harlan, "words are often chosen as much for their emotive as their cognitive force." 142 Moreover, control of word form choice leads inevitably to control of idea choice. 143 Accordingly, the Court should apply to regulation of word form choice the same strict standards that it applies to regulation of idea choice. In the line of cases running from Cohen to Edison, this is precisely the position adopted by the Court majority. 144

Justice Scalia’s dicta in R.A.V. calls into question the propositions established in the Cohen to Edison line of cases. In R.A.V., Justice Scalia describes the St. Paul ordinance as geared to the substantive content of the message sought to be conveyed, i.e., that certain racial, religious, or gender groups are inferior. 145 In other words, Justice Scalia treated the St. Paul ordinance as constituting a regulation of idea choice, a regulation that he found impermissible even if limited to otherwise unprotected speech. 146 In dicta, however, he suggests that an ordinance geared to word form choice and designed to prevent group epithets "would be facially valid if it met the requirements of the Equal Protection Clause." 147 Concretely, Justice Scalia’s dicta would invalidate a law that prohibits group epithets only in those instances in which a certain substantive message is conveyed, e.g., the inferiority of the vilified group, but would sustain a law that prohibits group epithets without regard to the substantive message conveyed by the epithet, e.g., a speaker might use a racial

140. Buchanan, Unified Theory, supra note 135, at 541-57. See especially the summary of the offensive speech cases (Cohen to Edison). Id. at 556-57.
142. Id. at 26.
143. Again, as expressed by Justice Harlan in his Cohen opinion, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Id.
144. See generally Buchanan, Unified Theory, supra note 135, at 541-57.
145. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992). In his opinion, Justice Scalia stated that "[w]hat we have here, it must be emphasized, is . . . a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.'" Id. (quoting In re Welfare of R.A.V., 464 N.W.2d 507, 508, 511 (Minn. 1991)).
147. Id. at 2548.
slur in the context of praising the group that the speaker has slurred.\(^{148}\)

Justice Scalia’s dicta thus opens a door that Cohen and its progeny tried to close.\(^{149}\) If this dicta is acted upon in subsequent cases, government will be permitted to regulate word form choice under looser standards than those applied to the regulation of idea choice. Such a distinction invites all the dangers eloquently described by Justice Harlan in his Cohen opinion.\(^{150}\) In the specific area of group epithets, government would be able to enact hate speech laws carefully crafted to apply only to word form choice and not to idea choice. In effect, group epithets as a type of word form choice would become a new (or revived) category of unprotected speech. This possibility constitutes the main danger to free speech values created by Justice Scalia’s R.A.V. opinion.\(^{151}\) Subsequent cases will determine whether this danger becomes a reality.

V. CONCLUSION

In R.A.V. v. City of St. Paul,\(^{152}\) the overbreadth analysis employed by Justice White and the other three concurring justices is the clear and preferred basis for invalidating the hate speech ordinance.

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148. To illustrate Justice Scalia’s distinction even more concretely, I will use the word “nigger” (perhaps the most odious of hate speech words in the American lexicon) in two speech settings. First, a speaker might say, “those niggers are lazy.” Second, a speaker might say, “those niggers did good work.” Justice Scalia would invalidate an ordinance geared to the underlying substantive message conveyed, i.e., you are punished only if the group epithet conveys a substantive message of racial (or other group) inferiority, but otherwise not. He would apparently sustain an ordinance not geared to the underlying substantive message conveyed, but only to the offensiveness of the words chosen, i.e., you are punished regardless of whether your message defames or praises the group that is the object of your racial (or other group) slur. If governmental regulation of group epithets is to occur, Justice Scalia may have his priorities reversed. A speaker who uses a group epithet for the very purpose of defaming or wounding the target group is more blameworthy than a speaker who, while highly insensitive in his or her choice of words, does not use a group epithet as part of a substantive message designed to hurt the target group.

149. On this point, it is significant that Justice Stevens does not join Part I(A) of Justice White’s concurring opinion in R.A.V., 112 S. Ct. at 2550. Part I(A) of Justice White’s opinion is the part most critical of Justice Scalia’s undermining of the traditional approach taken by the Court in relation to unprotected speech. Clearly, Justice Stevens is preserving for himself some running room to renew in later cases the battle that he lost in the line of cases running from Cohen to Edison. Id. at 2556-71.


151. For a discussion of these dangers in relation to racist speech, see generally Linzer, supra note 100, at 204-28.

152. R.A.V., 112 S. Ct. at 2550-51.
Justice Scalia's majority opinion needlessly complicates the conceptual landscape and creates dangers for free speech values. Justice Scalia's first, and relatively minor, mistake alters the Court's traditional approach to governmental regulation of unprotected speech.\textsuperscript{153} Under Justice Scalia's approach, unprotected speech will be regarded as containing expressive elements worthy of at least some First Amendment protection; analysis previously limited to the protected speech area will to some degree now be applied to the area of unprotected speech.\textsuperscript{154} This, in turn, will undermine the utility of the categorization approach as historically used by the Court to define those areas of expression in which "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."\textsuperscript{155}

Justice Scalia's second, and major mistake, is to suggest that government has the power to regulate word form choice and, more specifically, group epithets, as long as government does not attempt to regulate the substantive message that the group epithet seeks to convey.\textsuperscript{156} In other words, if government remains neutral as to idea choice, government may prohibit word form choice because of the offensiveness of the chosen word form, e.g., a group epithet that, regardless of its substantive message, is deemed offensive to a racial, gender, or religious class. This approach would reverse what \textit{Cohen} and related cases have previously established\textsuperscript{157} and would invite government to enact hate speech laws geared to word form choice.

With respect to government regulation of group epithets on the basis of the substantive message conveyed, Justice Scalia reached the correct result. While conceding that "help[ing] to ensure the basic human rights of members of groups that have historically been subjected to discrimination"\textsuperscript{158} is a compelling governmental interest, Justice Scalia persuasively concluded that "content discrimination" on the basis of the message conveyed is not "reasonably necessary to achieve [that] compelling interest."\textsuperscript{159} Here, Justice Scalia is saying that advancing the values of equality for historically oppressed groups

\textsuperscript{153} For a description of the traditional approach, see Justice White's concurring opinion in \textit{R.A.V.}, 112 S. Ct. at 2551-54.
\textsuperscript{154} See \textit{id.} at 2542-47.
\textsuperscript{155} \textit{id.} at 2552 (White, J., joined by Blackmun and O'Connor, J.J., concurring).
\textsuperscript{156} \textit{id.} at 2548.
\textsuperscript{157} See generally Buchanan, \textit{Unified Theory}, supra note 135, at 541-57.
\textsuperscript{158} \textit{R.A.V.}, 112 S. Ct. at 2549.
\textsuperscript{159} \textit{id.} at 2550.
does not justify content discrimination by government on the basis of ideas. Justice Scalia’s big mistake, and one that threatens free speech values, is his refusal to extend that same analysis to discrimination by government on the basis of word form choice. While Justice Scalia’s suggestions concerning government’s power to regulate word form choice may not be followed in later cases, the seeds of danger have been planted. Group epithets based on word form choice are now at risk.

160. Indeed, Justice Scalia, like Justice Stevens in earlier cases, amalgamates word form choice with method of communication choice. In discussing fighting words, Scalia states that “the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.” Id. at 2548-49.