

## HATE SPEECH

**Summary:** Because Valentine's day falls in February, each year the February Inn of Court team does a program on love. This year, we're flipping the script and doing a program on *hate*. In particular, we're addressing a subject that has become front-and-center in our current political climate--hate speech. What is it? How do we as a society identify and address it? What are the consequences for committing it? In the following program, we will try to answer these questions through both a 3-act play and interactive discussion around some of the nuances of how our profession interacts with the problem of hate speech.

### ACT I: THE BASKETBALL GAME

#### **Characters:**

- Owl Student 1 - Barry Potter
- Owl Student 2
- Owl Student 3
- Mouseketeer Student 1 - Fivel Mousekowitz
- Mouseketeer Student 2
- Mouseketeer Student 3

[**NARRATOR:** *In the parking lot of an off-campus basketball arena, students from Owl University and Mouseketeer College are tailgating before the annual basketball rivalry between their two teams. The Mouseketeers are a proud group, and trace their school's history back to its origins in the country of Mousekistan. In fact, many members of Mouseketeer student body is Mousekinese.*

*The students are all consuming adult beverages, and getting rowdy. Tension is building between two particular groups of rival students parked right across from each other. An altercation is about to ensue...]*

#### **Scene:**

OWL STUDENTS (*together*): Fly owls fly! On the road to victory! Fly owls fly! Get a basket 1, 2, 3. Shoot 'em low! Shoot 'em high! And watch our Owls fly! Fly Owls fly! On the road to victory! O-W-L-S, owls!

POTTER (*to the other Owls*): Hey, see over there? Those Mouseketeers are getting upset over our fight song.

OWL #2: Aw man, I love it. Let's get 'em going. What do you guys wanna do?

POTTER: Ooooooh, I brought something I made at home that's sure to rile them up.

*Potter goes into the back of his car and pulls out a mouse in a mousetrap.*

OWL #2 & OWL #3: Oh no you didn't!

POTTER: Oh yes I did! *Laughing with other owls and pointing at Mouseketeers.*

Look--they're coming over!

*The Mouseketeer students approach. One of them has their cell phone held up, ostensibly filming the incident that is about to unfold.*

FIVEL: THAT is unbelievably offensive! Take it down right now or else!

POTTER: Or else what? You and your little rat pack are going to roll a wheel of cheese at us?

FIVEL: I can't believe you just said that! Our people are from Mousekistan--we aren't rats.

POTTER: What's the difference? You're all dirty little rodents either way! Why don't you go crawl back into the little hole in the wall where you live!

FIVEL: Hole in the wall!?!

POTTER: I can't believe they let you mice into this country in the first place! If I were in charge, I'd put you all on a boat and send you back to whatever backward place you came from.

FIVEL: I was born here! My parents were born here! My grandparents...my whole family! I'm not going anywhere, and you know what else--

POTTER (*interrupting*): ...and to think our proud school has to share a basketball court with the likes of you...it's a disgrace!

FIVEL: That's it!

*Fivel rushes at Potter but his fellow Mouseketeers hold him back. Potter taunts him, but ultimately Fivel's mates calm him down.*

MOUSEKETEER #2: C'mon Fivel, it's not worth it.

MOUSEKETEER #3 (to Fivel): Hey, I just live-streamed that whole thing and it's already blowing up. That guy's gonna get what's coming to him.

*End Scene.*

**[Break for Discussion]**

## **ACT II: OWL UNIVERSITY DISCIPLINARY HEARING**

### **Characters:**

- Owl Student 1 - Barry Potter
- Disciplinary Board Chair - Dean Dumbledore
- Disciplinary Board Member #2
- Disciplinary Board Member #3

**[NARRATOR:** *In an old Owl University room, a panel of 3 august disciplinary review board judges sit across from one Barry Potter. They have gathered to review an incident in which Mr. Potter publicly engaged in very bad behavior. This incident was captured on video and quickly went viral. Owl University has received sharp criticism in the media, and the Mouseketeers want blood. On the docket for the disciplinary hearing today is whether Owl University can and should discipline Mr. Potter for his behavior and, if so, what is an appropriate sanction.*

*The disciplinary board peers over the records. They have been instructed by Owl University's legal counsel to preside over the matter carefully, since Mr. Potter is also facing a civil suit and Owl University could be next if it does not properly discipline him.*

DEAN DUMBLEDORE: Alright everyone, we have all read into Mr. Potter's file regarding the "hate speech" incident, and are here today to decide what disciplinary measures we should take.

*A knock at the door*

DEAN DUMBLEDORE (*looking to the other board members*): Unless anyone needs more time, I'm going to allow Mr. Potter in.

*The other board members shake their heads, and Dean Dumbledore let's Mr. Potter into the hearing room.*

DEAN DUMBLEDORE: Good afternoon, Mr. Potter. Please have a seat. Will you be accompanied by legal counsel today?

POTTER: No, I am here alone today.

DEAN DUMBLEDORE: OK. Mr. Potter. As the University's letter indicated, you were owed proper notice of this hearing, including date, time, and location of hearing. Further, it detailed the procedural process by which this hearing would be conducted. Did you receive the letter?

POTTER: Yes.

DEAN DUMBLEDORE: Do you have any questions about the contents of the letter, or any objections to the process outlined in the letter?

POTTER: No.

DEAN DUMBLEDORE: OK. Very well. Let's get to it then. Mr. Potter, you have been given proper notice and informed of your ability to retain legal counsel to represent you in this matter. You have chosen to continue *pro se*, meaning on your own and without legal counsel. Is that correct?

POTTER: Yes.

DEAN DUMBLEDORE: Mr. Potter, you are here today because of the speech you used and the actions you took against Mr. Fivel Mousekewitz at an Owl University basketball game. The disciplinary board has reviewed the footage from the incident and has received a statement from Mr. Mousekewitz, which you too have received. Mr. Mousekewitz, who is Mousekinese by ethnicity and attends Mouseketeer University, was deeply offended by your behavior. Your insults and the effigy you presented were particularly offensive to those belonging to the Mousekinese ethnic group. The words and actions you used against Mr. Mousekewitz could be considered hate speech and ethnic intimidation, and are therefore actionable by the university.

A typical disciplinary measure for such an incident is expulsion from the university. While we note that you have concerns over your 1<sup>st</sup> Amendment rights, as a public university we are permitted to minimize speech rights on campus. This comes from the law settled under *Tinker v. Des Moines Independent Community School District* (1969). In *Tinker* a school was permitted to minimize a student's right to freedom of speech if it materially and

substantially interferes with the operation of the school, and it collides with the rights of others.

POTTER: Respectfully, my conduct occurred off-campus and out of your jurisdiction. The words I used were not fighting words, had a *de minimis* impact on the operation of the school and interfered with no-one's rights. There are daily protest at our university about hot button issues. The students and faculty understand that there are a diversity of opinions among the student body. While I appreciate that the university has received some negative press around this incident, it did not *interfere with the operation of the school or collide with the rights of others*.

BOARD MEMBER #2: Your conduct occurred at a university sponsored event. Our student code of conduct treats such an event as a proxy-campus. We are not suppressing your speech for fear of an abstract, future disturbance. You caused an actual disturbance on campus. The university continues to feel pressure from the student body, the media and the Mousekinese community to take measures against your actions.

POTTER: The university can't prevent someone from making a tepidly negative comment--that isn't considered hate speech by a rule of law. (*Nuxoll v. Indian Prairie School Dist. (2008)*) My speech should not to be considered hate speech because it was not aimed at taunting Mr. Mousekewitz's ethnicity, but simply to make jokes about his team.

BOARD MEMBER #3: We believe the team and the ethnicity of Mr. Mousekewitz are interrelated, Mr. Potter, and that your comments and behavior were not merely *tepidly negative*. Nevertheless, whether or not a court finds your words to be hate speech and ethnic intimidation is less relevant in the context of this disciplinary hearing. Universities like ours have broader abilities to limit student speech. We may adopt any limiting rule so long as it "uses a rational means of accomplishing some legitimate school purpose." 22 Pa. Code 12.3(b). In this situation your words have shaken the Owl University community and continue to have a negative impact on the school and the student body.

POTTER: Board members, while I recognize that the university has a reputational interest, I implore you to allow me to continue my education. I admit that my conduct was regretful and my speech was unpopular, but expulsion is a punishment that exceeds the offense. I only have 2 semesters left. If I am expelled, I won't be able to transfer credits or complete my degree at another school. I already face severe discipline through the civil and criminal claims against me. I pray that if this Board decides to take disciplinary measures against me, you impose a form of sanction that doesn't interfere with my ability to complete my education at the university.

DEAN DUMBLEDORE: Mr. Potter, thank you for your comments and opinion. I believe we've heard enough to render a decision. The Board will deliberate in a closed session. We will vote on the issue of whether or not you have committed the violation charged. If we find that you have committed the violation, we will determine an appropriate disciplinary measure. We will inform you in writing of our decision. Any further questions?

POTTER: No. Thank you all for your time and consideration.

DEAN DUMBLEDORE: Hearing adjourned.

NARRATOR: *The disciplinary committee concluded that Mr. Potter did violate the student code of conduct, and decided to expel him. Mr. Potter's first amendment rights were minimized in this instance, as is customary in most disciplinary hearings and in the court system when speech "disturbs" school.*

*End Scene.*

### **ACT III: ALL THE PRESIDENT'S TWEETS**

#### **Characters:**

- President Donald J. Trump
- Kellyanne Conway

[**NARRATOR:** *We're in the Oval Office. The president is lazer focused on his phone...the only think he is reportedly lazer focused on. Fox News is on in the background. The President has an open McDonald's bag in front of him--it looks like he was eating a happy meal.*]

[*Intercom buzzes*]: Mr. President, Ms. Conway is here to see you.

POTUS: Ah yes, Kellyanne is here. Send her in, send her in.

*Enter Kellyanne Conway*

KC: Good morning, Mr. President. How's the Twitter feed?

POTUS: Kellyanne, it's the best Twitter feed in the history of the Internet. Everything I post--genius! Have you seen the story about this Potter kid getting expelled standing up to a bunch of Mousekinese? Disgraceful! Hold on...I have a tweet coming:

*The President types a Tweet on his phone, reading to himself:*

Potter is a true American patriot. I'm giving him a full ride to Trump University. Let's deport these Mousekinese murderers and rapists!

*Kellyanne's phone rings. She answers, listens to the person on the other end, thanks them and hangs up.*

KC: Mr. President, that was the Mayor of Philadelphia. He just informed me that your most recent tweet has caused a riot at City Hall. The Mousekinese community is in an uproar.

POTUS: Good. I hope they get their clocks cleaned by Potter and his buddies. Waaaaaait...I feel another Tweet coming on.

*The President types a Tweet on his phone, reading to himself:*

Dear Mousekinese protesters in Philly: I'm sending ICE over right now to round you up and ship you back to Mousekistan. Waving goodbye with my enormous hands - POTUS.

*Kellyanne's phone rings. She answers, listens to the person on the other end, thanks them and hangs up.*

KC: Ok. Mr. President, that was Philadelphia international airport--they're shut down indefinitely. ICE has flooded the airport with deportees and protesters have gotten on the runway. Planes can't take off or land.

POTUS: Worst airport ever. I wouldn't fly a donkey into that airport.

KC: Mr. President, what does that mean?

POTUS: Nevermind! This whole thing is Owl University's fault. I'm going to teach those academic elites a lesson they'll never forget. Here it comes...

*The President types a Tweet on his phone, reading to himself:*

@DumbledoreOwl - Expel Potter? Expel you! This tweet serves as an executive order that cuts off all federal funding to your very disgraceful university. Eat your heart out Crooked Hillary.

*The President pauses, and then starts typing another Tweet on his phone, reading to himself:*

Speaking of Crooked Hillary--

Wait...what's this? Kellyanne, why can't I type anything on Twitter?

KC: Try refreshing the page.

POTUS: Ok.....I got a message that my account has been deactivated.

NARRATOR: In the wake of the President's recent Twitter storm and account deactivation, Twitter released the following statement:

*Twitter is a publicly held company whose mission is to serve and help advance the global, public conversation. Elected world leaders play a critical role in that conversation because of their outsized impact on our society. It is our view that the impact of Mr. Trump's activity on our website was significant enough to undermine our mission. With great power comes great responsibility. We therefore made the decision to deactivate his account."*

*End Scene.*

## DISCUSSION NOTES

### ACT I

1. I think we can all agree that the altercation in the last act involved some hateful speech...but was it *criminal* “hate speech” in Pennsylvania?
  - a. In PA, hate speech is encoded in the statute as “ethnic intimidation.”
  - b. 18 P.S. § 2710 says that a person commits the offense of ethnic intimidation if
    - i. with **malicious intention** toward the **actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity** of another individual or group of individuals,
    - ii. he commits an offense under any other provision of this article or under Chapter 33 (relating to **arson, criminal mischief and other property destruction**) exclusive of section 3307 (relating to **institutional vandalism**) or under section 3503 (relating to **criminal trespass**) or under section 5504 (relating to **harassment by communication or address**) with respect to such individual or his or her property or with respect to one or more members of such group or to their property.
  - c. So you can’t be charged with hate speech in PA unless you commit one of these other crimes.
  - d. Hate speech in PA is graded one level higher than the companion crime. For instance, if one commits a summary offense and associated hate speech, the hate speech is a 3rd degree misdemeanor.
  - e. This statute was most recently applied by the PA Supreme Court in the 2011 case of *Commw v. Sinnott*, 612 Pa. 321, where the Court held that the ethnic intimidation statute requires only that ethnic hatred be one of the motivations for the underlying crime, but does not have to be the only motive.
2. Philly, in conjunction with the PA AG’s office and the Commission on Human Relations, has a hate crimes hotline: (215) 686-8931.
3. Are these laws enforceable? Isn’t this speech protected by the 1st Amendment of the US Constitution?
  - a. In Justice Alito’s opinion in *Matal v. Tam* last year, he quoted Justice Butler in saying that “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *U.S. v. Schwimmer*, 279 U.S. 644, 655 (1929).
  - b. There are exceptions to free speech:
    - i. Lewd/Obscene/Profane
    - ii. Slander/Libel/Defamation
    - iii. “Fighting Words” that, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. (fr/ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

- c. **Were the actions in this Act “fighting words?”**
- d. Setting aside these exceptions, in the realm of hate speech (as is the case for 1st Amendment jurisprudence, in general), regulation violates the Constitution when it is content-based.
- e. In *R.A.V. v. City of St. Paul*, the U.S. Supreme Court struck down a local hate speech ordinance as being content-based (1992) when it was limited to “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.” Under the ordinance, fighting words non related to these things were not subject to these penalties.
- f. More recently, in *Snyder v. Phelps*, the U.S. Supreme Court upheld the Westboro Baptist Church’s right to protest with deeply offensive signs at the funeral of a gay soldier who was killed in Iraq, so long as the signs don’t promote imminent violence.

## ACT II

1. Can a public university do this?
2. What about a private university?
3. What about an employer?
4. Many American universities and employers have a “speech code” (sometimes called a “harassment policy”) that is more restrictive than the limits of free speech under Constitutional jurisprudence...many have content-based restrictions.
5. SCOTUS has not yet decided whether it’s ok for a public university to have a speech code, but the Federal District Court for the Eastern District of MI has done so in *Doe v. University of Michigan* (1989).
6. In more recent news, Google fired engineer James Damore after publishing and circulating a 10-page anti-diversity memo entitled “Google’s Ideological Echo Chamber: How bias clouds our thinking about diversity and inclusion” to several employees.

## ACT III

1. In 2015, Twitter banned conservative publisher and former Breitbart report Charles C. Johnson for hate speech regarding raising money to “take out” a civil rights activist.
2. In addition to the U.S. Constitution, of course, Twitter is protected by Section 230 of the Communications Decency Act.
  - a. Entitled “Protection of private blocking and screening of offensive material”
  - b. A website cannot be subject to civil liability if in good faith they deactivate an account for obscene, lewd, lascivious, filthy, excessively violent, harassing, or

otherwise objectionable material—whether or not such material is constitutionally protected.

3. What are the implications of the President's use of Twitter here?
  - a. Abuse of power?
  - b. Because of his role as President, do we need to treat his Tweets differently?
  - c. Are they perhaps criminal? Inciting a riot?

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# 2010 Pennsylvania Code

## Title 18 - CRIMES AND OFFENSES

### Chapter 27 - Assault

### 2710 - Ethnic intimidation.

#### § 2710. Ethnic intimidation.

(a) **Offense defined.**--A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, he commits an offense under any other provision of this article or under Chapter 33 (relating to arson, criminal mischief and other property destruction) exclusive of section 3307 (relating to institutional vandalism) or under section 3503 (relating to criminal trespass) with respect to such individual or his or her property or with respect to one or more members of such group or to their property.

(b) **Grading.**--An offense under this section shall be classified as a misdemeanor of the third degree if the other offense is classified as a summary offense. Otherwise, an offense under this section shall be classified one degree higher in the classification specified in section 106 (relating to classes of offenses) than the classification of the other offense.

(c) **Definition.**--As used in this section "malicious intention" means the intention to commit any act, the commission of which is a necessary element of any offense referred to in subsection (a) motivated by hatred toward the race, color, religion or national origin of another individual or group of individuals.

(June 18, 1982, P.L.537, No.154, eff. imd.; Dec. 3, 2002, P.L.1176, No.143, eff. imd.; Dec. 9, 2002, P.L.1759, No.218,

eff. 60 days)

**2008 Effectuation of Declaration of Unconstitutionality.** The Legislative Reference Bureau effectuated the 2008 unconstitutionality.

**2008 Unconstitutionality.** Act 143 of 2002 was declared unconstitutional. *Marcavage v. Rendell*, 936 A.2d 188 (Pa. Commonwealth 2007).

**2002 Amendments.** Act 143 amended the entire section and Act 218 amended subsec. (a). Act 218 overlooked the amendment by Act 143, but the amendments do not conflict in substance and both have been given effect in setting forth the text of subsec. (a).

**1982 Amendment.** See section 2 of Act 154 of 1982 in the appendix to this title for special provisions relating to right of action for injunction, damages or other relief.

**Effective Date.** After December 2, 2002, and before February 7, 2003, section 2710 will reflect only the amendment by Act 143, as follows:

§ 2710. Ethnic intimidation.

(a) Offense defined.--A person commits the offense of ethnic intimidation if, with malicious intention toward the actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals, he commits an offense under any other provision of this article or under Chapter 33 (relating to arson, criminal mischief and other property destruction) exclusive of section 3307 (relating to institutional vandalism) or under section 3503 (relating to criminal trespass) or under section 5504 (relating to harassment by communication or address) with respect to such individual or his or her property or with respect to one or more members of such group or to their property.

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(relating to classes of offenses) than the classification of the other offense.

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**Cross References.** Section 2710 is referred to in section 8309 of Title 42 (Judiciary and Judicial Procedure).

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PHRC > Resources > Hate Crime

## BIAS & HATE CRIMES

### WHAT IS A HATE CRIME?

In Pennsylvania, a hate crime is defined as a criminal act motivated by ill will or hatred towards a victim's race, color, religion or national origin. In Pennsylvania, hate crimes are termed ethnic intimidation and the offense is set forth in the crimes code, Title 18, Section 2710. When certain criminal offenses are committed with the motive of hate, the crime of *ethnic intimidation* can also be charged. Generally, the types of offenses to which ethnic intimidation can be added are called underlying offenses. These underlying offenses involve danger or harm to you and/or your property.

The Pennsylvania State Police and local police departments charge and investigate criminal offenses that involve ethnic intimidation.

### REPORTING A HATE CRIME

- If the incident is happening **now**, or just happened, **call 9-1-1** immediately.
- If the incident has already occurred, the immediate danger may be over and there were no injuries, **contact your local police**.
- If you believe the incident was motivated by your race, color, religion or national origin, ask the officer to note it in the report.
- When the hate was expressed in words, give the officer the exact wording of what was said, regardless of how offensive it is.
- If there are witness(es) to the incident, point them out to the officer(s) at the scene.

### WHEN IS AN INCIDENT CONSIDERED A HATE CRIME?

In Pennsylvania, a person commits ethnic intimidation if he or she is motivated by hatred toward the race, color, religion or national origin of another individual or group of individuals while committing certain crimes.

### WHAT ARE EXAMPLES OF POSSIBLE HATE CRIMES? (This list is not exhaustive.)

- Harassment (in person or electronically)

- Physical assault
- Destruction of Property
- Criminal Trespass
- Arson or Firebombing
- Terroristic Threats

### **WHEN IS AN INCIDENT NOT CONSIDERED A HATE CRIME?**

- If the suspect is in the process of committing another crime, and calls the victim a derogatory name, it does not automatically mean that ethnic intimidation has taken place.
- If the suspect uses insulting or derogatory words but does not place another person in a reasonable fear of harm to their person or property, this is not ethnic intimidation.
- If the suspect uses insulting or derogatory words but does not place another person in a reasonable fear of harm to their person or property, this is not ethnic intimidation.
- If the incident is not found to be a crime – ethnic intimidation or any other type of crime - there is often not much enforcement action police can take. PHRC does keep statistics on these incidents and encourages the reporting of every incident of this type.

### **CIVIL REMEDIES**

If it is found that there is no directly enforceable action that can be taken by police, this does not mean what happened to you wasn't wrong. You may also bring a civil cause of action against the perpetrator, which carries a lower burden of proof than proving a crime. The perpetrator may be liable to a victim for general and special damages, including damages for emotional distress, punitive damages and reasonable attorneys' fees and costs. You will need to contact a private attorney to start a civil action.

### **HOW PHRC CAN HELP**

PHRC does not charge or investigate hate crimes or criminal offenses. PHRC does track incidents reported to us in order to inform the PA Interagency Task Force on Community Activities and Relations. This is a group of state agencies who work to prevent and respond to civil tension and violence arising from conflicts between ethnic or cultural groups and when there are public expressions of bias or hate. The primary

function of the group is to quickly and appropriately address civil tension when conflicts occur, and to promote positive community relations among various groups in order to prevent tension.

PHRC can also assist you in determining if an act of hate also violates the PA Human Relations Act (PHRA). To obtain this assistance, contact the PHRC regional office near you.

If you are reporting a crime such as property damage or assault that you believe was motivated by hate, please contact **your local police authorities or the local Pennsylvania State Police Station who provides services to your community** *prior* to reporting it to PHRC.

### **PA STATE POLICE CONTACT INFORMATION**

Contact information for PA State Police. **717-783-5599**  **NON EMERGENCY LINE**  
**HOURS ARE MONDAY THROUGH FRIDAY 8:30 A.M. - 5:30 P.M.**

To report an incident to PHRC for informational and tracking purposes, please contact us at 717-772-0523 . To request assistance in determining if a hate crime is actionable under the PHRA, contact our Philadelphia Regional Office (215-560-2495 ); Pittsburgh Regional Office (412-565-5395 ); or Harrisburg Regional Office (717-787-9780 .

### **FEDERAL HATE CRIMES:**

To learn more about federal hate crimes consult the [FBI's Hate Crime site](#).

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## COMMONWEALTH v. SINNOTT

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### Supreme Court of Pennsylvania.

#### COMMONWEALTH of Pennsylvania, Appellant v. Daniel SINNOTT, Appellee.

No. 11 EAP 2010.

Decided: November 02, 2011

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.  
 OPINION

The Commonwealth appeals from the portion of the Superior Court order reversing appellee Daniel Sinnott's conviction for ethnic intimidation on the basis of insufficient evidence. We reverse, and reinstate that conviction and judgment of sentence.

At about 11:30 a.m. on May 21, 2007, the victim, Evelyn Rojas, was visiting her mother when she heard screaming and cursing outside the house. When Rojas went outside to investigate, she found appellee, a tenant and employee of her father, throwing power tools her father had given him against the concrete steps. When Rojas asked appellee what was wrong, he said her father cheated him, he was going to take every house her father owned, and then told her, "[Y]ou, M-F'ers, are going to have to go back to Mexico, you wetbacks." N.T. Trial, 11/26/07, at 9. He also called Rojas a "fucking bitch" and "fucking whore." Id., at 9–10. Rojas told appellee she was not Mexican, but Puerto Rican, and therefore had as much right to be in the United States as he did; appellee replied, "No you don't, you wetback, go back to the Alamo." Id., at 10. Rojas testified appellee kept talking about the Alamo and how her father "did him dirty," id., and threatened to kill her father for cheating him. Rojas and her mother managed to pacify appellee, who went back inside his house.

When appellee emerged again and approached the women, he was wielding a power drill, which he kept revving. He walked around the block for about 45 minutes, and Rojas called the police. Meanwhile, appellee returned to his house, opened his front window, and pretended to videotape the two women. The police arrived when appellee was still inside his house; however, when they left, he came back outside with the drill in one hand and a hammer in the other. He quickly approached the women, advancing towards Rojas as if he were going to hit her with the hammer; she instinctively put her hands up to stop him. Her long nails got caught in his shirt, and as the two struggled, four of her nails were ripped from their nail beds, causing her fingers to bleed.

Appellee retreated into his house, and the police returned. Appellee would not come out, but spoke to the officers through the open window, telling them to check Rojas' "green card." Id., at 17. Once police gained entry into the house, they found a power drill on the floor next to appellee and arrested him.

Appellee was charged with simple assault,<sup>1</sup> terroristic threats,<sup>2</sup> ethnic intimidation,<sup>3</sup> and possession of instruments of crime.<sup>4</sup> He waived his right to a jury, and the trial court convicted him of all offenses, sentencing him to four to 23 months imprisonment for simple assault and a consecutive four years probation for terroristic threats; no further penalty was imposed.

Appellee appealed, challenging the sufficiency of the evidence in support of his terroristic threats and ethnic intimidation convictions. In a published opinion, the Superior Court affirmed the terroristic threats conviction, but reversed the conviction for ethnic intimidation, concluding the record failed to establish Rojas' ethnicity was the "primary basis" for appellee's behavior. Commonwealth v. Sinnott, 976 A.2d 1184, 1189 (Pa.Super.2009). The court noted penal statutes are to be strictly construed, id., at 1190 (citing 1 Pa.C.S. § 1928 (b)(1)), and opined 18 Pa.C.S. § 2710's requirement that the underlying offense be committed with "malicious intention" towards the victim's ethnicity could be met "only where the circumstances establish that the defendant was motivated by animus toward the victim's race or ethnicity and targeted the victim expressly on that basis." Sinnott, at 1190 (emphasis in original) (citing In re M.J.M., 858 A.2d 1259, 1267 (Pa.Super.2004); Commonwealth v. Ferino, 433 Pa.Super. 306, 640 A.2d 934, 938 (Pa.Super.1994), affirmed by an equally divided court, 540 Pa. 51, 655 A.2d 506, 507 (Pa.1995); Commonwealth v. Rink, 393 Pa.Super. 554, 574 A.2d 1078, 1084 (Pa.Super.1990)).

The Superior Court concluded the record supported appellee's contention that his ethnically derogatory remarks and threatening behavior were the product of circumstances unrelated to the victim's race, i.e., appellee's anger with the victim's father over their employment relationship. Examining the statute's language,



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the court stated it was “not convinced of the provision’s applicability where the testimony and circumstances suggest a more limited motivation.” *Id.* Thus, the court held although appellee’s anger did not justify his repeated use of ethnically derogatory terms, it did suggest that his commission of the underlying offense (terroristic threats) “was driven principally by factors other than the [victim’s] ethnicity.” *Id.*, at 1191, 574 A.2d 1078 (emphasis added). Accordingly, the court reversed appellee’s ethnic intimidation conviction.

The Commonwealth petitioned for allowance of appeal, which we granted, to determine:

Whether, to prove ethnic intimidation pursuant to 18 Pa.C.S. § 2710, the Commonwealth must prove the defendant targeted the victim solely based on the victim’s race, color, religion, or national origin.

*Commonwealth v. Sinnott*, 605 Pa. 455, 991 A.2d 305, 305 (Pa.2010).

As the proper construction of a statute involves a question of law, see *Commonwealth v. Bavusa*, 574 Pa. 620, 832 A.2d 1042, 1049 (Pa.2003), our scope of review is plenary, and our standard of review is *de novo*. See *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349, 352 n. 4 (Pa.2009). “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). When a statute’s words “are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.*, § 1921(b). Penal statutes are to be strictly construed, *id.*, § 1928(b) (1), and the Crimes Code states its provisions are to be “construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved.” 18 Pa.C.S. § 105.

The ethnic intimidation statute provides:

(a) Offense defined.—A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, he commits an offense under any other provision of this article . with respect to such individual or his or her property or with respect to one or more members of such group or to their property.

\* \* \*

(c) Definition.—As used in this section “malicious intention” means the intention to commit any act, the commission of which is a necessary element of any offense referred to in subsection (a) motivated by hatred toward the race, color, religion or national origin of another individual or group of individuals.

*Id.*, § 2710(a), (c) (emphasis added).<sup>5</sup>

The Commonwealth contends the Superior Court erred in interpreting the ethnic intimidation statute to require that the defendant commit the predicate crime with a single and exclusive improper motive, i.e., ethnic hatred. It argues the co-existence of other motives along with malicious intent toward the victim’s ethnicity does not negate the element of malicious intent; the presence of multiple motives does not diminish the sufficiency of any individual motive. Here, the Commonwealth claims appellee possessed the requisite malicious intent toward the victim’s ethnicity, along with his anger with her father. Thus, the Commonwealth argues, appellee’s hatred toward the victim’s national origin should not be negated by the additional fact that he was angry with her father.

The Commonwealth further contends the Superior Court erroneously relied on *Ferino*, which is not only distinguishable on its facts, but also wrongly decided.<sup>6</sup> Finally, the Commonwealth posits the Superior Court improperly invaded the fact-finder’s province by choosing which of appellee’s two existing motives for the predicate offense was dominant.

Appellee contends § 2710 requires the victim be selected because of animus toward the victim’s ethnicity. Appearing to concede such animus need not be the defendant’s sole motivation for committing the predicate offense, he contends some animus must exist, and such motivation was absent in his case. He claims his sole motivation for his conduct toward the victim was his anger with her father, and as in *Ferino*, there was no evidence of ethnic hatred behind his actions.

Neither the Superior Court nor this Court has specifically addressed the instant issue. *Ferino*, cited by the Superior Court, involved the issue of whether the defendant’s singular use of the word “nigger” while firing a gun at two victims, one of whom was Caucasian and one of whom was African-American, was sufficient to support a conviction of ethnic intimidation. The Superior Court observed § 2710 requires that in the course of committing the predicate offense, “the actor must manifest a malicious intent toward the intended victim and have as its motivation the hatred of the victim’s ‘race, color, religion or national origin.’” *Ferino*, at 937 (quoting 18 Pa.C.S. § 2710(a), (c)). This is an accurate summation of § 2710’s malicious intent requirement, which does not imply ethnic malice must be the sole motivator. Rather, the *Ferino* court concluded the evidence was insufficient because, based on the unique facts, there was no ethnic malice found present at all. The defendant’s comment was singular, his conduct was isolated, and his words and behavior were directed at both victims, only one of whom was black. Under these circumstances, the court concluded the evidence was insufficient to show a racial motivation for the underlying offense of terroristic threats. *Id.*, at 938. This Court, being evenly divided, affirmed by per curiam order. Here, unlike *Ferino*, appellee’s ethnic epithets were repeated numerous times over an extended period of time, and were specifically directed at the victim during the commission of the underlying offenses; therefore, *Ferino* is distinguishable on its facts.

The Court of Appeals of Michigan has examined a similar issue; its decision, although not binding, is instructive. In *People v. Schutter*, 265 Mich.App. 423, 695 N.W.2d 360 (Mich.App.2005), the court addressed “whether the [ethnic intimidation] statute requires the intent to intimidate or harass to be the sole motivating factor for the underlying criminal act or whether the requisite intent can be formed during the commission of the underlying criminal act, whatever the reason for the underlying predicate criminal act.” *Id.*, at 362.

Schutter involved an incident of road rage, where the Caucasian defendants and African-American victim almost collided. Both parties continued driving, shouting racial slurs at one another and eventually stopping near each other. More racial slurs were exchanged before the victim threw a punch at the defendants, who responded by severely beating the victim, uttering additional racial slurs as they did so. Charged with ethnic intimidation, and assault and battery, they argued there was no evidence they selected the victim because of his race; rather, they contended he became their victim because he followed them, got out of his car, and threw a punch at them. They claimed the racial epithets they shouted during the beating were merely incidental to the physical contact and were not indicative of race-based selection of the victim.

The Michigan Court of Appeals rejected this argument, noting its ethnic intimidation statute:<sup>7</sup>

requires an actor to cause physical contact with another person “maliciously, and with specific intent to intimidate or harass another person because of that person’s race.” This statutory language is rather straightforward and broad. It contains no limiting language to suggest that ethnic intimidation may only be charged when the specific intent to intimidate or harass is the sole reason for the underlying criminal act. Instead, the statute only requires some act of physical contact committed maliciously and accompanied by a specific intent to intimidate or harass because of race, color, religion, gender, or national origin. The circuit court properly interpreted the statute as being satisfied if this specific intent is formed during the commission of the underlying criminal act. That is so regardless of any other additional motivations for the underlying criminal act that may have existed earlier.

*Id.*, at 363–64 (quoting Mich. Comp. Laws § 750.147b(1)(a)). The court held “that what may have started out as merely road rage escalated into an act of ethnic intimidation.” *Id.*, at 364. Thus, the court concluded the evidence was sufficient to bind the defendants over for trial on ethnic intimidation charges.

As in Schutter, the language of our ethnic intimidation statute is straightforward and broad: an actor who commits one of the predicate offenses “with malicious intention toward the race, color, religion or national origin” of the victim is guilty. 18 Pa. C.S. § 2710(a). Malicious intention is defined as “the intention to commit any act . . . motivated by hatred toward the [victim’s] race, color, religion or national origin.” *Id.*, § 2710(c). Neither definition contains limiting language such as “solely” or “only”; all that is required is that the ethnically malicious intent be present, concurrent with the underlying criminal act. The legislature could have easily inserted specific language to require the ethnically malicious intent be the sole motivation behind the criminal act; however, it did not.

Human beings may act with a single, exclusive motive; they may act for multiple reasons. Where one intent is criminal under § 2710 and the other not, the question is not which is primary or dominant. If the evidence of criminal intent (here, racial animus) is sufficiently established, it cannot be negated by establishing that a second intent coexisted in the mind of the actor. Such a rule would lead to an absurd result which the legislature did not intend. See 1 Pa.C.S. § 1922(1) (legislature does not intend result that is absurd, impossible of execution, or unreasonable). Accordingly, we hold § 2710’s intent element is satisfied if there is evidence that ethnic malice was a motivator for the defendant’s criminal act; it need not be the sole motivator.

Furthermore, we note the Superior Court, in crediting appellee’s explanation for his attack on the victim, did not apply the proper standard of review. In reviewing a challenge to the sufficiency of the evidence, an appellate court is to consider the evidence admitted at trial and all reasonable inferences therefrom in the light most favorable to the Commonwealth as the verdict winner. *Commonwealth v. Ratsamy*, 594 Pa. 176, 934 A.2d 1233, 1237 (Pa.2007). An appellate court may not substitute its judgment for that of the fact-finder; the critical inquiry is not whether the court believes the evidence established guilt beyond a reasonable doubt, but whether the evidence believed by the fact-finder was sufficient to support the verdict. *Id.*, at 1235–36. The proper question is not whether the defendant’s contentions are supported by the record, but whether the verdict is so supported.

Evidence existed that appellee was motivated by racial animus; he made repeated references to the victim’s national origin (albeit mistaken) while behaving in a physically menacing manner, committing an assault on her, which he did not contest. Evidence also existed that appellee was motivated by his anger with the victim’s father; during the incident, he asserted her father had cheated him. However, the victim was not the father but the daughter. The trial court, as the fact-finder, concluded sufficient evidence existed to conclude that appellee’s conduct was motivated by malicious intent toward the victim’s ethnicity.

In crediting appellee’s contention that his conduct was solely motivated by anger with the victim’s father, the Superior Court not only imposed a non-existing requirement that racial animus be the sole or primary motivator, but also failed to view the evidence of appellee’s repeated derogatory ethnic slurs in the light most favorable to the Commonwealth as the verdict winner.

Accordingly, we reverse the portion of the Superior Court’s order reversing appellee’s ethnic intimidation conviction, and reinstate the judgment of sentence for that offense.<sup>8</sup> In all other aspects, the order is affirmed.

Order affirmed in part, reversed in part; jurisdiction relinquished.

Justice EAKIN.

Chief Justice CASTILLE, Messrs. Justice SAYLOR and BAER, Justice TODD, Justice McCAFFERY and Justice ORIE MELVIN join the opinion.

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Not Followed on State Law Grounds [State v. Henry](#), Or., January 21, 1987

62 S.Ct. 766

Supreme Court of the United States.

CHAPLINSKY

v.

STATE OF NEW HAMPSHIRE.

No. 255.

|  
Argued Feb. 5, 1942.|  
Decided March 9, 1942.**Synopsis**

Appeal from the Supreme Court of the State of New Hampshire.

Walter Chaplinsky was convicted of violating a New Hampshire statute prohibiting the addressing of any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, or calling him by any offensive or derisive name. From a judgment of the Supreme Court of New Hampshire, [91 N.H. 310](#), [18 A.2d 754](#), affirming the conviction, the defendant appeals.

Affirmed.

West Headnotes (14)

**[1] Constitutional Law****🔑 First Amendment**

Freedom of speech, freedom of press and freedom of worship which are protected by the First Amendment of Federal Constitution from infringement by Congress are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. [U.S.C.A.Const. Amend. 1, 14](#).

[54 Cases that cite this headnote](#)**[2] Constitutional Law****🔑 Press in General**

Where accused charged with cursing a public officer, was convicted under state statute prohibiting any person from addressing any offensive, derisive or annoying words to any other person lawfully in any street or any other public place, the statute could be attacked on the basis of “freedom of speech” but not on basis of “freedom of press” since spoken, not written, word was involved. [Pub.Laws N.H.1926, c. 378, § 2](#); [U.S.C.A.Const. Amends, 1, 14](#).

[32 Cases that cite this headnote](#)**[3] Constitutional Law****🔑 Particular Issues and Applications**

Cursing a public officer is not the exercise of “religion” within Constitution protecting “freedom of worship”. [U.S.C.A.Const. Amend. 14](#).

[5 Cases that cite this headnote](#)**[4] Constitutional Law****🔑 Disorderly conduct and breach of the peace**

Where accused was distributing literature of his sect on street, a disturbance occurred, a traffic officer started for police station with accused and they encountered a city marshal who repeated an earlier warning to accused who then cursed the city marshal, even if accused's activities which preceded the incident were religious in character and entitled to protection of the Fourteenth Amendment, they did not cloak accused with immunity from the legal consequences for concomitant acts committed in violation of a valid state criminal statute. [Pub.Laws N.H.1926, c. 378, § 2](#); [U.S.C.A.Const. Amend. 14](#).

[9 Cases that cite this headnote](#)**[5] Constitutional Law**

🔑 Absolute nature of right

**Constitutional Law**

🔑 Breach of the peace;unlawful assembly

**Constitutional Law**

🔑 Defamation

The “freedom of speech” protected by the constitution is not absolute at all times and under all circumstances and there are well-defined and narrowly limited classes of speech, the prevention and punishment of which does not raise any constitutional problem, including the lewd and obscene, the profane, the libelous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. [U.S.C.A.Const. Amend. 1, 14.](#)

675 Cases that cite this headnote

[6] **Constitutional Law**

🔑 Press in General

**Constitutional Law**

🔑 First Amendment

The protection of the First Amendment, mirrored in the Fourteenth Amendment, is not limited to the idea that “freedom of the press” means only freedom from restraint prior to publication. [U.S.C.A.Const. Amend. 1, 14.](#)

106 Cases that cite this headnote

[7] **Constitutional Law**

🔑 Law Enforcement;Criminal Conduct

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act raises no question under the Constitution. [U.S.C.A.Const. Amend. 1, 14.](#)

71 Cases that cite this headnote

[8] **Federal Courts**

🔑 Validity of state constitution or statutes

Where New Hampshire statute, attacked on ground that it placed unreasonable restraint on freedom of speech, contained two provisions, the first relating to words or names addressed to another in a public place and the second referring to noises and exclamations, and the statute had been authoritatively construed by the highest court of New Hampshire which held that the two provisions were distinct and that one could stand separately from the other, the United States Supreme Court would accept that construction of severability and limit its consideration to the first provision under which the accused was convicted. [Pub.Laws N.H.1926, c. 378, s 2; U.S.C.A.Const. Amend. 14.](#)

16 Cases that cite this headnote

[9] **Constitutional Law**

🔑 Breach of the peace;unlawful assembly

**Disorderly Conduct**

🔑 Constitutional and statutory provisions

**Disorderly Conduct**

🔑 Language, speech, and threats in general

New Hampshire statute, prohibiting any person from addressing any offensive, derisive or annoying words to any other person lawfully in any street or any other public place or calling him by an offensive or derisive name, authoritatively construed by highest court of New Hampshire as punishing the use in a public place of words likely to cause a breach of the peace, does not contravene constitutional right of “freedom of speech.” [Pub.Laws N.H.1926, c. 378, § 2; U.S.C.A.Const. Amend. 14.](#)

225 Cases that cite this headnote

[10] **Constitutional Law**

🔑 Disorderly conduct and breach of the peace

**Disorderly Conduct**

🔑 Constitutional and statutory provisions

**Disorderly Conduct**

🔑 Language, speech, and threats in general

New Hampshire statute prohibiting any person from addressing any offensive, derisive or annoying words to any other person lawfully in any street or any other public place or calling him by any offensive or derisive name, authoritatively construed by highest court of New Hampshire as punishing the use in a public place of words likely to cause a breach of the peace, is not so vague and indefinite as to render a conviction thereunder a violation of “due process of law”. Pub.Laws N.H.1926, c. 378, § 2; [U.S.C.A.Const. Amend. 14](#).

[109 Cases that cite this headnote](#)

**[11] Constitutional Law**

[🔑 Law Enforcement;Criminal Conduct](#)

A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

[10 Cases that cite this headnote](#)

**[12] Constitutional Law**

[🔑 Interaction with public safety officials](#)

**Disorderly Conduct**

[🔑 Verbal resistance in general](#)

Where accused stated to city marshal you are a “damned racketeer” and a “damned Fascist”, conviction of the accused under New Hampshire statute punishing the use in a public place of words likely to cause a breach of the peace did not substantially or unreasonably infringe upon “freedom of speech” protection by the Constitution. Pub.Laws N.H.1926, c. 378, § 2; [U.S.C.A.Const. Amend. 14](#).

[257 Cases that cite this headnote](#)

**[13] Constitutional Law**

[🔑 Other particular kinds or items of evidence](#)

In prosecution for violating state statute punishing the use in a public place of words likely to cause a breach of the peace, the refusal of state court to admit evidence of

provocation and evidence bearing on the truth or falsity of the utterances was open to no constitutional objection, since whether the facts sought to be proved by such evidence constituted a defense to the charge or might be shown in mitigation were questions for the state court to determine. Pub.Laws N.H.1926, c. 378, § 2; [U.S.C.A.Const. Amend. 14](#).

[24 Cases that cite this headnote](#)

**[14] Federal Courts**

[🔑 Review of State Courts](#)

Where conviction, under state statute punishing use in public place of words likely to cause a breach of the peace, was appealed to the United States Supreme Court on ground that the statute violated the Fourteenth Amendment, the function of the Supreme Court was fulfilled by a determination that the challenged statute, on its face and as applied, did not contravene the Fourteenth Amendment. Pub.Laws N.H.1926, c. 378, s 2; [U.S.C.A.Const. Amend. 14](#).

[9 Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*568 \*\*768** Mr. Hayden C. Covington, of Brooklyn, N.Y., for appellant.

Mr. Frank R. Kenison, of Conway, N.H., for appellee.

**Opinion**

**\*569** Mr. Justice MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire: ‘No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him,

or to prevent him from pursuing his lawful business or occupation.’

The complaint charged that appellant ‘with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, ‘You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists’ the same being offensive, derisive and annoying words and names’.

Upon appeal there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N.H. 310, 18 A.2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets \*570 of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a ‘racket’. Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

Over appellant's objection the trial court excluded as immaterial testimony relating to appellant's mission ‘to preach the true facts of the Bible’, his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

[1] It is now clear that ‘Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state \*571 action’. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949.<sup>1</sup> \*\*769 Freedom of worship is similarly sheltered. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352.

<sup>1</sup> See also *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, decided December 8, 1941; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352; *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed. 1093; *Schneider v. State of New Jersey*, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155; *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278; *Grosjean v. American Press Co.*, 297 U.S. 233, 243, 56 S.Ct. 444, 446, 80 L.Ed. 660; *Near v. Minnesota*, 283 U.S. 697, 707, 51 S.Ct. 625, 627, 75 L.Ed. 1357; *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; *Whitney v. California*, 274 U.S. 357, 362, 371, 373, 47 S.Ct. 641, 643, 646, 647, 71 L.Ed. 1095; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

[2] [3] [4] Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid

criminal statute. We turn, therefore, to an examination of the statute itself.

[5] [6] [7] Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.<sup>2</sup> There are certain well-defined and narrowly limited classes of speech, the prevention \*572 and punishment of which have never been thought to raise any Constitutional problem.<sup>3</sup> These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>4</sup> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>5</sup> ‘Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.’ *Cantwell v. Connecticut*, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352.

<sup>2</sup> *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (Brandeis, J., concurring); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352.

<sup>3</sup> The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. *Near v. Minnesota*, 283 U.S. 697, 714, 715, 51 S.Ct. 625, 630, 75 L.Ed. 1357.

<sup>4</sup> Chafee, *Free Speech in the United States* (1941), 149.

<sup>5</sup> Chafee, *op. cit.*, 150.

[8] The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations.

The court (91 N.H. 310, 18 A.2d 757) said: ‘The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional.’ We accept that construction of severability and limit our consideration to the first provision of the statute.<sup>6</sup>

<sup>6</sup> Since the complaint charged appellant only with violating the first provision of the statute, the problem of *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484, is not present.

\*\*770 \*573 On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being ‘forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed’.<sup>7</sup> It was further said: ‘The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. \* \* \* The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. \* \* \* The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. \* \* \* Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. \* \* \* The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including ‘classical fighting words’, words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.’

<sup>7</sup> *State v. Brown*, 68 N.H. 200, 38 A. 731; *State v. McConnell*, 70 N.H. 294, 47 A. 267.

[9] [10] [11] We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352; \*574

[Thornhill v. Alabama](#), 310 U.S. 88, 105, 60 S.Ct. 736, 745, 84 L.Ed. 1093. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. [Fox v. Washington](#), 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573.<sup>8</sup>

<sup>8</sup> We do not have here the problem of [Lanzetta v. New Jersey](#), 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. [State v. Brown](#), 1894, 68 N.H. 200, 38 A. 731.

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. [Herndon v. Lowry](#), 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066. See [Nash v. United States](#), 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232.

[12] Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

[13] [14] The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

#### All Citations

315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [March v. Mills](#), 1st Cir.(Me.), August 8, 2017

137 S.Ct. 1744

Supreme Court of the United States

Joseph MATAL, Interim Director, [United States Patent and Trademark Office](#), Petitioner

v.

Simon Shiao TAM.

No. 15–1293.

|  
Argued Jan. 18, 2017.|  
Decided June 19, 2017.**Synopsis**

**Background:** Trademark applicant sought review of the decision of the Patent and Trademark Office's (PTO) Trademark Trial and Appeal Board (TTAB), [2013 WL 5498164](#), which affirmed an examining attorney's refusal to register the trademark “THE SLANTS” for a musical band, on grounds that the mark was disparaging to people of Asian descent. A panel of the United States Court of Appeals for the Federal Circuit, Moore, Circuit Judge, [785 F.3d 567](#), affirmed, but on rehearing en banc, the Court of Appeals, Moore, Circuit Judge, [808 F.3d 1321](#), vacated and remanded. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice [Alito](#), held that disparagement clause of Lanham Act, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was facially invalid under First Amendment protection of speech.

Affirmed.

Justice [Kennedy](#) filed an opinion concurring in part and concurring in the judgment, in which Justices [Ginsburg](#), [Sotomayor](#), and [Kagan](#) joined.

Justice [Thomas](#) filed an opinion concurring in part and concurring in the judgment.

Justice [Gorsuch](#) took no part in the consideration or decision of the case.

West Headnotes (24)

**[1] Constitutional Law**

🔑 Trademarks and trade names

**Trademarks**

🔑 Validity

Disparagement clause of Lanham Act, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was facially invalid under First Amendment protection of speech, as it offended a bedrock First Amendment principle that speech may not be banned on the ground that it expresses ideas that offend. [U.S.C.A. Const.Amend. 1](#); Lanham Act, § 2(a), [15 U.S.C.A. § 1052\(a\)](#).

[1 Cases that cite this headnote](#)

**[2] Constitutional Law**

🔑 Trademarks and trade names

**Trademarks**

🔑 False or deceptive matter

In light of facial invalidity, under First Amendment protection of speech, of disparagement clause of Lanham Act, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, trademark registration for “THE SLANTS,” as the name of a musical band, could not be refused on the grounds that the name was a derogatory term for persons of Asian descent. [U.S.C.A. Const.Amend. 1](#); Lanham Act, § 2(a), [15 U.S.C.A. § 1052\(a\)](#).

[1 Cases that cite this headnote](#)

**[3] Trademarks**

🔑 Capacity to Distinguish or Signify; Distinctiveness

The principle underlying trademark protection is that distinctive marks, i.e., words, names, symbols, and the like, can help distinguish a particular artisan's goods from those of others.

[Cases that cite this headnote](#)

**[4] Trademarks**

🔑 [Function and purpose of trademarks in general](#)

A trademark designates the goods as the product of a particular trader and protects his good will against the sale of another's product as his, and helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid.

[Cases that cite this headnote](#)

**[5] Trademarks**

🔑 [Nature of trademarks in general; definitions](#)

Federal law does not create trademarks; trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country.

[4 Cases that cite this headnote](#)

**[6] Trademarks**

🔑 [Protection and regulation in general](#)

National protection of trademarks is desirable, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.

[Cases that cite this headnote](#)

**[7] Trademarks**

🔑 [Necessity of registration](#)

**Trademarks**

🔑 [Infringement](#)

Without federal registration, a valid trademark may still be used in commerce and can be enforced against would-be infringers in several ways, the most important of which is that, even if a trademark is not federally registered, it may still be enforceable under the Lanham Act, which creates a federal cause of

action for trademark infringement. Lanham Act, § 43(a), 15 U.S.C.A. § 1125(a).

[5 Cases that cite this headnote](#)

**[8] Trademarks**

🔑 [Marks Protected](#)

**Trademarks**

🔑 [Effect](#)

A trademark that is not registered under federal law can be enforced under state common law, or if it has been registered in a State, under that State's registration system.

[2 Cases that cite this headnote](#)

**[9] Trademarks**

🔑 [Grounds](#)

**Trademarks**

🔑 [Validity, ownership, and use](#)

**Trademarks**

🔑 [Goods or services underlying mark;class](#)

Federal registration of trademarks on the principal register confers important legal rights and benefits on trademark owners who register their marks: (1) it serves as constructive notice of the owner's claim of ownership of the mark; (2) it is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate; and (3) it can make a mark incontestable once a mark has been registered for five years. Lanham Trade-Mark Act, §§ 7(b), 15, 22, 33(b), 15 U.S.C.A. §§ 1057(b), 1065, 1072, 1115(b).

[2 Cases that cite this headnote](#)

**[10] Federal Courts**

🔑 [Presentation of Questions Below or on Review;Record;Waiver](#)

Supreme Court, on certiorari review, would address the argument of applicant for federal

trademark registration, that Lanham Act's disparagement clause, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, did not reach marks that disparaged racial or ethnic groups, though applicant had not raised that argument before the Patent and Trademark Office (PTO) or the Federal Circuit, because acceptance of applicant's statutory interpretation would resolve the case and leave for another day the applicant's constitutional challenge to disparagement clause under First Amendment protection of speech. *U.S.C.A. Const.Amend. 1*; Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a).

1 Cases that cite this headnote

**[11] Constitutional Law**

🔑 Necessity of Determination

**Constitutional Law**

🔑 Ripeness;prematurity

It is important to avoid the premature adjudication of constitutional questions, and courts ought not to pass on questions of constitutionality unless such adjudication is unavoidable.

Cases that cite this headnote

**[12] Constitutional Law**

🔑 Necessity of Determination

**Trademarks**

🔑 False or deceptive matter

“Persons,” within meaning of Lanham Act's disparagement clause, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, extended to terms that disparaged persons who shared a common race or ethnicity, and thus, it was necessary for the court to address the constitutionality of the clause, with respect to rejection of application for trademark registration for “THE SLANTS” as the name of a musical band, on grounds that the name was a derogatory term for persons of Asian descent. *U.S.C.A. Const.Amend. 1*; Lanham Act, §§ 2(a), 45, 15 U.S.C.A. §§ 1052(a), 1127.

Cases that cite this headnote

**[13] Statutes**

🔑 Absence of Ambiguity;Application of Clear or Unambiguous Statute or Language

**Statutes**

🔑 Statutory scheme in general

The court's inquiry into the meaning of the statute's text ceases when the statutory language is unambiguous and the statutory scheme is coherent and consistent.

3 Cases that cite this headnote

**[14] Constitutional Law**

🔑 Government-sponsored speech

The First Amendment, which prohibits Congress and other government entities and actors from abridging the freedom of speech, does not say that Congress and other government entities must abridge their own ability to speak freely. *U.S.C.A. Const.Amend. 1*.

2 Cases that cite this headnote

**[15] Constitutional Law**

🔑 Government-sponsored speech

While the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, imposing a requirement of viewpoint-neutrality on government speech would be paralyzing; when a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others, and the Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. *U.S.C.A. Const.Amend. 1*.

8 Cases that cite this headnote

**[16] Constitutional Law**

🔑 Government-sponsored speech

While the government-speech doctrine is important, and indeed, essential, it is a doctrine that is susceptible to dangerous misuse, and if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints; for that reason, the Supreme Court must exercise great caution before extending its government-speech precedents. [U.S.C.A. Const.Amend. 1](#).

[7 Cases that cite this headnote](#)

**[17] Constitutional Law**

🔑 Trademarks and trade names

Federally registered trademarks are private speech, not government speech. [U.S.C.A. Const.Amend. 1](#); Lanham Act, § 2, 15 U.S.C.A. § 1052.

[5 Cases that cite this headnote](#)

**[18] Constitutional Law**

🔑 Denial of benefits

The Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit, but at the same time, the Government is not required to subsidize activities that it does not wish to promote. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1](#).

[Cases that cite this headnote](#)

**[19] Constitutional Law**

🔑 Justification for exclusion or limitation

When a unit of government creates a limited public forum for private speech, in either a literal or metaphysical sense, some content-based and speaker-based restrictions may be allowed, but even in such cases, viewpoint discrimination is forbidden. (Per Justice Alito, with three Justices concurring and

four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1](#).

[4 Cases that cite this headnote](#)

**[20] Constitutional Law**

🔑 Offensive, vulgar, abusive, or insulting speech

The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1](#).

[2 Cases that cite this headnote](#)

**[21] Constitutional Law**

🔑 Trademarks and trade names

**Trademarks**

🔑 Validity

Assuming that it was appropriate to apply the *Central Hudson* test, for determining whether regulation of commercial speech is valid under the First Amendment, to challenges to provisions of the Lanham Act, the Lanham Act's disparagement clause, prohibiting federal trademark registration for marks that might disparage any persons, living or dead, was not narrowly drawn. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1](#); Lanham Act, § 2(a), 15 U.S.C.A. § 1052(a).

[1 Cases that cite this headnote](#)

**[22] Constitutional Law**

🔑 Reasonableness;relationship to governmental interest

A restriction of commercial speech must serve a substantial interest, and it must be narrowly drawn, and this means, among other things, that the regulatory technique may extend only as far as the interest it serves. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1](#).

[Cases that cite this headnote](#)

**[23] Constitutional Law**

🔑 [Hate speech](#)

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of the Supreme Court's free speech jurisprudence is that it protects the freedom to express hated thoughts. (Per Justice Alito, with three Justices concurring and four Justices concurring in the judgment.) [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)

**[24] Trademarks**

🔑 [Alphabetical listing](#)

THE SLANTS.

[Cases that cite this headnote](#)

**West Codenotes**

**Held Unconstitutional**

[15 U.S.C.A. § 1052\(a\)](#)

*\*1747 Syllabus\**

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Simon Tam, lead singer of the rock group “The Slants,” chose this moniker in order to “reclaim” the term and drain its denigrating force as a derogatory term for Asian persons. Tam sought federal registration of the mark “THE SLANTS.” The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may “disparage ... or bring ... into contemp[t] or disrepute” any “persons, living or dead.” [15 U.S.C. § 1052\(a\)](#). Tam contested the denial of registration through the administrative appeals process, to no avail. He then

took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause.

*Held* : The judgment is affirmed.

[808 F.3d 1321](#), affirmed.

Justice [ALITO](#) delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding:

1. The disparagement clause applies to marks that disparage the members of a racial or ethnic group. Tam's view, that *\*1748* the clause applies only to natural or juristic persons, is refuted by the plain terms of the clause, which uses the word “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group necessarily disparages many “persons,” namely, members of that group. Tam's narrow reading also clashes with the breadth of the disparagement clause, which by its terms applies not just to “persons,” but also to “institutions” and “beliefs.” [§ 1052\(a\)](#). Had Congress wanted to confine the reach of the clause, it could have used the phrase “particular living individual,” which it used in neighboring [§ 1052\(c\)](#). Tam contends that his interpretation is supported by legislative history and by the PTO's practice for many years of registering marks that plainly denigrated certain groups. But an inquiry into the meaning of the statute's text ceases when, as here, “the statutory language is unambiguous and the statutory scheme is coherent and consistent.” [Barnhart v. Sigmon Coal Co.](#), 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (internal quotation marks omitted). Even if resort to legislative history and early enforcement practice were appropriate, Tam has presented nothing showing a congressional intent to adopt his interpretation, and the PTO's practice in the years following the disparagement clause's enactment is unenlightening. Pp. 1754 – 1757.

2. The disparagement clause violates the First Amendment's Free Speech Clause. Contrary to the Government's contention, trademarks are private, not government speech. Because the “Free Speech Clause ... does not regulate government speech,” [Pleasant Grove City v. Summum](#), 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-

speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.

The Federal Government does not dream up the trademarks registered by the PTO. Except as required by § 1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. If the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. And once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. It is thus far-fetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently. And none of this Court's government-speech cases supports the idea that registered trademarks are government speech. *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896; *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853; and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. —, 135 S.Ct. 2239, 192 L.Ed.2d 274 distinguished. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way. Pp. 1757 – 1761.

Justice ALITO, joined by THE CHIEF JUSTICE, Justice THOMAS, and \*1749 Justice BREYER, concluded in Parts III–B, III–C, and IV:

(a) The Government's argument that this case is governed by the Court's subsidized-speech cases is unpersuasive. Those cases all involved cash subsidies or their equivalent, *e.g.*, funds to private parties for family planning services in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, and cash grants to artists in *National Endowment for Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500. The federal registration of a trademark is nothing like these programs. The PTO does not pay money to parties seeking registration of a mark; it requires the payment of fees to file an application

and to maintain the registration once it is granted. The Government responds that registration provides valuable non-monetary benefits traceable to the Government's resources devoted to registering the marks, but nearly every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways. Pp. 1760 – 1762.

(b) Also unpersuasive is the Government's claim that the disparagement clause is constitutional under a “government-program” doctrine, an argument which is based on a merger of this Court's government-speech cases and subsidy cases. It points to two cases involving a public employer's collection of union dues from its employees, *Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 127 S.Ct. 2372, 168 L.Ed.2d 71, and *Ysursa v. Pocatello Ed. Assn.*, 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770, but these cases occupy a special area of First Amendment case law that is far removed from the registration of trademarks. Cases in which government creates a limited public forum for private speech, thus allowing for some content- and speaker-based restrictions, see, *e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150 L.Ed.2d 151; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831, 115 S.Ct. 2510, 132 L.Ed.2d 700, are potentially more analogous. But even in those cases, viewpoint discrimination is forbidden. The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The “public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572. Pp. 1761 – 1764.

(c) The dispute between the parties over whether trademarks are commercial speech subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elect. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve “a substantial interest” and be “narrowly drawn.” *Id.*, at 564–565, 100 S.Ct.

2343 (internal quotation marks omitted). One purported interest is in preventing speech expressing ideas that offend, but that idea strikes at the heart of the First Amendment. The second interest asserted is protecting the orderly flow of commerce from disruption caused by trademarks that support invidious discrimination; but the clause, which reaches any trademark that disparages *any person, group, or institution*, is not narrowly drawn. Pp. 1763 – 1765.

\*1750 Justice KENNEDY, joined by Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN, agreed that 15 U.S.C. § 1052(a) constitutes viewpoint discrimination, concluding:

(a) With few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700. The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. Here, the disparagement clause identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols,” § 1052(a); and within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination. The Government’s arguments in defense of the statute are unpersuasive. Pp. 1765 – 1768.

(b) Regardless of whether trademarks are commercial speech, the viewpoint based discrimination here necessarily invokes heightened scrutiny. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544. To the extent trademarks qualify as commercial speech, they are an example of why that category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship. Pp. 1767 – 1769.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to

Parts I, II, and III–A, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined except for Part II, and an opinion with respect to Parts III–B, III–C, and IV, in which ROBERTS, C.J., and THOMAS and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., took no part in the consideration or decision of the case.

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#### Opinion

Justice ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice BREYER join.

This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” “Slants” is a derogatory term for persons of Asian descent, and members of the band are Asian–Americans.

But the band members believe that by taking that slur as the name of their group, they will help to “reclaim” the term and drain its denigrating force.

[1] [2] The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may “disparage ... or bring ... into contemp[t] or disrepute” any “persons, living or dead.” 15 U.S.C. § 1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

## I

### A

[3] [4] “The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others.” *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. —, —, 135 S.Ct. 1293, 1299, 191 L.Ed.2d 222 (2015); see also *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212, 120 S.Ct. 1339, 146 L.Ed.2d 182 (2000). A trademark “designate[s] the goods as the product of a particular trader” and “protect[s] his good will against the sale of another's product as his.” *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 39 S.Ct. 48, 63 L.Ed. 141 (1918); see also *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412–413, 36 S.Ct. 357, 60 L.Ed. 713 (1916). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Wal-Mart Stores, supra*, at 212–213, 120 S.Ct. 1339; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985).

[5] “[F]ederal law does not create trademarks.” *B & B Hardware, supra*, at —, 135 S.Ct., at 1299. Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. 3 J. McCarthy, *Trademarks and Unfair Competition* § 19:8 (4th ed. 2017) (hereinafter McCarthy); 1 *id.*, §§ 5:1, 5:2, 5:3; Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 *Trademark Rep.* 456, 457–458 (1988); Pattishall, *Two Hundred Years of American Trademark Law*, 68

*Trademark Rep.* 121, 121–123 (1978); see *Trade-Mark Cases*, 100 U.S. 82, 92, 25 L.Ed. 550 (1879). For most of the 19th century, trademark protection was the province of the States. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780–782, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992) (Stevens, J., concurring in judgment); *id.*, at 785, 112 S.Ct. 2753 (THOMAS, J., concurring in judgment). Eventually, Congress stepped in to provide \*1752 a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§ 77–84, 16 Stat. 210–212. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. See Act of July 5, 1946, ch. 540, 60 Stat. 427. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

[6] Under the Lanham Act, trademarks that are “used in commerce” may be placed on the “principal register,” that is, they may be federally registered. 15 U.S.C. § 1051(a)(1). And some marks “capable of distinguishing [an] applicant's goods or services and not registrable on the principal register ... which are in lawful use in commerce by the owner thereof” may instead be placed on a different federal register: the supplemental register. § 1091(a). There are now more than two million marks that have active federal certificates of registration. PTO Performance and Accountability Report, Fiscal Year 2016, p. 192 (Table 15), <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf> (all Internet materials as last visited June 16, 2017). This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. “[N]ational protection of trademarks is desirable,” we have explained, “because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 531, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (internal quotation marks omitted); see also *Park 'N Fly, Inc., supra*, at 198, 105 S.Ct. 658 (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers”).

## B

[7] [8] Without federal registration, a valid trademark may still be used in commerce. See 3 *McCarthy* § 19:8. And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under § 43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. See *Two Pesos, supra*, at 768, 112 S.Ct. 2753 (“Section 43(a) prohibits a broader range of practices than does § 32, which applies to registered marks, but it is common ground that § 43(a) protects qualifying unregistered trademarks” (internal quotation marks and citation omitted)).<sup>1</sup> Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d). See \*1753 5 *McCarthy* § 25A:49, at 25A–198 (“[T]here is no requirement [in the Anticybersquatting Act] that the protected ‘mark’ be registered: unregistered common law marks are protected by the Act”). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State’s registration system. See 3 *id.*, § 19:3, at 19–23 (explaining that “[t]he federal system of registration and protection does not preempt parallel state law protection, either by state common law or state registration” and “[i]n the vast majority of situations, federal and state trademark law peacefully coexist”); *id.*, § 22:1 (discussing state trademark registration systems).

<sup>1</sup> In the opinion below, the Federal Circuit opined that although “Section 43(a) allows for a federal suit to protect an unregistered trademark,” “it is not at all clear” that respondent could bring suit under § 43(a) because “there is no authority extending § 43(a) to marks denied under § 2(a)’s disparagement provision.” *In re Tam*, 808 F.3d 1321, 1344–1345, n. 11 (en banc), as corrected (Feb. 11, 2016). When drawing this conclusion, the Federal Circuit relied in part on our statement in *Two Pesos* that “the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).” 505 U.S., at 768, 112 S.Ct. 2753. We need not decide today whether respondent could bring suit under § 43(a)

if his application for federal registration had been lawfully denied under the disparagement clause.

[9] Federal registration, however, “confers important legal rights and benefits on trademark owners who register their marks.” *B & B Hardware*, 575 U.S., at —, 135 S.Ct., at 1317 (internal quotation marks omitted). Registration on the principal register (1) “serves as ‘constructive notice of the registrant’s claim of ownership’ of the mark,” *ibid.* (quoting 15 U.S.C. § 1072); (2) “is ‘prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,’” *B & B Hardware*, 575 U.S. at —, 135 S.Ct., at 1300 (quoting § 1057(b)); and (3) can make a mark “‘incontestable’” once a mark has been registered for five years,” *ibid.* (quoting §§ 1065, 1115(b)); see *Park ‘N Fly*, 469 U.S., at 193, 105 S.Ct. 658. Registration also enables the trademark holder “to stop the importation into the United States of articles bearing an infringing mark.” 3 *McCarthy* § 19:9, at 19–38; see 15 U.S.C. § 1124.

## C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is “merely descriptive or deceptively misdescriptive” of goods, § 1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is “likely ... to cause confusion, or to cause mistake, or to deceive,” § 1052(d).

At issue in this case is one such provision, which we will call “the disparagement clause.” This provision prohibits the registration of a trademark “which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” § 1052(a).<sup>2</sup> This clause appeared in the original Lanham Act and has remained the same to this day. See § 2(a), 60 Stat. 428.

<sup>2</sup> The disparagement clause also prevents a trademark from being registered on the supplemental register. § 1091(a).

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a “two-part test.”

The examiner first considers “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services.” Trademark Manual of Examining Procedure § 1203.03(b)(i) (Apr. 2017), p. 1200–150, <http://tmep.uspto.gov>. “If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols,” the examiner moves to the second step, asking “whether that meaning may \*1754 be disparaging to a substantial composite<sup>3</sup> of the referenced group.” *Ibid.* If the examiner finds that a “substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark ... to be disparaging in the context of contemporary attitudes,” a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.” *Ibid.*

<sup>3</sup> By “composite,” we assume the PTO means component.

## D

Simon Tam is the lead singer of “The Slants.” *In re Tam*, 808 F.3d 1321, 1331 (C.A.Fed.2015) (en banc), as corrected (Feb. 11, 2016). He chose this moniker in order to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group “draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes” and has given its albums names such as “The Yellow Album” and “Slanted Eyes, Slanted Hearts.” *Ibid.*

Tam sought federal registration of “THE SLANTS,” on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO’s two-part framework and finding that “there is ... a substantial composite of persons who find the term in the applied-for mark offensive.” *Id.*, at 30. The examining attorney relied in part on the fact that “numerous dictionaries define ‘slants’ or ‘slant-eyes’ as a derogatory or offensive

term.” *Id.*, at 29. The examining attorney also relied on a finding that “the band’s name has been found offensive numerous times”—citing a performance that was canceled because of the band’s moniker and the fact that “several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive.” *Id.*, at 29–30.

Tam contested the denial of registration before the examining attorney and before the PTO’s Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment’s Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny. See 808 F.3d, at 1334–1339. The majority also rejected the Government’s argument that registered trademarks constitute government speech, as well as the Government’s contention that federal registration is a form of government subsidy. See *id.*, at 1339–1355. And the majority opined that even if the disparagement clause were analyzed under this Court’s commercial speech cases, the clause would fail the “intermediate scrutiny” that those cases prescribe. See *id.*, at 1355–1357.

Several judges wrote separately, advancing an assortment of theories. Concurring, Judge O’Malley agreed with the majority’s reasoning but added that the disparagement clause is unconstitutionally vague. See *id.*, at 1358–1363. Judge Dyk concurred in part and dissented in part. He argued that trademark registration is a government subsidy and that the disparagement clause is facially constitutional, \*1755 but he found the clause unconstitutional as applied to THE SLANTS because that mark constitutes “core expression” and was not adopted for the purpose of disparaging Asian–Americans. See *id.*, at 1363–1374. In dissent, Judge Lourie agreed with Judge Dyk that the clause is facially constitutional but concluded for a variety of reasons that it is also constitutional as applied in this case. See *id.*, at 1374–1376. Judge Reyna also dissented, maintaining that trademarks are commercial speech and that the disparagement clause survives intermediate scrutiny because it “directly advances the government’s substantial interest in the orderly flow of commerce.” See *id.*, at 1376–1382.

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause “is facially invalid under the Free Speech Clause of the First Amendment.” Pet. for Cert. i; see *sub. nom. Lee v. Tam*, 579 U.S. —, 137 S.Ct. 30, 195 L.Ed.2d 902 (2016).

## II

[10] Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam’s argument that the clause does not reach marks that disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage “persons,” and Tam claims that the term “persons” “includes only natural and juristic persons,” not “non-juristic entities such as racial and ethnic groups.” Brief for Respondent 46.

Tam never raised this argument before the PTO or the Federal Circuit, and we declined to grant certiorari on this question when Tam asked us to do so, see Brief Responding to Petition for Certiorari, pp. i, 17–21. Normally, that would be the end of the matter in this Court. See, e.g., *Yee v. Escondido*, 503 U.S. 519, 534–538, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Freytag v. Commissioner*, 501 U.S. 868, 894–895, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment).

[11] [12] But as the Government pointed out in connection with its petition for certiorari, accepting Tam’s statutory interpretation would resolve this case and leave the First Amendment question for another day. See Reply Brief 9. “[W]e have often stressed” that it is “importan[t] [to] avoid[d] the premature adjudication of constitutional questions,” *Clinton v. Jones*, 520 U.S. 681, 690, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), and that “we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable,” *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944). See also *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945); *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905). We thus begin by explaining why Tam’s argument about the definition of “persons” in the Lanham Act is meritless.

As noted, the disparagement clause prohibits the registration of trademarks “which may disparage ... persons, living or dead.” 15 U.S.C. § 1052(a). Tam points to a definition of “person” in the Lanham Act, which provides that “[i]n the construction of this chapter, unless the contrary is plainly apparent from the context ... [t]he term ‘person’ and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person.” § 1127. Because racial and ethnic groups are neither natural nor “juristic” persons, \*1756 Tam asserts, these groups fall outside this definition. Brief for Respondent 46–48.

Tam’s argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage “persons.” A mark that disparages a “substantial” percentage of the members of a racial or ethnic group, Trademark Manual § 1203.03(b)(i), at 1200–150, necessarily disparages many “persons,” namely, members of that group. Tam’s argument would fail even if the clause used the singular term “person,” but Congress’ use of the plural “persons” makes the point doubly clear.<sup>4</sup>

<sup>4</sup> Tam advances a convoluted textual argument that goes as follows. The definition of a “person” in 15 U.S.C. § 1127 does not include a “non-juristic person,” *i.e.*, a group that cannot sue or be sued in its own right. Brief for Respondent 46–47. Such groups consist of multiple natural persons. Therefore, the members of such groups are not “persons” under the disparagement clause. *Id.*, at 46–48.

This argument leads to the absurd result that no person is a “person” within the meaning of the disparagement clause. This is so because every person is a member of a “non-juristic” group, *e.g.*, right-handers, left-handers, women, men, people born on odd-numbered days, people born on even-numbered days.

Tam’s narrow reading of the term “persons” also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage, not just “persons,” but also “institutions” and “beliefs.” 15 U.S.C. § 1052(a). It thus applies to the members of any group whose members share particular “beliefs,” such as political, ideological, and religious groups. It applies to marks that denigrate “institutions,” and on Tam’s reading, it also reaches “juristic” persons such as corporations,

unions, and other unincorporated associations. See § 1127. Thus, the clause is not limited to marks that disparage a particular natural person. If Congress had wanted to confine the reach of the disparagement clause in the way that Tam suggests, it would have been easy to do so. A neighboring provision of the Lanham Act denies registration to any trademark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent.” § 1052(c) (emphasis added).

[13] Tam contends that his interpretation of the disparagement clause is supported by its legislative history and by the PTO’s willingness for many years to register marks that plainly denigrated African–Americans and Native Americans. These arguments are unpersuasive. As always, our inquiry into the meaning of the statute’s text ceases when “the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (internal quotation marks omitted). Here, it is clear that the prohibition against registering trademarks “which may disparage ... persons,” § 1052(a), prohibits registration of terms that disparage persons who share a common race or ethnicity.

Even if resort to legislative history and early enforcement practice were appropriate, we would find Tam’s arguments unconvincing. Tam has not brought to our attention any evidence in the legislative history showing that Congress meant to adopt his interpretation. And the practice of the PTO in the years following the enactment of the disparagement clause is unenlightening. The admitted vagueness of the disparagement test<sup>5</sup> and the huge \*1757 volume of applications have produced a haphazard record of enforcement. (Even today, the principal register is replete with marks that many would regard as disparaging to racial and ethnic groups.<sup>6</sup>) Registration of the offensive marks that Tam cites is likely attributable not to the acceptance of his interpretation of the clause but to other factors—most likely the regrettable attitudes and sensibilities of the time in question.

<sup>5</sup> The PTO has acknowledged that the guidelines “for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.” *In re In Over Our Heads, Inc.*, 16 USPQ 2d

1653, 1654 (T.T.A.B.1990) (brackets and internal quotation marks omitted). The PTO has similarly observed that whether a mark is disparaging “is highly subjective and, thus, general rules are difficult to postulate.” *Harjo v. Pro–Football Inc.*, 50 USPQ 2d 1705, 1737 (T.T.A.B.1999), rev’d, 284 F.Supp.2d 96 (D.D.C.2003), rev’d and remanded in part, 415 F.3d 44 (C.A.D.C.2005) (*per curiam*).

<sup>6</sup> See, e.g., App. to Brief for Pro–Football, Inc., as *Amicus Curiae*.

### III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends (1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new “government-program” doctrine. We address each of these arguments below.

#### A

[14] The First Amendment prohibits Congress and other government entities and actors from “abridging the freedom of speech”; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that “[t]he Free Speech Clause ... does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009); see *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) (“[T]he Government’s own speech ... is exempt from First Amendment scrutiny”); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000).

[15] As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum, supra*, at 468, 129 S.Ct. 1125; see *Walker*

*v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. —, — — —, 135 S.Ct. 2239, 2245–2247, 192 L.Ed.2d 274 (2015). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

**\*1758** Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort.<sup>7</sup> There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources.<sup>8</sup> These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

<sup>7</sup> See, e.g., D. Nelson, *The Posters That Won the War* (1991).

<sup>8</sup> *Ibid.*

[16] But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, 15 U.S.C. § 1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such

viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act’s viewpoint-neutral requirements, registration is mandatory. *Ibid.* (requiring that “[n]o trademark ... shall be refused registration on the principal register on account of its nature unless” it falls within an enumerated statutory exception). And if an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. See §§ 1062(a), 1071; 37 C.F.R. § 41.31(a) (2016). Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. See 15 U.S.C. §§ 1058(a), 1059, 1064; 37 C.F.R. §§ 2.111(b), 2.160.

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. See App. to Brief for Pro-Football, Inc., as *Amicus Curiae*. It is expressing contradictory views.<sup>9</sup> It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

<sup>9</sup> Compare “Abolish Abortion,” Registration No. 4,935,774 (Apr. 12, 2016), with “I Stand With Planned Parenthood,” Registration No. 5,073,573 (Nov. 1, 2016); compare “Capitalism Is Not Moral, Not Fair, Not Freedom,” Registration No. 4,696,419 (Mar. 3, 2015), with “Capitalism Ensuring Innovation,” Registration No. 3,966,092 (May 24, 2011); compare “Global Warming Is Good,” Registration No. 4,776,235 (July 21, 2015), with “A Solution to Global Warming,” Registration No. 3,875,271 (Nov. 10, 2010).

**\*1759** For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to “make.believe” (Sony),<sup>10</sup> “Think different” (Apple),<sup>11</sup> “Just do it” (Nike),<sup>12</sup> or “Have it your way” (Burger King)<sup>13</sup>? Was the Government warning about a coming disaster when it registered the mark “EndTime Ministries”<sup>14</sup>?

- 10 “make.believe,” Registration No. 4,342,903 (May 28, 2013).
- 11 “Think Different,” Registration No. 2,707,257 (Apr. 15, 2003).
- 12 “Just Do It,” Registration No. 1,875,307 (Jan. 25, 1995).
- 13 “Have It Your Way,” Registration No. 0,961,016 (June 12, 1973).
- 14 “EndTime Ministries,” Registration No. 4,746,225 (June 2, 2015).

The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1220, n. 3 (T.T.A.B.1993) (“[I]ssuance of a trademark registration ... is not a government imprimatur”). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. See *Application of National Distillers & Chemical Corp.*, 49 C.C.P.A. (Pat.) 854, 863, 297 F.2d 941, 949 (1962) (Rich, J., concurring) (“The purchasing public knows no more about trademark registrations than a man walking down the street in a strange city knows about legal title to the land and buildings he passes” (emphasis deleted)).

None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns*, we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising “to advance the image and desirability of beef and beef products.” 544 U.S., at 561, 125 S.Ct. 2055 (quoting 7 U.S.C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U.S., at 561, 125 S.Ct. 2055. Noting that “[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government,” we held that the ads were government speech. *Id.*, at 560, 125 S.Ct. 2055. The Government’s involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Sumnum* is similarly far afield. A small city park contained 15 monuments. 555 U.S., at 464, 129

S.Ct. 1125. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465, 129 S.Ct. 1125. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group’s religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; “[p]ublic parks are often closely identified in the public mind with the government unit that owns the land”; and “[t]he monuments that are accepted ... are meant to \*1760 convey and have the effect of conveying a government message.” *Id.*, at 472, 129 S.Ct. 1125.

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Sumnum*. 576 U.S., at — — —, 135 S.Ct., at 2246–2247. First, license plates have long been used by the States to convey state messages. *Id.*, at — — —, 135 S.Ct., at 2248–2249. Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” *Id.*, at — — —, 135 S.Ct., at 2249 (internal quotation marks omitted). Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” *Id.*, at — — —, 135 S.Ct., at 2249. As explained above, none of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Sumnum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.

Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? See 808 F.3d, at 1346 (explaining that if trademark registration amounts to government speech, “then copyright registration” which “has identical accoutrements” would “likewise amount to government speech”).

The Government attempts to distinguish copyright on the ground that it is “ ‘the engine of free expression,’ ” Brief for Petitioner 47 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003)), but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

[17] Trademarks are private, not government, speech.

## B

[18] We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. “[W]e have held that the Government ‘may not deny a benefit to a \*1761 person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.’ ” *Agency for Int'l Development v. Alliance for Open Society*

*Int'l, Inc.*, 570 U.S. —, —, 133 S.Ct. 2321, 2328, 186 L.Ed.2d 398 (2013) (some internal quotation marks omitted). But at the same time, government is not required to subsidize activities that it does not wish to promote. *Ibid.* Determining which of these principles applies in a particular case “is not always self-evident,” *id.*, at —, 133 S.Ct., at 2330, but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States v. American Library Assn., Inc.*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *Cammarano v. United States*, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959).

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of \$225–\$600. 37 C.F.R. § 2.6(a)(1). (Tam submitted a fee of \$275 as part of his application to register THE SLANTS. App. 18.) And to maintain federal registration, the holder of a mark must pay a fee of \$300–\$500 every 10 years. § 2.6(a)(5); see also 15 U.S.C. § 1059(a). The Federal Circuit concluded that these fees have fully supported the registration system for the past 27 years. 808 F.3d, at 1353.

The Government responds that registration provides valuable non-monetary benefits that “are directly traceable to the resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks.” Brief for Petitioner 27. But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e.g.*, the adjudication of private lawsuits and the use of public parks and highways.

Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

### C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to “government-program” cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two \*1762 cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 181–182, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the employer to collect the portion of union dues that would be used in election activities. *Id.*, at 180–182, 127 S.Ct. 2372. A public employee union argued that this law unconstitutionally restricted its speech based on its content; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. *Id.*, at 188, 127 S.Ct. 2372. Upholding this law, we characterized it as imposing a “modest limitation” on an “extraordinary benefit,” namely, taking money from the wages of non-union members and turning it over to the union free of charge. *Id.*, at 184, 127 S.Ct. 2372. Refusing to confer an even

greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union's free speech rights. *Id.*, at 189–190, 127 S.Ct. 2372.

*Ysursa v. Pocatello Ed. Assn.*, 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union's political action committee. *Id.*, at 355, 129 S.Ct. 1093. We reasoned that the “the government ... [was] not required to assist others in funding the expression of particular ideas.” *Id.*, at 358, 129 S.Ct. 1093; see also *id.*, at 355, 129 S.Ct. 1093 (“The First Amendment ... does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression”).

*Davenport* and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 224–226, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). But the challenged laws did not go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to confer a substantial non-cash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.<sup>15</sup>

<sup>15</sup> While these cases resemble subsidy cases insofar as the free speech rights of unions and their members are concerned, arrangements like those in these cases also implicate the free speech rights of non-union members. Our decision here has no bearing on that issue.

\*1763 [19] Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, e.g., *Good News Club v. Milford Central School*, 533 U.S. 98, 106–107, 121 S.Ct. 2093, 150

L.Ed.2d 151 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Lamb's Chapel*, 508 U.S., at 392–393, 113 S.Ct. 2141. See also *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541–544, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). When government creates such a forum, in either a literal or “metaphysical” sense, see *Rosenberger*, 515 U.S., at 830, 115 S.Ct. 2510 some content- and speaker-based restrictions may be allowed, see *id.*, at 830–831, 115 S.Ct. 2510. However, even in such cases, what we have termed “viewpoint discrimination” is forbidden. *Id.*, at 831, 115 S.Ct. 2510.

Our cases use the term “viewpoint” discrimination in a broad sense, see *ibid.*, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

[20] We have said time and again that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). See also *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Coates v. Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); *Bachellar v. Maryland*, 397 U.S. 564, 567, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509–514, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 237–238, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 4–5, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161,

60 S.Ct. 146, 84 L.Ed. 155 (1939); *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.<sup>16</sup>

<sup>16</sup> We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.

#### IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed “government-program” doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The Government and *amici* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name “The Slants” not only identifies the band but expresses a view about social issues.

[21] [22] We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.<sup>17</sup> Under *Central Hudson*, a restriction of speech must serve “a substantial interest,” and it must be “narrowly drawn.” *Id.*, at 564–565, 100 S.Ct. 2343 (internal quotation marks omitted). This means, among other things, that “[t]he regulatory technique may extend only as far as the interest it serves.” *Id.*, at 565, 100 S.Ct. 2343. The disparagement clause fails this requirement.

17 As with the framework discussed in Part III–C of this opinion, we leave open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act. And nothing in our decision should be read to speak to the validity of state unfair competition provisions or product libel laws that are not before us and differ from § 1052(d)'s disparagement clause.

[23] It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing “‘underrepresented groups’” from being “‘bombarded with demeaning messages in commercial advertising.’” Brief for Petitioner 48 (quoting 808 F.3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An *amicus* supporting the Government refers to “encouraging racial tolerance and protecting the privacy and welfare of individuals.” Brief for Native American Organizations as *Amici Curiae* 21. But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.” *United States v. Schwimmer*, 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F.3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as *Amicus Curiae* 18–21. Commerce, we are told, is disrupted by trademarks that “involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.” 808 F.3d, at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–20.

A simple answer to this argument is that the disparagement clause is not “narrowly \*1765 drawn” to drive out trademarks that support invidious discrimination. The clause reaches any trademark that

disparages *any person, group, or institution*. It applies to trademarks like the following: “Down with racists,” “Down with sexists,” “Down with homophobes.” It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: “James Buchanan was a disastrous president” or “Slavery is an evil institution”?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

\* \* \*

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

*It is so ordered.*

Justice GORSUCH took no part in the consideration or decision of this case.

Justice KENNEDY, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U.S.C. § 1052(a), which prohibits the registration of marks that may “disparage ... or bring ... into contemp[t] or disrepute” any “persons, living or dead, institutions, beliefs, or national symbols.”

As the Court is correct to hold, § 1052(a) constitutes viewpoint discrimination—a form of speech suppression

so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

## I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

The First Amendment guards against laws “targeted at specific subject matter,” \*1766 a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert*, 576 U.S. —, —, 135 S.Ct. 2218, 2230, 192 L.Ed.2d 236 (2015). This category includes a subtype of laws that go further, aimed at the suppression of “particular views ... on a subject.” *Rosenberger*, 515 U.S., at 829, 115 S.Ct. 2510. A law found to discriminate based on viewpoint is an “egregious form of content discrimination,” which is “presumptively unconstitutional.” *Id.*, at 829–830, 115 S.Ct. 2510.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. See *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject”). In the instant case, the disparagement clause the Government now seeks to

implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” 15 U.S.C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. Cf. *Rosenberger, supra*, at 831–832, 115 S.Ct. 2510 (“The ... declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways”). The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant's audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian–Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the

reaction of the speaker's audience. The Court has suggested \*1767 that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed, supra*, at — — —, 135 S.Ct., at 2229–2230, but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 1763 – 1764 (collecting examples).

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respondent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian–Americans can and do contribute to our diverse Nation. Brief for Respondent 1–4, 42–43. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

## II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be

considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

“Commercial speech is no exception,” the Court has explained, to the principle that the First Amendment “requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (internal quotation marks omitted). Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 71–72, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. Justice Holmes' reference to the “free trade in ideas” and the “power of ... thought to get itself accepted in the competition of the market,” \*1768 *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (dissenting opinion), was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. See *ante*, at 1751. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. See Brief for Pro–Football, Inc., as *Amicus Curiae* 8 (collecting examples). Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. See *id.*, at 8–9 (collecting examples). To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493, 42 S.Ct. 384, 66 L.Ed. 729 (1922) (“The labels in question are literally false, and ... palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public”). This case also does not involve laws related to product labeling or otherwise designed to protect consumers. See *Sorrell*, *supra*, at 579, 131 S.Ct. 2653 (“[T]he government’s legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech” (internal quotation marks omitted)). These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

It is telling that the Court’s precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 540–542, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Rosenberger*, 515 U.S., at 833, 115 S.Ct. 2510. The exception is necessary to allow the government to stake out positions and pursue policies. See *Southworth*, *supra*, at 235, 120 S.Ct. 1346; see also *ante*, at 1757 – 1758. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here. See *ante*, at 1758 – 1761.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words,

symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these \*1769 purposes can be complex, see, e.g., *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U.S. —, —, 133 S.Ct. 2321, 2328, 186 L.Ed.2d 398 (2013), our cases are clear that viewpoint discrimination is not permitted where, as here, the Government “expends funds to encourage a diversity of views from private speakers,” *Velazquez*, *supra*, at 542, 121 S.Ct. 1043 (internal quotation marks omitted).

\* \* \*

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court’s opinion in part and concur in the judgment.

Justice THOMAS, concurring in part and concurring in the judgment.

I join the opinion of Justice ALITO, except for Part II. Respondent failed to present his statutory argument either to the Patent and Trademark Office or to the Court of Appeals, and we declined respondent’s invitation to grant certiorari on this question. *Ante*, at 1755. I see no reason to address this legal question in the first instance. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. —, —, 137 S.Ct. 1002, 1009–1010, 197 L.Ed.2d 354 (2017).

I also write separately because “I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (THOMAS, J., concurring in part and concurring in judgment); see also, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (same). I nonetheless join Part IV of Justice ALITO’s opinion because it correctly concludes that the disparagement clause, 15 U.S.C. § 1052(a), is unconstitutional even under the less stringent test

announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

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Overruled in Part by [Girouard v. U.S.](#), U.S.Mass., April 22, 1946

49 S.Ct. 448

Supreme Court of the United States

UNITED STATES

v.

SCHWIMMER.

No. 484.

|

Argued April 12, 1929.

|

Decided May 27, 1929.

**Synopsis**

Mr. Justice Holmes, Mr. Justice Sanford, and Mr. Justice Brandeis dissenting.

Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Application by Rosika Schwimmer for admission to citizenship. Decree denying the petition was reversed by the Circuit Court of Appeals (27 F.(2d) 742), and the United States brings certiorari. Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.

West Headnotes (6)

**[1] Aliens, Immigration, and Citizenship**  
 🔑 Nature of and right to naturalization

Aliens can acquire equality with native-born citizens only by naturalization according to uniform rules.

[7 Cases that cite this headnote](#)

**[2] Aliens, Immigration, and Citizenship**  
 🔑 Presumptions and burden of proof

Every applicant for citizenship has burden of showing by satisfactory evidence that he has specified qualifications.

[29 Cases that cite this headnote](#)

**[3] Aliens, Immigration, and Citizenship**  
 🔑 Nature of and right to naturalization

Every alien, establishing requisite facts, is entitled as of right to admission to citizenship.

[7 Cases that cite this headnote](#)

**[4] Aliens, Immigration, and Citizenship**  
 🔑 Claim of exemption from military service

Alien denying willingness to take up arms in nation's defense, failed to establish that declared opinions and beliefs did not prevent or impair true faith and allegiance and was not entitled to citizenship; "pacifist". 8 U.S.C.A. §§ 381, 382.

[45 Cases that cite this headnote](#)

**[5] Aliens, Immigration, and Citizenship**  
 🔑 Presumptions and burden of proof

Application for citizenship must be denied, in case of doubt as to any essential matter of fact on fair consideration of evidence.

[26 Cases that cite this headnote](#)

**[6] Aliens, Immigration, and Citizenship**  
 🔑 Claim of exemption from military service

Alien, failing to establish that declared opinions and beliefs did not prevent or impair true faith and allegiance, was not entitled to citizenship; "pacifist." 8 U.S.C.A. §§ 1427, 1430(b), 1446(g), 1448.

[7 Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*\*448 \*646** The Attorney General and Mr. Alfred A. Wheat, of Washington, D. C., for the United States.

Mrs. Olive H. Rabe, of Chicago, Ill., for respondent.

**Opinion**

Mr. Justice BUTLER delivered the opinion of the Court.

Respondent filed a petition for naturalization in the District Court for the Northern District of Illinois. The court found her unable, without mental reservation, to take the prescribed oath of allegiance, and not attached to the principles of the Constitution of the United States, and not well disposed to the good order and happiness of the same; and it denied her application. The Circuit Court of Appeals reversed the decree, and directed the District Court to grant respondent's petition. [Schwimmer v. United States, 27 F.\(2d\) 742.](#)

The Naturalization Act of June 29, 1906, requires:

'He (the applicant for naturalization) shall, before he is admitted to citizenship, declare on oath in open court \* \* \* that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.' U. S. C. tit. 8, s 381 (8 USCA s 381).

'It shall be made to appear to the satisfaction of the court \* \* \* that during that time (at least five years preceding the application) he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. \* \* \*' Section 382 (8 USCA s 382).

Respondent was born in Hungary in 1877 and is a citizen of the country. She came to the United States in August, 1921, to visit and lecture, has resided in Illinois since the latter part of that month, declared her intention to become a citizen the following November, and filed petition for naturalization in September, 1926. On a preliminary form, she stated that she understood the principles \*647 of and fully believed in our form of government, \*\*449 and that she had read, and in becoming a citizen was willing to take, the oath of allegiance. Question 22 was this: 'If necessary, are you willing to take up arms in defense of this country?' She answered: 'I would not take up arms personally.'

She testified that she did not want to remain subject to Hungary, found the United States nearest her ideals of a democratic republic, and that she could whole-heartedly take the oath of allegiance. She said: 'I cannot see that a woman's refusal to take up arms is a contradiction to the oath of allegiance.' For the fulfillment of the duty to

support and defend the Constitution and laws, she had in mind other ways and means. She referred to her interest in civic life, to her wide reading and attendance at lectures and meetings, mentioned her knowledge of foreign languages, and that she occasionally glanced through Hungarian, French, German, Dutch, Scandinavian, and Italian publications, and said that she could imagine finding in meetings and publications attacks on the American form of government, and she would conceive it her duty to uphold it against such attacks. She expressed steadfast opposition to any undemocratic form of government, like proletariat, fascist, white terror, or military dictatorships. 'All my past work proves that I have always served democratic ideals and fought-though not with arms-against undemocratic institutions.' She stated that before coming to this country she had defended American ideals, and had defended America in 1924 during an international pacifist congress in Washington.

She also testified: 'If \* \* \* the United States can compel its women citizens to take up arms in the defense of the country-something that no other civilized government has ever attempted-I would not be able to comply with this requirement of American citizenship. In this \*648 case I would recognize the right of the government to deal with me as it is dealing with its male citizens who for conscientious reasons refuse to take up arms.'

The district director of naturalization by letter called her attention to a statement made by her in private correspondence: 'I am an uncompromising pacifist. \* \* \* I have no sense of nationalism, only a cosmic consciousness of belonging to the human family.' She answered that the statement in her petition demonstrated that she was an uncompromising pacifist. 'Highly as I prize the privilege of American citizenship, I could not compromise my way into it by giving an untrue answer to question 22, though for all practical purposes I might have done so, as even men of my age-I was 49 years old last September-are not called to take up arms. \* \* \* That 'I have no nationalistic feeling' is evident from the fact that I wish to give up the nationality of my birth and to adopt a country which is based on principles and institutions more in harmony with my ideals. My 'cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are the children of God.'

And at the hearing she reiterated her ability and willingness to take the oath of allegiance without reservation and added: 'I am willing to do everything that

an American citizen has to do except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist. \* \* \* I do not care how many other women fight, because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do everything that the law compels American citizens to do. That is why I can take the oath of allegiance, because, as far as I can find out there is nothing that I could be compelled to do that I cannot do. \* \* \* With reference to spreading propaganda among the women throughout

**\*649** the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell any one who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism, if I am asked for that.'

[1] [2] Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native-born citizens. All alike owe allegiance to the government, and the government owes to them the duty of protection. These are reciprocal obligations, and each is a consideration for the other. *Luria v. United States*, 231 U. S. 9, 22, 34 S. Ct. 10 (58 L. Ed. 101). But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the government. And, in order to safeguard against admission of those who are unworthy, or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications. *Tutun v. United States*, 270 U. S. 568, 578, 46 S. Ct. 425 (70 L. Ed. 738). And see *United States v. Ginsberg*, 243 U. S. 472, 475, 37 S. Ct. 422 (61 L. Ed. 853).

[3] [4] Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is 'to receive testimony, to compare it with the law, and to judge on both law and fact.' **\*\*450** *Spratt v. Spratt*, 4 Pet. 393, 408 (7 L. Ed. 897). We quite recently declared that: 'Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least,

**\*650** they should be resolved in favor of the United States and against the claimant.' *United States v. Manzi*, 276 U. S. 463, 467, 48 S. Ct. 328, 329 (72 L. Ed. 654). And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several states when called into the service of the United States; it declares that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens. This court, in the *Selective Draft Law Cases*, 245 U. S. 366, page 378, 38 S. Ct. 159, 161 (62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856), speaking through Chief Justice White, said that 'the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. \* \* \*'

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government. **\*651** And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States cannot long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of

conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

The record shows that respondent strongly desires to become a citizen. She is a linguist, lecturer, and writer; she is well educated and accustomed to discuss governments and civic affairs. Her testimony should be considered having regard to her interest and disclosed ability correctly to express herself. Her claim at the hearing that she possessed the required qualifications and was willing to take the oath was much impaired by other parts of her testimony. Taken as a whole, it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms. Her expressed willingness to be treated as the government dealt with conscientious objectors who refused to take up arms in the recent war indicates that she deemed herself to belong to that class. The fact that she is an uncompromising pacifist, with no sense of nation \*652 alism, but only a cosmic sense of belonging to the human family, justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

A pacifist, in the general sense of the word, is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.

It is shown by official records and everywhere well known that during the recent war there were found among those who described themselves as pacifists and conscientious

objectors many citizens-though happily a minute part of all-who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp \*\*451 made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which \*653 the applicant is required to give affirmative evidence by the Naturalization Act.

[5] The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the act. She failed to do so. The District Court was bound by the law to deny her application.

The decree of the Circuit Court of Appeals is reversed.

The decree of the District Court is affirmed.

Mr. Justice HOLMES.

The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts 'may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and except in so far as the same may show that she cannot take the oath of allegiance without a mental reservation.' The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted \*654 to. And as

to the opinion the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed.

Of course the fear is that if a war came the applicant would exert activities such as were dealt with in [Schenck v. United States](#), 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The

notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free \*655 thought-not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the teachings of the Sermon on the Mount.

Mr. Justice BRANDEIS concurs in this opinion.

Mr. Justice SANFORD (dissenting).

I agree, in substance, with the views expressed by the Circuit Court of Appeals, and think its decree should be affirmed.

#### All Citations

279 U.S. 644, 49 S.Ct. 448 (Mem), 73 L.Ed. 889



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [March v. Mills](#), 1st Cir.(Me.), August 8, 2017

112 S.Ct. 2538

Supreme Court of the United States

R.A.V., Petitioner,

v.

CITY OF ST. PAUL, MINNESOTA.

No. 90-7675.

|

Argued Dec. 4, 1991.

|

Decided June 22, 1992.

### Synopsis

Person was charged with violating city ordinance prohibiting bias-motivated disorderly conduct. The District Court, Ramsey County, [Charles A. Flinn, Jr.](#), J., dismissed charge prior to trial on ground that ordinance censored expressive conduct in violation of First Amendment. City appealed. The Minnesota Supreme Court, [464 N.W.2d 507](#), reversed and remanded. Certiorari was granted. The Supreme Court, Justice [Scalia](#), held that ordinance was facially invalid under First Amendment.

Reversed and remanded.

Justice [White](#) filed an opinion concurring in the judgment in which Justice [Blackmun](#) and Justice [O'Connor](#) joined and in which Justice [Stevens](#) joined in part.

Justice [Blackmun](#) filed an opinion concurring in the judgment.

Justice [Stevens](#) filed an opinion concurring in the judgment in which Justice [White](#) and Justice [Blackmun](#) joined in part.

West Headnotes (9)

### [1] Federal Courts

🔑 State constitutions, statutes, regulations, and ordinances

In construing bias-motivated disorderly conduct ordinance, Supreme Court was bound by construction given to it by Minnesota Supreme Court and, accordingly, would accept Minnesota Supreme Court's authoritative statement that ordinance reached only those expressions that constituted "fighting words."

[31 Cases that cite this headnote](#)

### [2] Constitutional Law

🔑 Viewpoint or idea discrimination

First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of ideas expressed. [U.S.C.A. Const.Amend. 1.](#)

[266 Cases that cite this headnote](#)

### [3] Constitutional Law

🔑 Content-Based Regulations or Restrictions

Content-based regulations are presumptively invalid under First Amendment. [U.S.C.A. Const.Amend. 1.](#)

[310 Cases that cite this headnote](#)

### [4] Constitutional Law

🔑 "Fighting words"

### Constitutional Law

🔑 Defamation

### Constitutional Law

🔑 Obscenity in General

Categories of speech such as obscenity, defamation, and "fighting words" can, consistently with First Amendment, be regulated because of their constitutionally proscribable content; however, government may not regulate those areas based on hostility, or favoritism, towards nonproscribable message they contain. [U.S.C.A. Const.Amend. 1.](#)

[252 Cases that cite this headnote](#)

**[5] Constitutional Law**

## 🔑 “Fighting words”

Exclusion of “fighting words” from scope of First Amendment simply means that, for purposes of that Amendment, unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. [U.S.C.A. Const.Amend. 1](#).

[52 Cases that cite this headnote](#)

**[6] Constitutional Law**

## 🔑 “Fighting words”

Government may not regulate use of “fighting words” based on hostility or favoritism towards underlying message expressed. [U.S.C.A. Const.Amend. 1](#).

[43 Cases that cite this headnote](#)

**[7] Civil Rights**

## 🔑 Offenses

**Constitutional Law**

## 🔑 Bias or hate crimes

Ordinance which made it disorderly conduct for a person to place on public or private property a symbol, object, appellation, characterization or graffiti, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on basis of race, color, creed, religion or gender was facially unconstitutional under First Amendment; ordinance imposed special prohibitions on speakers who expressed views on disfavored subjects of race, color, creed, religion or gender while at the same time it permitted displays containing abusive invective if they were not addressed to those topics and, in its practical operation, went beyond mere content discrimination to actual viewpoint discrimination. [U.S.C.A. Const.Amend. 1](#).

[368 Cases that cite this headnote](#)

**[8] Civil Rights**

## 🔑 Offenses

**Constitutional Law**

## 🔑 Bias or hate crimes

Municipality's desire to communicate to minority groups that it did not condone “group hatred” of bias-motivated speech did not justify ordinance making it disorderly conduct to place on public or private property a symbol, object, appellation, characterization or graffiti known to arouse anger, alarm or resentment in others on basis of race, color, creed, religion or gender. [U.S.C.A. Const.Amend. 1](#).

[114 Cases that cite this headnote](#)

**[9] Civil Rights**

## 🔑 Offenses

**Constitutional Law**

## 🔑 Bias or hate crimes

Bias-motivated disorderly conduct ordinance's content discrimination was not justified on ground that ordinance was narrowly tailored to serve compelling state interest in ensuring basic human rights of groups historically discriminated against, since ordinance not limited to favored topics would have same beneficial effect. [U.S.C.A. Const.Amend. 1](#).

[63 Cases that cite this headnote](#)

*Syllabus*\*

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

\*377 After allegedly burning a cross on a black family's lawn, petitioner R.A.V. was charged under, *inter alia*, the St. Paul, Minnesota, Bias–Motivated Crime Ordinance, which prohibits the display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color,

creed, religion or gender.” The trial court dismissed this charge on the ground that the ordinance was substantially overbroad and impermissibly content based, but the State Supreme Court reversed. It rejected the overbreadth claim because the phrase “arouses anger, alarm or resentment in others” had been construed in earlier state cases to limit the ordinance's reach to “fighting words” within the meaning of this Court's decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 a category of expression unprotected by the First Amendment. The court also concluded that the ordinance was not impermissibly content based because it was narrowly tailored to serve a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.

*Held:* The ordinance is facially invalid under the First Amendment. Pp. 2542–2550.

(a) This Court is bound by the state court's construction of the ordinance as reaching only expressions constituting “fighting words.” However, R.A.V.'s request that the scope of the *Chaplinsky* formulation be modified, thereby invalidating the ordinance as substantially overbroad, need not be reached, since the ordinance unconstitutionally prohibits speech on the basis of the subjects the speech addresses. P. 2542.

(b) A few limited categories of speech, such as obscenity, defamation, and fighting words, may be regulated *because of their constitutionally proscribable content*. However, these categories are not entirely invisible to the Constitution, and government may not regulate them based on hostility, or favoritism, towards a nonproscribable message they contain. Thus the regulation of “fighting words” may not be based on nonproscribable content. It may, however, be underinclusive, addressing some offensive instances and leaving other, equally offensive, ones alone, so long as the selective prescription is not based on content, or there is no realistic possibility that regulation of ideas is afoot. Pp. 2542–2547.

\*378 c) The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of “race, color, creed, religion or gender.” At the same time, it

permits displays containing abusive invective if they are not addressed to those topics. Moreover, in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination. Displays containing “fighting words” that do not invoke the disfavored subjects would seemingly be useable *ad libitum* by those arguing in favor of racial, color, etc., tolerance and equality, but not by their opponents. St. Paul's desire to communicate to minority groups that it does not condone the “group hatred” of bias-motivated speech does not justify selectively silencing speech on the basis of its content. Pp. 2547–2548.

(d) The content-based discrimination reflected in the ordinance does not rest upon the very reasons why the particular class of speech at issue is proscribable, it is not aimed only at the “secondary effects” of \*\*2541 speech within the meaning of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, and it is not for any other reason the sort that does not threaten censorship of ideas. In addition, the ordinance's content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect. Pp. 2548–2550.

464 N.W.2d 507 (Minn.1991), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and KENNEDY, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined, and in which STEVENS, J., joined except as to Part I–A, *post*, p. 2550. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 2560. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which WHITE and BLACKMUN, JJ., joined, *post*, p. 2561.

#### Attorneys and Law Firms

*Edward J. Cleary* argued the cause for petitioner. With him on the briefs was *Michael F. Cromett*.

*Tom Foley* argued the cause for respondent. With him on the brief was *Steven C. DeCoster*.\*

\* Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by [Steven R. Shapiro](#), [John A. Powell](#), and [Mark R. Anfinson](#); for the Association of American Publishers et al. by [Bruce J. Ennie](#); and for the Center for Individual Rights by [Gary B. Born](#) and [Michael P. McDonald](#).

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by [Hubert H. Humphrey III](#), Attorney General of Minnesota, and [Richard S. Slowes](#), Assistant Attorney General, [Jimmy Evans](#), Attorney General of Alabama, [Grant Woods](#), Attorney General of Arizona, [Richard Blumenthal](#), Attorney General of Connecticut, and [John J. Kelly](#), Chief State's Attorney of Connecticut, [Larry EchoHawk](#), Attorney General of Idaho, [Roland W. Burris](#), Attorney General of Illinois, [Robert T. Stephan](#), Attorney General of Kansas, [J. Joseph Curran, Jr.](#), Attorney General of Maryland, [Scott Harshbarger](#), Attorney General of Massachusetts, [Frank J. Kelley](#), Attorney General of Michigan, [Robert J. Del Tufo](#), Attorney General of New Jersey, [Lee I. Fisher](#), Attorney General of Ohio, [Susan B. Loving](#), Attorney General of Oklahoma, [T. Travis Medlock](#), Attorney General of South Carolina, [Charles W. Burson](#), Attorney General of Tennessee, [Mary Sue Terry](#), Attorney General of Virginia, and [Paul Van Dam](#), Attorney General of Utah; for the Anti-Defamation League of B'nai B'rith by [Allen I. Saeks](#), [Jeffrey P. Sinensky](#), [Steven M. Freeman](#), and [Michael Lieberman](#); for the Asian American Legal Defense and Education Fund et al. by [Angelo N. Ancheta](#); for the Center for Democratic Renewal et al. by [Frank E. Deale](#); for the Criminal Justice Legal Foundation by [Kent S. Scheidegger](#) and [Charles L. Hobson](#); for the League of Minnesota Cities et al. by [Carla J. Heyl](#), [Robert J. Alfton](#), and [Jerome J. Segal](#); for the National Association for the Advancement of Colored People et al. by [Ronald D. Maines](#), [Dennis C. Hayes](#), [Willie Abrams](#), and [Kemp R. Harshman](#); for the National Black Women's Health Project by [Catharine A. MacKinnon](#) and [Burke Marshall](#); for the National Institute of Municipal Law Officers et al. by [Richard Ruda](#), [Michael J. Wahoske](#), and [Mark B. Rotenberg](#); and for People for the American Way by [Richard S. Hoffman](#), [Kevin J. Hasson](#), and [Elliot M. Minberg](#).

[Charles R. Sheppard](#) filed a brief for the Patriot's Defense Foundation, Inc., as *amicus curiae*.

## Opinion

\*379 Justice [SCALIA](#) delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished \*380 under any of a number of laws,<sup>1</sup> one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias–Motivated Crime Ordinance, St. Paul, Minn., Legis.Code § 292.02 (1990), which provides:

<sup>1</sup> The conduct might have violated Minnesota statutes carrying significant penalties. See, e.g., [Minn.Stat. § 609.713\(1\) \(1987\)](#) (providing for up to five years in prison for terroristic threats); § 609.563 (arson) (providing for up to five years and a \$10,000 fine, depending on the value of the property intended to be damaged); § 609.595 (Supp.1992) (criminal damage to property) (providing for up to one year and a \$3,000 fine, depending upon the extent of the damage to the property).

“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.”

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment.<sup>2</sup> The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases, see, e.g., [In re Welfare of S.L.J.](#), 263 N.W.2d 412 (Minn.1978), the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words,” i.e., “conduct that itself inflicts injury or tends to incite immediate violence ...,” [In re Welfare of R.A.V.](#), 464 N.W.2d 507, 510 (Minn.1991) (citing [Chaplinsky v. New Hampshire](#), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942)), and therefore the ordinance

reached only expression “that the first amendment does not protect,” 464 N.W.2d, at 511. The court also concluded that the ordinance was not impermissibly content based because, in its view, “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.” *Ibid.* \*\*2542 We granted certiorari, 501 U.S. 1204, 111 S.Ct. 2795, 115 L.Ed.2d 969 (1991).

- 2 Petitioner has also been charged, in Count I of the delinquency petition, with a violation of Minn.Stat. § 609.2231(4) (Supp.1990) (racially motivated assaults). Petitioner did not challenge this count.

## I

[1] In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339, 106 S.Ct. 2968, 2975–2976, 92 L.Ed.2d 266 (1986); *New York v. Ferber*, 458 U.S. 747, 769, n. 24, 102 S.Ct. 3348, 3361, n. 24, 73 L.Ed.2d 1113 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895–896, 93 L.Ed. 1131 (1949). 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*. 464 N.W.2d, at 510–511. Petitioner and his *amici* urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as “substantially overbroad,” *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914–2915, 37 L.Ed.2d 830 (1973). We find it unnecessary to consider this issue. Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the “fighting words” doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.<sup>3</sup>

- 3 Contrary to Justice WHITE's suggestion, *post*, at 2550–2551, n. 1, petitioner's claim is “fairly included” within the questions presented in the petition for certiorari, see this Court's Rule 14.1(a). It was clear from the petition and from petitioner's other filings in this Court (and in the courts below) that his assertion that the St. Paul ordinance “violat [es] overbreadth ... principles of the First Amendment,” Pet. for Cert. i, was *not* just a technical “overbreadth”

claim—*i.e.*, a claim that the ordinance violated the rights of too many third parties—but included the contention that the ordinance was “overbroad” in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based. An important component of petitioner's argument is, and has been all along, that narrowly construing the ordinance to cover only “fighting words” cannot cure this fundamental defect. *Id.*, at 12, 14, 15–16. In his briefs in this Court, petitioner argued that a narrowing construction was ineffective because (1) its boundaries were vague, Brief for Petitioner 26, and because (2) denominating particular expression a “fighting word” because of the impact of its ideological content upon the audience is inconsistent with the First Amendment, Reply Brief for Petitioner 5; *id.*, at 13 (“[The ordinance] is overbroad, *viewpoint discriminatory* and vague as ‘narrowly construed’ ”) (emphasis added). At oral argument, counsel for petitioner reiterated this second point: “It is ... one of my positions, 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 message, and making that clear through the State.” Tr. of Oral Arg. 8. In resting our judgment upon this contention, we have not departed from our criteria of what is “fairly included” within the petition. See *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382, n. 6, 103 S.Ct. 1905, 1911–1912, n. 6, 76 L.Ed.2d 1 (1983); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94, n. 9, 103 S.Ct. 416, 421, n. 9, 74 L.Ed.2d 250 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 113, n. 9, 102 S.Ct. 869, 876, n. 9, 71 L.Ed.2d 1 (1982); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 361 (6th ed. 1986).

\*382 [2] [3] The First Amendment generally prevents government from proscribing speech, see, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 309–311, 60 S.Ct. 900, 905–906, 84 L.Ed. 1213 (1940), or even expressive conduct, see, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991) *id.*, at 124, 112 S.Ct., at 512–513 (KENNEDY, J., concurring in judgment); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332–2333, 65 L.Ed.2d 319 (1980); *Police Dept. of Chicago v.*

*Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289–2290, 33 L.Ed.2d 212 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of \*\*2543 speech in a \*383 few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky, supra*, 315 U.S., at 572, 62 S.Ct. at 762. We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (defamation); *Chaplinsky v. New Hampshire, supra* (“fighting” words”); see generally *Simon & Schuster, supra*, 502 U.S., at 124, 112 S.Ct., at 513–514 (KENNEDY, J., concurring in judgment). Our decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); see generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13–17, 110 S.Ct. 2695, 2702–2705, 111 L.Ed.2d 1 (1990), and for obscenity, see *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

[4] We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” *Roth, supra*, 354 U.S., at 483, 77 S.Ct., at 1308; *Beauharnais, supra*, 343 U.S., at 266, 72 S.Ct., at 735; *Chaplinsky, supra*, 315 U.S., at 571–572, 62 S.Ct., at 768–769; or that the “protection of the First Amendment does not extend” to them, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124, 109 S.Ct. 2829, 2835, 106 L.Ed.2d 93 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all,” Sunstein, *Pornography and the First Amendment*, 1986 *Duke L.J.* 589, 615, n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories

of speech entirely invisible to the Constitution, so that they may be made the vehicles for \*384 content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. We recently acknowledged this distinction in *Ferber*, 458 U.S., at 763, 102 S.Ct., at 3357–3358, where, in upholding New York’s child pornography law, we expressly recognized that there was no “question here of censoring a particular literary theme....” See also *id.*, at 775, 102 S.Ct., at 3364 (O’CONNOR, J., concurring) (“As drafted, New York’s statute does not attempt to suppress the communication of particular ideas”).

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government “may regulate [them] freely,” *post*, at 2552 (WHITE, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.<sup>4</sup> It is \*385 not true that “fighting words” have at most a “*de minimis*” expressive content, *ibid.*, or that their content is *in all respects* “worthless and undeserving of constitutional protection,” *post*, at 2553; sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no essential part of any exposition of ideas.” *Chaplinsky, supra*, 315 U.S., at 572, 62 S.Ct., at 769 (emphasis added).

4 Justice WHITE concedes that a city council cannot prohibit only those legally obscene works that contain criticism of the city government, *post*, at 2555, but asserts that to be the consequence, not of the First Amendment, but of the Equal Protection Clause. Such content-based discrimination would not, he asserts, “be rationally related to a legitimate government interest.” *Ibid.* But of course the only reason that government interest is not a “legitimate” one is that it violates the First Amendment. This Court itself has occasionally fused the First Amendment into the Equal Protection Clause in this fashion, but at least with the acknowledgment (which

Justice WHITE cannot afford to make) that the First Amendment underlies its analysis. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289–2290, 33 L.Ed.2d 212 (1972) (ordinance prohibiting only nonlabor picketing violated the Equal Protection Clause because there was no “appropriate governmental interest” supporting the distinction inasmuch as “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). See generally *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124, 112 S.Ct. 501, 512, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment).

Justice STEVENS seeks to avoid the point by dismissing the notion of obscene antigovernment speech as “fantastical,” *post*, at 2562, apparently believing that any reference to politics prevents a finding of obscenity. Unfortunately for the purveyors of obscenity, that is obviously false. A shockingly hardcore pornographic movie that contains a model sporting a political tattoo can be found, “*taken as a whole*, [to] lac[k] serious literary, artistic, political, or scientific value,” *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614–2615, 37 L.Ed.2d 419 (1973) (emphasis added). Anyway, it is easy enough to come up with other illustrations of a content-based restriction upon “unprotected speech” that is obviously invalid: the anti-government libel illustration mentioned earlier, for one. See *supra*, at 2543. And of course the concept of racist fighting words is, unfortunately, anything but a “highly speculative hypotheticala[l],” *post*, at 2562.

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. See *Johnson*, 491 U.S., at 406–407, 109 S.Ct., at 2540–2541. See also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569–570, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (plurality opinion); *id.*, at 573–574, 111 S.Ct., at 2464–2465 (SCALIA, J., concurring in judgment); *id.*, at 581–582, 111 S.Ct., at 2468–2469 (SOUTER, J., concurring

in judgment); *United States v. O'Brien*, 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678–1679, 20 L.Ed.2d 672 (1968). Similarly, we have upheld reasonable “time, place, or manner” restrictions, but only if they are “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753–2754, 105 L.Ed.2d 661 (1989) (internal quotation marks omitted); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984) (noting that the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

**\*\*2545 [5] [6]** In other words, the exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech,” *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed. Compare *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (invalidating a ban on residential picketing that exempted labor picketing).<sup>5</sup>

<sup>5</sup> Although Justice WHITE asserts that our analysis disregards “established principles of First Amendment law,” *post*, at 2560, he cites not a single case (and we are aware of none) that even involved, much less considered and resolved, the issue of content discrimination through regulation of “unprotected” speech—though we plainly *recognized* that as an issue in *New York v. Ferber*, 458 U.S.

747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.

\*387 The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be “underinclusiv[e],” *post*, at 2553 (WHITE, J., concurring in judgment)—a First Amendment “absolutism” whereby “[w]ithin a particular ‘proscribable’ category of expression, ... a government must either proscribe *all* speech or no speech at all,” *post*, at 2562 (STEVENS, J., concurring in judgment). That easy target is of the concurrences’ own invention. In our view, the First Amendment imposes not an “underinclusiveness” limitation but a “content discrimination” limitation upon a State’s prohibition of proscribable speech. There is no problem whatever, for example, with a State’s prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be “underinclusive,” it would not discriminate on the basis of content. See, e.g., *Sable Communications*, 492 U.S., at 124–126, 109 S.Ct., at 2835–2836 (upholding 47 U.S.C. § 223(b)(1), which prohibits obscene *telephone* communications).

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 “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,” *Simon & Schuster*, 502 U.S., at 116, 112 S.Ct., at 508; *Leathers v. Medlock*, 499 U.S. 439, 448, 111 S.Ct. 1438, 1444, 113 L.Ed.2d 494 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383–384, 104 S.Ct. 3106, 3119–3120, 82 L.Ed.2d 278 (1984); *Consolidated Edison Co.*, 447 U.S., at 536, 100 S.Ct., at 2333; \*388 *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95–98, 92 S.Ct., at 2289–2292. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having

been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within \*\*2546 the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See *Kucharek v. Hanaway*, 902 F.2d 513, 517 (CA7 1990), cert. denied, 498 U.S. 1041, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969) (upholding the facial validity of § 871 because of the “overwhelm[ing] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence”). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice STEVENS, *post*, at 2563–2564), a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–772, 96 S.Ct. 1817, 1830–1831, 48 L.Ed.2d 346 (1976)) is in its view greater there. Cf. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (state regulation of airline advertising); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (state regulation of lawyer advertising). But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion. See, e.g., *Los Angeles Times*, Aug. 8, 1989, section 4, p. 6, col. 1.

Another valid basis for according differential treatment to even a content-defined subclass of 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,” *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting, with emphasis, *Virginia State Bd. of Pharmacy, supra*, 425 U.S., at 771, 96 S.Ct., at 1830); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 2453, n. 34, 49 L.Ed.2d 310 (1976) (plurality opinion); *id.*, at 80–82, 96 S.Ct., at 2457–2458 (Powell, J., concurring); *Barnes*, 501 U.S., at 586, 111 S.Ct., at 2470–2471 (SOUTER, J., concurring in judgment). A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. See *id.*, at 571, 111 S.Ct., at 2463 (plurality opinion); *id.*, at 577, 111 S.Ct., at 2466 (SCALIA, J., concurring in judgment); *id.*, at 582, 111 S.Ct., at 2468–2469 (SOUTER, J., concurring in judgment); *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 425–432, 110 S.Ct. 768, 776–780, 107 L.Ed.2d 851 (1990); *O’Brien*, 391 U.S., at 376–377, 88 S.Ct., at 1678–1679. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e–2; 29 CFR § 1604.11 (1991). See also \*390 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not \*\*2547 shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is “even arguably ‘conditioned upon the sovereign’s agreement with what a speaker may intend to say.’ ” *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555, 101 S.Ct. 2882, 2917, 69 L.Ed.2d 800 (1981) (STEVENS, J., dissenting in part) (citation omitted). There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular “neutral” basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that

limitation, the regulation of “fighting words,” like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone. See *Posadas de Puerto Rico*, 478 U.S., at 342–343, 106 S.Ct., at 2977–2978.<sup>6</sup>

6 Justice STEVENS cites a string of opinions as supporting his assertion that “selective regulation of speech based on content” is not presumptively invalid. *Post*, at 2563–2564. Analysis reveals, however, that they do not support it. To begin with, three of them did not command a majority of the Court, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63–73, 96 S.Ct. 2440, 2448–2454, 49 L.Ed.2d 310 (1976) (plurality opinion); *FCC v. Pacifica Foundation*, 438 U.S. 726, 744–748, 98 S.Ct. 3026, 3037–3040, 57 L.Ed.2d 1073 (1978) (plurality opinion); *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion), and two others did not even discuss the First Amendment, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946). In any event, all that their contents establish is what we readily concede: that presumptive invalidity does not mean invariable invalidity, leaving room for such exceptions as reasonable and viewpoint-neutral content-based discrimination in nonpublic forums, see *Lehman, supra*, 418 U.S., at 301–304, 94 S.Ct., at 2716–2718; see also *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985), or with respect to certain speech by government employees, see *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); see also *Civil Service Comm’n v. Letter Carriers*, 413 U.S. 548, 564–567, 93 S.Ct. 2880, 2889–2891, 37 L.Ed.2d 796 (1973).

### \*391 II

[7] [8] Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting

words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. See *Simon & Schuster*, 502 U.S., at 116, 112 S.Ct., at 508; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229–230, 107 S.Ct. 1722, 1727–1728, 95 L.Ed.2d 209 (1987).

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—\*\*2548 aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all “anti-Catholic \*392 bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

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.” 464 N.W.2d, at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that “[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,” *id.*, at 508, but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general “fighting words” law would not meet the city's needs because only

a content-specific measure can communicate to minority groups that the “group hatred” aspect of such speech “is not condoned by the majority.” Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice STEVENS suggests that this “fundamentally misreads” the ordinance. *Post*, at 2570. It is directed, he claims, not to speech of a particular content, but to particular “injur[ies]” that are “qualitatively different” from other injuries. *Post*, at 2565. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is \*393 nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to “racial, religious, or gender-specific symbols” such as “a burning cross, Nazi swastika or other instrumentality of like import.” Brief for Respondent 8. Indeed, St. Paul argued in the Juvenile Court that “[t]he burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.” Memorandum from the Ramsey County Attorney to the Honorable Charles A. Flinn, Jr., dated July 13, 1990, in *In re Welfare of R.A.V.*, No. 89–D–1231 (Ramsey Cty. Juvenile Ct.), p. 1, reprinted in App. to Brief for Petitioner C–1.

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, see *supra*, at 2545, 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 **\*\*2549** embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting **\*394** words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the “secondary effects” of the speech, see *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). According to St. Paul, the ordinance is intended, “not to impact on [*sic*] the right of free expression of the accused,” but rather to “protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.” Brief for Respondent 28. Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), “Listeners' reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*.” *Id.*, at 321, 108 S.Ct., at 1163–1164. “The emotive impact of speech on its audience is not a ‘secondary effect.’” *Ibid.* See also *id.*, at 334, 108 S.Ct., at 1170–1171. (opinion of Brennan, J.).<sup>7</sup>

<sup>7</sup> St. Paul has not argued in this case that the ordinance merely regulates that subclass of fighting words which is most likely to provoke a violent response. But even if one assumes (as appears unlikely) that the categories selected may be so described, that would not justify selective regulation under a “secondary effects” theory. The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message;

because the “chain of causation” thus *necessarily* “run[s] through the persuasive effect of the expressive component” of the conduct, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586, 111 S.Ct. 2456, 2470, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment), it is clear that the St. Paul ordinance regulates on the basis of the “primary” effect of the speech—*i.e.*, its persuasive (or repellant) force.

**\*395** It hardly needs discussion that the ordinance does not fall within some more general exception permitting *all* selectivity that for any reason is beyond the suspicion of official suppression of ideas. The statements of St. Paul in this very case afford ample basis for, if not full confirmation of, that suspicion.

[9] Finally, St. Paul and its *amici* defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the “danger of censorship” presented by a facially content-based statute, *Leathers v. Medlock*, 499 U.S., at 448, 111 S.Ct., at 1444, requires that that weapon be employed only where it is “*necessary* to serve the asserted [compelling] interest,” *Burson v. Freeman*, 504 U.S. 191, 199, 112 S.Ct. 1846, 1852, 119 L.Ed.2d 5 (1992) (plurality opinion) (emphasis **\*\*2550** added); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 954–955, 74 L.Ed.2d 794 (1983). The existence of adequate content-neutral alternatives thus “undercut[s] significantly” any defense of such a statute, *Boos v. Barry, supra*, 485 U.S., at 329, 108 S.Ct., at 1168, casting considerable doubt on the government's protestations that “the asserted justification is in fact an accurate description of the purpose and effect of the law,” *Burson, supra*, 504 U.S., at 213, 112 S.Ct., at 1859 (KENNEDY, J., concurring). See *Boos, supra*, 485 U.S., at 324–329, 108 S.Ct., at 1165–1168; cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586–587, 103 S.Ct. 1365, 1372–1373, 75 L.Ed.2d 295 (1983). The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling **\*396** 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.<sup>8</sup> That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

<sup>8</sup> A plurality of the Court reached a different conclusion with regard to the Tennessee anti-electioneering statute considered earlier this Term in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). In light of the “logical connection” between electioneering and the State's compelling interest in preventing voter intimidation and election fraud—an inherent connection borne out by a “long history” and a “widespread and time-tested consensus,” *id.*, at 206, 208, n. 10, 211, 112 S.Ct., at 1855, 1856, n. 10, 1857–1858—the plurality concluded that it was faced with one of those “rare case[s]” in which the use of a facially content-based restriction was justified by interests unrelated to the suppression of ideas, *id.*, at 211, 112 S.Ct., at 1857–1858; see also *id.*, at 213, 112 S.Ct., at 1858–1859 (KENNEDY, J., concurring). Justice WHITE and Justice STEVENS are therefore quite mistaken when they seek to convert the *Burson* plurality's passing comment that “[t]he First Amendment does not require States to regulate for problems that do not exist,” *id.*, at 207, 112 S.Ct., at 1856, into endorsement of the revolutionary proposition that the suppression of particular ideas can be justified when only those ideas have been a source of trouble in the past. *Post*, at 2555 (WHITE, J., concurring in judgment); *post*, at 2570 (STEVENS, J., concurring in judgment).

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Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

\*397 Justice WHITE, with whom Justice BLACKMUN and Justice O'CONNOR join, and with whom Justice STEVENS joins except as to Part I–A, concurring in the judgment.

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

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment. See Part II, *infra*. Instead, “find[ing] it unnecessary” to consider the questions upon which we granted review,<sup>1</sup> *ante*, at 2542, the \*398 Court holds the \*\*2551 ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), which was joined by two of the five Justices in the majority in the present case.

<sup>1</sup> The Court granted certiorari to review the following questions:

“1. May a local government enact a content-based, ‘hate-crime’ ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?”

“2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, like that used to save the vague and overbroad content-neutral laws, restricting its application to ‘fighting words’ or ‘imminent lawless action?’ ” Pet. for Cert. i.

It has long been the rule of this Court that “[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.” This Court's Rule 14.1(a). This Rule has served to focus the issues presented for review. But the majority reads the Rule so expansively

that any First Amendment theory would appear to be “fairly included” within the questions quoted above.

Contrary to the impression the majority attempts to create through its selective quotation of petitioner's briefs, see *ante*, at 2542, n. 3, petitioner did not present to this Court or the Minnesota Supreme Court anything approximating the novel theory the majority adopts today. Most certainly petitioner did not “reiterat[e]” such a claim at argument; he responded to a question from the bench, Tr. of Oral Arg. 8. Previously, this Court has shown the restraint to refrain from deciding cases on the basis of its own theories when they have not been pressed or passed upon by a state court of last resort. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 217–224, 103 S.Ct. 2317, 2321–2325, 76 L.Ed.2d 527 (1983).

Given this threshold issue, it is my view that the Court lacks jurisdiction to decide the case on the majority rationale. Cf. *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382, n. 6, 103 S.Ct. 1905, 1911, n. 6, 76 L.Ed.2d 1 (1983). Certainly the preliminary jurisdictional and prudential concerns are sufficiently weighty that we would never have granted certiorari had petitioner sought review of a question based on the majority's decisional theory.

This Court ordinarily is not so eager to abandon its precedents. Twice within the past month, the Court has declined to overturn longstanding but controversial decisions on questions of constitutional law. See *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). In each case, we had the benefit of full briefing on the critical issue, so that the parties and *amici* had the opportunity to apprise us of the impact of a change in the law. And in each case, the Court declined to abandon its precedents, invoking the principle of *stare decisis*. *Allied-Signal, Inc.*, *supra*, 504 U.S., at 783–786, 112 S.Ct., at 2261; *Quill Corp.*, *supra*, 504 U.S., at 317–318, 112 S.Ct., at 1915–1916.

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

\*399 I

A

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), made the point in the clearest possible terms:

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them \*\*2552 is clearly outweighed by the social interest in order and morality.” *Id.*, at 571–572, 62 S.Ct., at 769.

See also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984) (citing *Chaplinsky* ).

Thus, as the majority concedes, see *ante*, at 2543, this Court has long held certain discrete categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts “fire” in a crowded theater may not claim the protection of the First Amendment. *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 764, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113 (1982); *Miller v. California*, 413 U.S. 15, 20, 93 S.Ct. 2607, 2612, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 484–485, 77 S.Ct. 1304, 1308–1309, 1 L.Ed.2d 1498 (1957). And 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.” *Ferber, supra*, 458 U.S., at 763, 102 S.Ct., at 3358 (citations omitted).

\*400 All of these categories are content based. But the Court has held that the First Amendment does not apply to them because their expressive content is worthless or of *de minimis* value to society. *Chaplinsky, supra*, 315 U.S., at 571–572, 62 S.Ct., at 768–769. 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.” *Ferber, supra*, 458 U.S., at 763–764, 102 S.Ct., at 3358–3359; *Bigelow v. Virginia*, 421 U.S. 809, 819, 95 S.Ct. 2222, 2231, 44 L.Ed.2d 600 (1975). This categorical approach 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.<sup>2</sup>

<sup>2</sup> “In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance.” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504–505, 104 S.Ct. 1949, 1961–1962, 80 L.Ed.2d 502 (1984).

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are “not within the area of constitutionally protected speech.” *Roth, supra*, 354 U.S., at 483, 77 S.Ct., at 1308. See *ante*, at 2543, citing *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919 (1952); *Chaplinsky, supra*, 315 U.S., at 571–572, 62 S.Ct., at 768–769; *Bose Corp., supra*, 466 U.S., at 504, 104 S.Ct., at 1961; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124, 109 S.Ct. 2829, 2835, 106 L.Ed.2d 93 (1989). The present Court submits that such clear statements “must be taken in context” and are not “literally true.” *Ante*, at 2543.

To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence. Indeed, the Court in *Roth* reviewed the guarantees of freedom of expression in effect at the time of the ratification of the Constitution and concluded, “In light of this history, it is apparent that the unconditional phrasing of the First Amendment was \*401 not intended to protect every utterance.” 354 U.S., at 482–483, 77 S.Ct., at 1308.

In its decision today, the Court points to “[n]othing ... in this Court's precedents warrant[ing] disregard of this longstanding tradition.” *Burson*, 504 U.S., at 216, 112 S.Ct., at 1860 (SCALIA, J., concurring in judgment); \*\*2553 *Allied-Signal, Inc., supra*, 504 U.S., at 783, 112 S.Ct., at 2261. Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.” *Ante*, at 2545. Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: “Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.” *Ante*, at 2543. It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, *Ferber, supra*, 458 U.S., at 763–764, 102 S.Ct., at 3358–3359; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.

The majority's observation that fighting words are “quite expressive indeed,” *ante*, at 2544, is no answer. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. *Chaplinsky*, 315 U.S., at 572, 62 S.Ct., at 769. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. See *ante*, at 2545.

\*402 Therefore, the Court's insistence on inventing its brand of First Amendment underinclusiveness puzzles me.<sup>3</sup> The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression, *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973); *Osborne v. Ohio*, 495 U.S.

103, 112, n. 8, 110 S.Ct. 1691, 1697, n. 8, 109 L.Ed.2d 98 (1990); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985); *Ferber, supra*, 458 U.S., at 772, 102 S.Ct., at 3362, but the Court's new "underbreadth" creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms, see *Ferber, supra*, at 763–764, 102 S.Ct., at 3358–3359; *Chaplinsky, supra*, 315 U.S., at 571–572, 62 S.Ct., at 768–769, until the city of St. Paul cures the underbreadth by adding to its ordinance a catchall phrase such as "and all other fighting words that may constitutionally be subject to this ordinance."

<sup>3</sup> The assortment of exceptions the Court attaches to its rule belies the majority's claim, see *ante*, at 2545, that its new theory is truly concerned with content discrimination. See Part I–C, *infra* (discussing the exceptions).

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.<sup>4</sup> Indeed, by characterizing fighting words as a form of "debate," **\*2554** *ante*, at 2548, the majority legitimates hate speech as a form of public discussion.

<sup>4</sup> This does not suggest, of course, that cross burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 445, 89 S.Ct. 1827, 1828, 23 L.Ed.2d 430 (1969). But in such a context, the cross burning could not be characterized as a "direct personal insult or an invitation to exchange fisticuffs," *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 2542, 105 L.Ed.2d 342 (1989), to which the fighting words doctrine, see Part II, *infra*, applies.

**\*403** Furthermore, the Court obscures the line between speech that could be regulated freely on the basis of content (*i.e.*, the narrow categories of expression falling outside the First Amendment) and that which could be regulated on the basis of content only upon a showing of a compelling state interest (*i.e.*, all remaining expression). By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing

with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category. See *Burson v. Freeman, supra*, at 196, 112 S.Ct., at 1849–1850; *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 222–223, 109 S.Ct. 1013, 1019–1020, 103 L.Ed.2d 271 (1989).

## B

In a second break with precedent, the Court refuses to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expression. Assuming, *arguendo*, that the St. Paul ordinance is a content-based regulation of protected expression, it nevertheless would pass First Amendment review under settled law upon a showing that the regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209 (1987)). St. Paul has urged that its ordinance, in the words of the majority, "helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination...." *Ante*, at 2549. The Court expressly concedes that this interest is compelling and is promoted by the ordinance. *Ibid.* Nevertheless, the Court treats strict scrutiny analysis as irrelevant to the constitutionality of the legislation:

"The dispositive question ... is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not **\*404** limited to the favored topics, for example, would have precisely the same beneficial effect." *Ante*, at 2550.

Under the majority's view, a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis.<sup>5</sup>

<sup>5</sup> The majority relies on *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), in arguing that the availability of content-neutral alternatives

“ ‘undercut[s] significantly’ ” a claim that content-based legislation is “ ‘necessary to serve the asserted [compelling] interest.’ ” *Ante*, at 2550 (quoting *Boos, supra*, at 329, 108 S.Ct., at 1168, and *Burson v. Freeman*, 504 U.S. 191, 199, 112 S.Ct. 1846, 1852, 119 L.Ed.2d 5 (plurality opinion)). *Boos* does not support the majority's analysis. In *Boos*, Congress already had decided that the challenged legislation was not necessary, and the Court pointedly deferred to this choice. 485 U.S., at 329, 108 S.Ct., at 1168. St. Paul lawmakers have made no such legislative choice.

Moreover, in *Boos*, the Court held that the challenged statute was not narrowly tailored because a less restrictive alternative was available. *Ibid.* But the Court's analysis today turns *Boos* inside-out by substituting the majority's policy judgment that a *more* restrictive alternative could adequately serve the compelling need identified by St. Paul lawmakers. The result would be: (a) a statute that was not tailored to fit the need identified by the government; and (b) a greater restriction on fighting words, even though the Court clearly believes that fighting words have protected expressive content. *Ante*, at 2543–2544.

This abandonment of the doctrine is inexplicable in light of our decision in *Burson v. Freeman, supra*, which was handed down just a month ago.<sup>6</sup> In *Burson*, seven of the \*\*2555 eight participating Members of the Court agreed that the strict scrutiny standard applied in a case involving a First Amendment challenge to a content-based statute. See *id.*, at 198, 112 S.Ct., at 1851; \*405 *id.*, at 217, 112 S.Ct., at 1861 (STEVENS, J., dissenting).<sup>7</sup> The statute at issue prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The plurality concluded that the legislation survived strict scrutiny because the State had asserted a compelling interest in regulating electioneering near polling places and because the statute at issue was narrowly tailored to accomplish that goal. *Id.*, at 208–210, 112 S.Ct., at 1856–1857.

<sup>6</sup> Earlier this Term, seven of the eight participating Members of the Court agreed that strict scrutiny analysis applied in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991), in which we struck down New York's “Son of Sam” law, which required “that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account.” *Id.*, at 108, 112 S.Ct., at 504.

<sup>7</sup> The *Burson* dissenters did not complain that the plurality erred in applying strict scrutiny; they objected that the plurality was not sufficiently rigorous in its review. 504 U.S., at 225–226, 112 S.Ct., at 1865 (STEVENS, J., dissenting).

Significantly, the statute in *Burson* did not proscribe all speech near polling places; it restricted only political speech. *Id.*, at 197, 112 S.Ct., at 1850. The *Burson* plurality, which included THE CHIEF JUSTICE and Justice KENNEDY, concluded that the distinction between types of speech required application of strict scrutiny, but it squarely rejected the proposition that the legislation failed First Amendment review because it could have been drafted in broader, content-neutral terms:

“States adopt laws to address the problems that confront them. *The First Amendment does not require States to regulate for problems that do not exist.*” *Id.*, at 207, 112 S.Ct., at 1856 (emphasis added).

This reasoning is in direct conflict with the majority's analysis in the present case, which leaves two options to lawmakers attempting to regulate expressions of violence: (1) enact a sweeping prohibition on an entire class of speech (thereby requiring “regulat[ion] for problems that do not exist”); or (2) not legislate at all.

Had the analysis adopted by the majority in the present case been applied in *Burson*, the challenged election law would have failed constitutional review, for its content-based distinction between political and nonpolitical speech could not have been characterized as “reasonably necessary,” \*406 *ante*, at 2550, to achieve the State's interest in regulating polling place premises.<sup>8</sup>

<sup>8</sup> Justice SCALIA concurred in the judgment in *Burson*, reasoning that the statute, “though content based, is constitutional [as] a reasonable, viewpoint-neutral regulation of a nonpublic forum.” *Id.*, at 214, 112 S.Ct., at 1859. However, nothing in his reasoning in the present case suggests that a content-based ban on fighting words would be constitutional were that ban limited to nonpublic fora. Taken together, the two opinions suggest that, in some settings, political speech, to which “the First Amendment ‘has its fullest and most urgent application,’ ” is entitled to less constitutional protection than fighting words. *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271

(1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971)).

As with its rejection of the Court's categorical analysis, the majority offers no reasoned basis for discarding our firmly established strict scrutiny analysis at this time. The majority appears to believe that its doctrinal revisionism is necessary to prevent our elected lawmakers from prohibiting libel against members of one political party but not another and from enacting similarly preposterous laws. *Ante*, at 2543. The majority is misguided.

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,” **\*\*2556** *ibid.*, would unquestionably fail rational-basis review.<sup>9</sup>

<sup>9</sup> 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. *Ante*, at 2543–2544, n. 4. While decisions such as *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), recognize that First Amendment principles may be relevant to an equal protection claim challenging distinctions that impact on protected expression, *id.*, at 95–99, 92 S.Ct., at 2289–2292, 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.

**\*407** Turning to the St. Paul ordinance and assuming, *arguendo*, as the majority does, that the ordinance is not constitutionally overbroad (but see Part II, *infra*), there is no question that it would pass equal protection review. The ordinance proscribes a subset of “fighting words,” those that injure “on the basis of race, color, creed, religion or gender.” This selective regulation reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed, as the

majority concedes, the interest is compelling. *Ante*, at 2549–2550.

## C

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, see *post*, at 2560–2561 (BLACKMUN, J., concurring in judgment), or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law.

For instance, if the majority were to give general application to the rule on which it decides this case, today's decision would call into question the constitutionality of the statute making it illegal to threaten the life of the President. 18 U.S.C. § 871. See *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*). Surely, this statute, by singling out certain threats, incorporates a content-based distinction; it indicates that the Government especially disfavors threats against the President as opposed to threats against all others. **\*408**

<sup>10</sup> See *ante*, at 2547. But because the Government could prohibit all threats and not just those directed against the President, under the Court's theory, the compelling reasons justifying the enactment of special legislation to safeguard the President would be irrelevant, and the statute would fail First Amendment review.

<sup>10</sup> Indeed, such a law is content based in and of itself because it distinguishes between threatening and nonthreatening speech.

To save the statute, the majority has engrafted the following exception onto its newly announced First Amendment rule: Content-based distinctions may be drawn within an unprotected category of speech if the basis for the distinctions is “the very reason the entire class of speech at issue is proscribable.” *Ante*, at 2545. Thus, the argument goes, the statute making it illegal to threaten the life of the President is constitutional, “since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.” *Ante*, at 2546.

The exception swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since “the reasons why [fighting words] are outside the First Amendment ... have special force when applied to [groups that have historically been subjected to discrimination].”

To avoid the result of its own analysis, the Court suggests that fighting words are simply **\*\*2557** a mode of communication, rather than a content-based category, and that the St. Paul ordinance has not singled out a particularly objectionable mode of communication. *Ante*, at 2544, 2548. Again, the majority confuses the issue. A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, *Chaplinsky*, 315 U.S., at 572, 62 S.Ct., at 769, a message that is at its ugliest when directed against groups **\*409** that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.

As its second exception, the Court posits that certain content-based regulations will survive under the new regime if the regulated subclass “happens to be associated with particular ‘secondary effects’ of the speech ...,” *ante*, at 2546, which the majority treats as encompassing instances in which “words can ... violate laws directed not against speech but against conduct ...” *ibid.* <sup>11</sup> Again, there is a simple explanation for the Court's eagerness to craft an exception to its new First Amendment rule: Under the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional.

<sup>11</sup> The consequences of the majority's conflation of the rarely used secondary effects standard and the *O'Brien* test for conduct incorporating “speech” and “nonspeech” elements, see generally *United States v. O'Brien*, 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678–1679, 20 L.Ed.2d 672 (1968), present another question that I fear will haunt us and the lower courts in the aftermath of the majority's opinion.

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate “because of [an] individual's race, color, religion, sex, or national origin,” 42 U.S.C. § 2000e–2(a) (1), and the regulations covering hostile workplace claims forbid “sexual harassment,” which includes “[u]nwelcome sexual advances, requests for sexual favors, and other

verbal or physical conduct of a sexual nature” that create “an intimidating, hostile, or offensive working environment,” 29 CFR § 1604.11(a) (1991). The regulation does not prohibit workplace harassment generally; it focuses on what the majority would characterize as the “disfavored topi[c]” of sexual harassment. *Ante*, at 2547. In this way, Title VII is similar to the St. Paul ordinance that the majority condemns because it “impose[s] special prohibitions on those speakers who express views on disfavored subjects.” *Ibid.* Under the broad principle the Court uses to decide the present case, **\*410** hostile work environment claims based on sexual harassment should fail First Amendment review; because a general ban on harassment in the workplace would cover the problem of sexual harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment.

Hence, the majority's second exception, which the Court indicates would insulate a Title VII hostile work environment claim from an underinclusiveness challenge because “sexually derogatory ‘fighting words’ ... may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.” *Ante*, at 2546. But application of this exception to a hostile work environment claim does not hold up under close examination.

First, the hostile work environment regulation is not keyed to the presence or absence of an economic *quid pro quo*, *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986), but to the impact of the speech on the victimized worker. Consequently, the regulation would no more fall within a secondary effects exception than does the St. Paul ordinance. *Ante*, at 2549. Second, the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working environment, which reaches beyond any “incidental” effect on speech. *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968). If the relationship between the broader statute and specific **\*\*2558** regulation is sufficient to bring the Title VII regulation within *O'Brien*, then all St. Paul need do to bring its ordinance within this exception is to add some prefatory language concerning discrimination generally.

As to the third exception to the Court's theory for deciding this case, the majority concocts 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. This final exception would apply in cases in which "there is no realistic possibility that official suppression of ideas is afoot." *Ante*, at 2547. As I have demonstrated, \*411 this case does not concern the official suppression of ideas. See *supra*, at 2552–2553. The majority discards this notion out of hand. *Ante*, at 2549.

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.

## II

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

We have emphasized time and again that overbreadth doctrine is an exception to the established principle that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S., at 610, 93 S.Ct., at 2915; *Brockett v. Spokane Arcades, Inc.*, 472 U.S., at 503–504, 105 S.Ct., at 2801–2802. A defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. This is because "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Broadrick, supra*, 413 U.S., at 612, 93 S.Ct., at 2916; *Osborne v. Ohio*, 495 U.S., at 112, n. 8, 110 S.Ct., at 1697, n. 8; *New York v. Ferber*, 458 U.S., at 768–769, 102 S.Ct. at 3360–3361; *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980); *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972).

However, we have consistently held that, because overbreadth analysis is "strong medicine," it may be

invoked to strike an entire statute only when the overbreadth of the statute is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," \*412 *Broadrick*, 413 U.S., at 615, 93 S.Ct., at 2917, and when the statute is not susceptible to limitation or partial invalidation, *id.*, at 613, 93 S.Ct., at 2916; *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2571, 96 L.Ed.2d 500 (1987). "When a federal court is dealing with a federal statute challenged as overbroad, it should ... construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction." *Ferber*, 458 U.S., at 769, n. 24, 102 S.Ct., at 3361, n. 24. Of course, "[a] state court is also free to deal with a state statute in the same way." *Ibid.* See, e.g., *Osborne*, 495 U.S., at 113–114, 110 S.Ct., at 1698.

Petitioner contends that the St. Paul ordinance is not susceptible to a narrowing construction and that the ordinance therefore should be considered as written, and not as construed by the Minnesota Supreme Court. Petitioner is wrong. Where a state court has interpreted a provision of state law, we cannot ignore that interpretation, even if it is \*\*2559 not one that we would have reached if we were construing the statute in the first instance. *Ibid.*; *Kolender v. Lawson*, 461 U.S. 352, 355, 103 S.Ct. 1855, 1856, 75 L.Ed.2d 903 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5, 102 S.Ct. 1186, 1191, n. 5, 71 L.Ed.2d 362 (1982).<sup>12</sup>

<sup>12</sup> Petitioner can derive no support from our statement in *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 645, 98 L.Ed.2d 782 (1988), that "the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." In *American Booksellers*, no state court had construed the language in dispute. In that instance, we certified a question to the state court so that it would have an opportunity to provide a narrowing interpretation. *Ibid.* In *Erznoznik v. Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975), the other case upon which petitioner principally relies, we observed not only that the ordinance at issue was not "by its plain terms ... easily susceptible of a narrowing construction," but that the state courts had made no effort to restrict the scope of the statute when it was challenged on overbreadth grounds.

Of course, the mere presence of a state court interpretation does not insulate a statute from overbreadth review. We

have stricken legislation when the construction supplied by the state court failed to cure the overbreadth problem. \*413 See, e.g., *Lewis v. New Orleans*, 415 U.S. 130, 132–133, 94 S.Ct. 970, 972, 39 L.Ed.2d 214 (1974); *Gooding, supra*, 405 U.S., at 524–525, 92 S.Ct., at 1107–1108. But in such cases, we have looked to the statute as construed in determining whether it contravened the First Amendment. Here, the Minnesota Supreme Court has provided an authoritative construction of the St. Paul antibias ordinance. Consideration of petitioner's overbreadth claim must be based on that interpretation.

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.

In attempting to narrow the scope of the St. Paul antibias ordinance, the Minnesota Supreme Court relied upon two of the categories of speech and expressive conduct that fall outside the First Amendment's protective sphere: words that incite “imminent lawless action,” *Brandenburg v. Ohio*, 395 U.S. 444, 449, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969), and “fighting” words, *Chaplinsky v. New Hampshire*, 315 U.S., at 571–572, 62 S.Ct., at 768–769. The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in *Chaplinsky*—words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.*, at 572, 62 S.Ct., at 769. However, the Minnesota court was far from clear in identifying the “injur[ies]” inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that “the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.” *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (1991). I \*414 therefore understand the court to have ruled that St. Paul may constitutionally prohibit expression that “by its very utterance” causes “anger, alarm or resentment.”

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. See *United States v. Eichman*, 496 U.S. 310, 319, 110 S.Ct. 2404, 2410, 110 L.Ed.2d 287 (1990); \*\*2560 *Texas v. Johnson*, 491 U.S. 397, 409, 414, 109 S.Ct. 2533, 2542, 2545, 105 L.Ed.2d 342 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56, 108 S.Ct. 876, 881–882, 99 L.Ed.2d 41 (1988); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978); *Hess v. Indiana*, 414 U.S. 105, 107–108, 94 S.Ct. 326, 328–329, 38 L.Ed.2d 303 (1973); *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785–1786, 29 L.Ed.2d 284 (1971); *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365–1366, 22 L.Ed.2d 572 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

In the First Amendment context, “[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” *Houston v. Hill*, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. Cf. *Lewis, supra*, 415 U.S., at 132, 94 S.Ct., at 972.<sup>13</sup> The ordinance is therefore fatally overbroad and invalid on its face.

13 Although the First Amendment protects offensive speech, *Johnson v. Texas*, 491 U.S., at 414, 109 S.Ct., at 2544, it does not require us to be subjected to such expression at all times, in all settings. We have held that such expression may be proscribed when it intrudes upon a “captive audience.” *Frisby v. Schultz*, 487 U.S. 474, 484–485, 108 S.Ct. 2495, 2502–2503, 101 L.Ed.2d 420 (1988); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–749, 98 S.Ct. 3026, 3040–3041, 57 L.Ed.2d 1073 (1978). And expression may be limited when it merges into conduct. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); cf. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). However, because of the manner in which the Minnesota Supreme Court construed the St. Paul ordinance, those issues are not before us in this case.

**\*415 III**

Today, the Court has disregarded two established principles of First Amendment law without providing a coherent replacement theory. Its decision is an arid, doctrinaire interpretation, driven by the frequently irresistible impulse of judges to tinker with the First Amendment. The decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

Justice **BLACKMUN**, concurring in the judgment.

I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening.

In the first instance, by deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws. As Justice **WHITE** points out, this weakens the traditional protections of speech. If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden to categorize, as the Court has done here, we shall reduce protection across the board. It is sad that in its effort to reach a satisfying result in this case, the Court is willing to weaken First Amendment protections.

In the second instance is the possibility that this case will not significantly alter First Amendment jurisprudence but, instead, will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults **\*\*2561** are of greater harm than other fighting words. I fear that the Court has been distracted from its **\*416** proper mission by the temptation to decide the issue over “politically correct speech” and “cultural diversity,” neither of which is presented here. If this is the meaning of today’s opinion, it is perhaps even more regrettable.

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.

I concur in the judgment, however, because I agree with Justice **WHITE** that this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.

Justice **STEVENS**, with whom Justice **WHITE** and Justice **BLACKMUN** join as to Part I, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.

This case involves the constitutionality of one such ordinance. Because the regulated conduct has some communicative content—a message of racial, religious, or gender hostility—the ordinance raises two quite different First Amendment questions. Is the ordinance “overbroad” because **\*417** it prohibits too much speech? If not, is it “underbroad” because it does not prohibit enough speech?

In answering these questions, my colleagues today wrestle with two broad principles: first, that certain “categories of expression [including ‘fighting words’] are ‘not within the area of constitutionally protected speech,’ ” *ante*, at 2552 (**WHITE**, J., concurring in judgment); and second, that “[c]ontent-based regulations [of expression] are presumptively invalid,” *ante*, at 2542 (Majority opinion). Although in past opinions the Court has repeated both of these maxims, it has—quite rightly—adhered to neither with the absolutism suggested by my colleagues. Thus, while I agree that the St. Paul ordinance

is unconstitutionally overbroad for the reasons stated in Part II of Justice WHITE's opinion, I write separately to suggest how the allure of absolute principles has skewed the analysis of both the majority and Justice WHITE's opinions.

## I

Fifty years ago, the Court articulated a categorical approach to First Amendment jurisprudence.

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942).

We have, as Justice WHITE observes, often described such categories of expression as “not within the area of constitutionally protected speech.” *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957).

**\*\*2562 \*418** The Court today revises this categorical approach. It is not, the Court rules, that certain “categories” of expression are “unprotected,” but rather that certain “elements” of expression are wholly “proscribable.” To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains. Thus, obscene antigovernment speech may be regulated because it is obscene, but not because it is antigovernment. *Ante*, at 2543. It is this revision of the categorical approach that allows the Court to assume that the St. Paul ordinance proscribes *only* fighting words, while at the same time concluding that the ordinance is invalid because it imposes a content-based regulation on expressive activity.

As an initial matter, the Court's revision of the categorical approach seems to me something of an adventure in a doctrinal wonderland, for the concept of “obscene antigovernment” speech is fantastical. The category of the

obscene is very narrow; to be obscene, expression must be found by the trier of fact to “appea[l] to the prurient interest, ... depic[t] or describ[e], in a patently offensive way, sexual conduct, [and], taken as a whole, lac[k] serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614–2615, 37 L.Ed.2d 419 (1973) (emphasis added). “Obscene antigovernment” speech, then, is a contradiction in terms: If expression is antigovernment, it does not “lac[k] serious ... political ... value” and cannot be obscene.

The Court attempts to bolster its argument by likening its novel analysis to that applied to restrictions on the time, place, or manner of expression or on expressive conduct. It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag. But these analogies **\*419** are inapposite. In each of these examples, the two elements (*e.g.*, loudness and pro-Republican orientation) can coexist; in the case of “obscene antigovernment” speech, however, the presence of one element (“obscenity”) by definition means the absence of the other. To my mind, it is unwise and unsound to craft a new doctrine based on such highly speculative hypotheticals.

I am, however, even more troubled by the second step of the Court's analysis—namely, its conclusion that the St. Paul ordinance is an unconstitutional content-based regulation of speech. Drawing on broadly worded dicta, the Court establishes a near-absolute ban on content-based regulations of expression and holds that the First Amendment prohibits the regulation of fighting words by subject matter. Thus, while the Court rejects the “all-or-nothing-at-all” nature of the categorical approach, *ante*, at 2543, it promptly embraces an absolutism of its own: Within a particular “proscribable” category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.<sup>1</sup> This aspect of the Court's ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of **\*\*2563** First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

<sup>1</sup> The Court disputes this characterization because it has crafted two exceptions, one for “certain media

or markets” and the other for content discrimination based upon “the very reason that the entire class of speech at issue is proscribable.” *Ante*, at 2545. These exceptions are, at best, illdefined. The Court does not tell us whether, with respect to the former, fighting words such as crossburning could be proscribed only in certain neighborhoods where the threat of violence is particularly severe, or whether, with respect to the second category, fighting words that create a particular risk of harm (such as a race riot) would be proscribable. The hypothetical and illusory category of these two exceptions persuades me that either my description of the Court's analysis is accurate or that the Court does not in fact mean much of what it says in its opinion.

\*420 Although the Court has, on occasion, declared that content-based regulations of speech are “never permitted,” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212 (1972), such claims are overstated. Indeed, in *Mosley* itself, the Court indicated that Chicago's selective proscription of nonlabor picketing was not *per se* unconstitutional, but rather could be upheld if the city demonstrated that nonlabor picketing was “clearly more disruptive than [labor] picketing.” *Id.*, at 100, 92 S.Ct., at 2292. Contrary to the broad dicta in *Mosley* and elsewhere, our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.

This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity: Although the First Amendment broadly protects “speech,” it does not protect the right to “fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.” Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *Vand.L.Rev.* 265, 270 (1981). Whether an agreement among competitors is a violation of the Sherman Act or protected activity under the *Noerr-Pennington* doctrine<sup>2</sup> hinges upon the content of the agreement. Similarly, “the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say.” *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66, 96 S.Ct. 2440, 2450, 49 L.Ed.2d 310 (1976) (plurality opinion); see also *Musser v. Utah*, 333 U.S. 95, 100–103,

68 S.Ct. 397, 399–401, 92 L.Ed. 562 (1948) (Rutledge, J., dissenting).

2 See *Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

\*421 Likewise, whether speech falls within one of the categories of “unprotected” or “proscribable” expression is determined, in part, by its content. Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content. Even within categories of protected expression, the First Amendment status of speech is fixed by its content. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), establish that the level of protection given to speech depends upon its subject matter: Speech about public officials or matters of public concern receives greater protection than speech about other topics. It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: Much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.

Consistent with this general premise, we have frequently upheld content-based regulations of speech. For example, in *Young v. American Mini Theatres*, the Court upheld zoning ordinances that regulated movie theaters based on the content of the films shown. In *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (plurality opinion), we upheld a restriction on the broadcast of *specific* indecent words. In *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (plurality opinion), we upheld a city law that permitted commercial advertising, but prohibited political advertising, on city buses. In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), we \*\*2564 upheld a state law that restricted the speech of state employees, but only as concerned partisan political matters. We have long recognized the power of the Federal Trade Commission to regulate misleading advertising and labeling, see, e.g., *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), and the National Labor Relations Board's power to regulate an employer's election-related speech on the basis of its content, see, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–618, 89 S.Ct. 1918, 1942–1943, 23 L.Ed.2d 547 (1969). \*422 It

is also beyond question that the Government may choose to limit advertisements for cigarettes, see 15 U.S.C. §§ 1331–1340,<sup>3</sup> but not for cigars; choose to regulate airline advertising, see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), but not bus advertising; or choose to monitor solicitation by lawyers, see *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), but not by doctors.

<sup>3</sup> See also *Packer Corp. v. Utah*, 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932) (Brandeis, J.) (upholding a statute that prohibited the advertisement of cigarettes on billboards and street-car placards).

All of these cases involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content based, but they are not, in my opinion, “presumptively invalid.” As these many decisions and examples demonstrate, the prohibition on content-based regulations is not nearly as total as the *Mosley* dictum suggests.

Disregarding this vast body of case law, the Court today goes beyond even the overstatement in *Mosley* and applies the prohibition on content-based regulation to speech that the Court had until today considered wholly “unprotected” by the First Amendment—namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly “unprotected,” it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. Yet in ruling that proscribable speech cannot be regulated based on subject **\*423** matter, the Court does just that.<sup>4</sup> Perversely, this gives fighting words *greater* protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit

political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on “race, color, creed, religion or gender” while leaving unregulated fighting words based on “union membership ... or homosexuality.” *Ante*, at 2547. The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that still can be wholly proscribed) is now entitled to greater protection than commercial speech—and possibly greater protection than core political speech. See **\*\*2565** *Burson v. Freeman*, 504 U.S. 191, 195, 196, 112 S.Ct. 1846, 1850, 119 L.Ed.2d 5 (1992).

<sup>4</sup> The Court states that the prohibition on content-based regulations “applies differently in the context of proscribable speech” than in the context of other speech, *ante*, at 2545, but its analysis belies that claim. The Court strikes down the St. Paul ordinance because it regulates fighting words based on subject matter, despite the fact that, as demonstrated above, we have long upheld regulations of commercial speech based on subject matter. The Court’s self-description is inapt: By prohibiting the regulation of fighting words based on its subject matter, the Court provides the same protection to fighting words as is currently provided to core political speech.

Perhaps because the Court recognizes these perversities, it quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations. First, the Court states that a content-based regulation is valid “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech ... is proscribable.” *Ante*, at 2545. In a pivotal passage, the Court writes:

“[T]he Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why **\*424** threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the ... President.” *Ante*, at 2546.

As I understand this opaque passage, Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause “fear of violence,” “disruption,” and actual “violence.”

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

Next, the Court recognizes that a State may regulate advertising in one industry but not another because “the risk of fraud (one of the characteristics ... that justifies depriving [commercial speech] of full First Amendment protection ...)” in the regulated industry is “greater” than in other industries. *Ante*, at 2546. Again, the same reasoning demonstrates the constitutionality of St. Paul's ordinance. “[O]ne of the characteristics that justifies” the constitutional status of fighting words is that such words “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S., at 572, 62 S.Ct., at 762. Certainly a legislature that may determine that the risk of fraud is greater in the legal \*425 trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats.

Similarly, it is impossible to reconcile the Court's analysis of the St. Paul ordinance with its recognition that “a prohibition of fighting words that are directed at certain persons or groups ... would be facially valid.” *Ante*, at 2548 (emphasis deleted). A selective proscription of unprotected expression designed to protect “certain persons or groups” (for example, a law proscribing threats directed at the elderly) would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression (that is, if the elderly are more severely injured by threats than are the nonelderly). Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications. See *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). St. Paul has determined—reasonably in my judgment—that fighting-word injuries “based on race, color, creed, religion or gender” are qualitatively different and more severe than

fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target (“certain persons or groups”) or the basis of the harm (injuries “based on race, color, creed, religion or gender”) makes no constitutional difference: What matters is whether the legislature's selection is based \*\*2566 on a legitimate, neutral, and reasonable distinction.

In sum, the central premise of the Court's ruling—that “[c]ontent-based regulations are presumptively invalid”—has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law. Finally, although the Court recognizes \*426 exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny.

## II

Although I agree with much of Justice WHITE's analysis, I do not join Part I–A of his opinion because I have reservations about the “categorical approach” to the First Amendment. These concerns, which I have noted on other occasions, see, e.g., *New York v. Ferber*, 458 U.S. 747, 778, 102 S.Ct. 3348, 3365–3366, 73 L.Ed.2d 1113 (1982) (opinion concurring in judgment), lead me to find Justice WHITE's response to the Court's analysis unsatisfying.

Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of “categories” fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. Our definitions of “obscenity,” see, e.g., *Marks v. United States*, 430 U.S. 188, 198, 97 S.Ct. 990, 996, 51 L.Ed.2d 260 (1977) (STEVENS, J., concurring in part and dissenting in part), and “public forum,” see, e.g., *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 126–131, 101 S.Ct. 2676, 2683–2686, 69

L.Ed.2d 517 (1981); *id.*, at 136–140, 101 S.Ct., at 2688–2691 (Brennan, J., concurring in judgment); *id.*, at 147–151, 101 S.Ct., at 2694–2696 (Marshall, J., dissenting); *id.*, at 152–154, 101 S.Ct. at 2696–2698 (STEVENS, J., dissenting) (all debating the definition of “public forum”), illustrate this all too well. The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail.

Moreover, the categorical approach does not take seriously the importance of *context*. The meaning of any expression and the legitimacy of its regulation can only be determined \*427 in context.<sup>5</sup> Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience. Similarly, although legislatures may freely regulate most nonobscene child pornography, such pornography that is part of “a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device” may be entitled to constitutional protection; the “question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.” *Ferber*, 458 U.S., at 778, 102 S.Ct., at 3366 (STEVENS, J., concurring in judgment); see also *Smith v. United States*, 431 U.S. 291, 311–321, 97 S.Ct. 1756, 1769–1774, 52 L.Ed.2d 324 (1977) (STEVENS, J., dissenting). The categorical approach sweeps too broadly when it declares \*\*2567 that all such expression is beyond the protection of the First Amendment.

<sup>5</sup> “A word,” as Justice Holmes has noted, “is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918); see also *Jacobellis v. Ohio*, 378 U.S. 184, 201, 84 S.Ct. 1676, 1685, 12 L.Ed.2d 793 (1964) (Warren, C.J., dissenting).

Perhaps sensing the limits of such an all-or-nothing approach, the Court has applied its analysis less categorically than its doctrinal statements suggest. The Court has recognized intermediate categories of speech (for example, for indecent nonobscene speech and commercial speech) and geographic categories of speech (public fora, limited public fora, nonpublic fora) entitled to varying levels of protection. The Court has also stringently delimited the categories of unprotected speech.

While we once declared that “[i]bels utterances [are] not ... within the area of constitutionally protected speech,” *Beauharnais v. Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919 (1952), our rulings in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), have substantially qualified this \*428 broad claim. Similarly, we have consistently construed the “fighting words” exception set forth in *Chaplinsky* narrowly. See, e.g., *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). In the case of commercial speech, our ruling that “the Constitution imposes no ... restraint on government [regulation] as respects purely commercial advertising,” *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942), was expressly repudiated in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In short, the history of the categorical approach is largely the history of narrowing the categories of unprotected speech.

This evolution, I believe, indicates that the categorical approach is unworkable and the quest for absolute categories of “protected” and “unprotected” speech ultimately futile. My analysis of the faults and limits of this approach persuades me that the categorical approach presented in Part I–A of Justice WHITE’s opinion is not an adequate response to the novel “underbreadth” analysis the Court sets forth today.

### III

As the foregoing suggests, I disagree with both the Court’s and part of Justice WHITE’s analysis of the constitutionality of the St. Paul ordinance. Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice WHITE, I do not believe that fighting words are wholly unprotected by the First Amendment. To the contrary, I believe our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech. Applying this analysis and

assuming, *arguendo*, (as the Court does) that the St. Paul ordinance is *not* overbroad, I conclude that such a selective, subject-matter regulation on proscribable speech is constitutional.

\*429 Not all content-based regulations are alike; our decisions clearly recognize that some content-based restrictions raise more constitutional questions than others. Although the Court's analysis of content-based regulations cannot be reduced to a simple formula, we have considered a number of factors in determining the validity of such regulations.

First, as suggested above, the scope of protection provided expressive activity depends in part upon its content and character. We have long recognized that when government regulates political speech or “the expression of editorial opinion on matters of public importance,” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375–376, 104 S.Ct. 3106, 3114–3115, 82 L.Ed.2d 278 (1984), “First Amendment protectio[n] is ‘at its zenith,’ ” \*\*2568 *Meyer v. Grant*, 486 U.S. 414, 425, 108 S.Ct. 1886, 1894, 100 L.Ed.2d 425 (1988). In comparison, we have recognized that “commercial speech receives a limited form of First Amendment protection,” *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986), and that “society's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammelled political debate,” *Young v. American Mini Theatres*, 427 U.S., at 70, 96 S.Ct., at 2452; see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The character of expressive activity also weighs in our consideration of its constitutional status. As we have frequently noted, “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989); see also *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The protection afforded expression turns as well on the context of the regulated speech. We have noted, for example, that “[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting ... [and] must take into account the economic dependence of the employees on their employers.” *NLRB v. Gissel Packing Co.*, 395

U.S., at 617, 89 S.Ct., at 1942. Similarly, the distinctive character of a university environment, see \*430 *Widmar v. Vincent*, 454 U.S. 263, 277–280, 102 S.Ct. 269, 278–280, 70 L.Ed.2d 440 (1981) (STEVENS, J., concurring in judgment), or a secondary school environment, see *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), influences our First Amendment analysis. The same is true of the presence of a “ ‘captive audience[ ], one] there as a matter of necessity, not of choice.’ ” *Lehman v. Shaker Heights*, 418 U.S., at 302, 94 S.Ct., at 2717 (citation omitted).<sup>6</sup> Perhaps the most familiar embodiment of the relevance of context is our “fora” jurisprudence, differentiating the levels of protection afforded speech in different locations.

<sup>6</sup> Cf. *In re Chase*, 468 F.2d 128, 139–140 (CA7 1972) (Stevens, J., dissenting) (arguing that defendant who, for reasons of religious belief, refused to rise and stand as the trial judge entered the courtroom was not subject to contempt proceedings because he was not present in the courtroom “as a matter of choice”).

The nature of a contested restriction of speech also informs our evaluation of its constitutionality. Thus, for example, “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious. “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S., at 414, 109 S.Ct., at 2545. “Viewpoint discrimination is censorship in its purest form,” *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62, 103 S.Ct. 948, 964, 74 L.Ed.2d 794 (1983) (Brennan, J., dissenting), and requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue, see, e.g., *Schacht v. United States*, 398 U.S. 58, 63, 90 S.Ct. 1555, 1559, 26 L.Ed.2d 44 (1970). “Especially where ... the legislature's suppression of speech suggests an attempt \*431 to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785–786, 98 S.Ct.

1407, 1420–1421, 55 L.Ed.2d 707 (1978). Thus, although a regulation that on its face regulates speech by subject matter may in some **\*\*2569** instances effectively suppress particular viewpoints, see, e.g., *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 546–547, 100 S.Ct. 2326, 2338, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in judgment), in general, viewpoint-based restrictions on expression require greater scrutiny than subject-matter-based restrictions.<sup>7</sup>

<sup>7</sup> Although the Court has sometimes suggested that subject-matter-based and viewpoint-based regulations are equally problematic, see, e.g., *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S., at 537, 100 S.Ct., at 2338, our decisions belie such claims.

Finally, in considering the validity of content-based regulations we have also looked more broadly at the scope of the restrictions. For example, in *Young v. American Mini Theatres*, 427 U.S., at 71, 96 S.Ct., at 2452–2453, we found significant the fact that “what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited.” Similarly, in *FCC v. Pacifica Foundation*, the Court emphasized two dimensions of the limited scope of the FCC ruling. First, the ruling concerned only broadcast material which presents particular problems because it “confronts the citizen ... in the privacy of the home”; second, the ruling was not a complete ban on the use of selected offensive words, but rather merely a limitation on the times such speech could be broadcast. 438 U.S., at 748–750, 98 S.Ct., at 3039–3041.

All of these factors play some role in our evaluation of content-based regulations on expression. Such a multifaceted analysis cannot be conflated into two dimensions. Whatever the allure of absolute doctrines, it is just too simple to declare expression “protected” or “unprotected” or to proclaim a regulation “content based” or “content neutral.”

**\*432** In applying this analysis to the St. Paul ordinance, I assume, *arguendo* —as the Court does—that the ordinance regulates *only* fighting words and therefore is *not* overbroad. Looking to the content and character of the regulated activity, two things are clear. First, by hypothesis the ordinance bars only low-value speech, namely, fighting words. By definition such expression constitutes “no essential part of any exposition of ideas,

and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” *Chaplinsky*, 315 U.S., at 572, 62 S.Ct., at 769. Second, the ordinance regulates “expressive conduct [rather] than ... the written or spoken word.” *Texas v. Johnson*, 491 U.S., at 406, 109 S.Ct., at 2540.

Looking to the context of the regulated activity, it is again significant that the ordinance (by hypothesis) regulates *only* fighting words. Whether words are fighting words is determined in part by their context. Fighting words are not words that merely cause offense; fighting words must be directed at individuals so as to “by their very utterance inflict injury.” By hypothesis, then, the St. Paul ordinance restricts speech in confrontational and potentially violent situations. The case at hand is illustrative. The cross burning in this case—directed as it was to a single African–American family trapped in their home—was nothing more than a crude form of physical intimidation. That this cross burning sends a message of racial hostility does not automatically endow it with complete constitutional protection.<sup>8</sup>

<sup>8</sup> The Court makes much of St. Paul's description of the ordinance as regulating “a message.” *Ante*, at 2548. As always, however, St. Paul's argument must be read in context:

“Finally, we ask the Court to reflect on the ‘content’ of the ‘expressive conduct’ represented by a ‘burning cross.’ It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim[s] head. It is perhaps the ultimate expression of ‘fighting words.’ ” App. to Brief for Petitioner C–6.

**\*\*2570 \*433** Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the *harm* the speech causes. In this regard, the Court fundamentally misreads the St. Paul ordinance. The Court describes the St. Paul ordinance as regulating expression “addressed to one of [several] specified disfavored *topics*,” *ante*, at 2547 (emphasis supplied), as

policing “disfavored *subjects*,” *ibid.* (emphasis supplied), and as “prohibit[ing] ... speech solely on the basis of the *subjects* the speech addresses,” *ante*, at 2542 (emphasis supplied). Contrary to the Court's suggestion, the ordinance regulates only a subcategory of expression that causes *injuries based on* “race, color, creed, religion or gender,” not a subcategory that involves *discussions* that concern those characteristics.<sup>9</sup> The ordinance, as construed by the Court, criminalizes expression that “one knows ... [by its very utterance inflicts injury on] others on the basis of race, color, creed, religion or \*434 gender.” In this regard, the ordinance resembles the child pornography law at issue in *Ferber*, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults.

<sup>9</sup> The Court contends that this distinction is “wordplay,” reasoning that “[w]hat makes [the harms caused by race-based threats] distinct from [the harms] produced by other fighting words is ... the fact that [the former are] caused by a *distinctive idea*.” *Ante*, at 2548 (emphasis added). In this way, the Court concludes that regulating speech based on the injury it causes is no different from regulating speech based on its subject matter. This analysis fundamentally miscomprehends the role of “race, color, creed, religion [and] gender” in contemporary American society. One need look no further than the recent social unrest in the Nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats. Just as the statute prohibiting threats against the President is justifiable because of the place of the President in our social and political order, so a statute prohibiting race-based threats is justifiable because of the place of race in our social and political order. Although it is regrettable that race occupies such a place and is so incendiary an issue, until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable.

Moreover, even if the St. Paul ordinance did regulate fighting words based on its subject matter, such a regulation would, in my opinion, be constitutional. As noted above, subject-matter-based regulations on commercial speech are widespread and largely unproblematic. As we have long recognized, subject-matter regulations generally do not raise the same concerns of government censorship and the distortion of public discourse presented by viewpoint regulations. Thus, in upholding subject-matter regulations we have

carefully noted that viewpoint-based discrimination was not implicated. See *Young v. American Mini Theatres*, 427 U.S., at 67, 96 S.Ct., at 2450–2451 (emphasizing “the need for absolute neutrality by the government,” and observing that the contested statute was not animated by “hostility for the point of view” of the theaters); *FCC v. Pacifica Foundation*, 438 U.S., at 745–746, 98 S.Ct., at 3038–3039 (stressing that “government must remain neutral in the marketplace of ideas”); see also *FCC v. League of Women's Voters of Cal.*, 468 U.S., at 412–417, 104 S.Ct., at 3134–3137 (STEVENS, J., dissenting); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 554–555, 101 S.Ct. 2882, 2916–2917, 69 L.Ed.2d 800 (1981) (STEVENS, J., dissenting in part). Indeed, some subject-matter restrictions are a functional necessity in contemporary governance: “The First Amendment does not require States to regulate for problems that do not exist.” *Burson v. Freeman*, 504 U.S., at 207, 112 S.Ct., at 1856.

Contrary to the suggestion of the majority, the St. Paul ordinance does *not* regulate expression based on viewpoint. The Court contends that the ordinance requires proponents of racial intolerance to “follow the Marquis \*\*2571 of Queensberry rules” while allowing advocates of racial tolerance to “fight freestyle.” The law does no such thing.

\*435 The Court writes:

“One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ ” *Ante*, at 2548.

This may be true, but it hardly proves the Court's point. The Court's reasoning is asymmetrical. The response to a sign saying that “all [religious] bigots are misbegotten” is a sign saying that “all advocates of religious tolerance are misbegotten.” Assuming such signs could be fighting words (which seems to me extremely unlikely), neither sign would be banned by the ordinance for the attacks were not “based on ... religion” but rather on one's beliefs about tolerance. Conversely (and again assuming such signs are fighting words), just as the ordinance would prohibit a Muslim from hoisting a sign claiming that all Catholics were misbegotten, so the ordinance would bar a Catholic from hoisting a similar sign attacking Muslims.

The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance,

the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt"—*by either party*. It does not, therefore, favor one side of any debate.<sup>10</sup>

<sup>10</sup> Cf. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 418, 104 S.Ct. 3106, 3137, 82 L.Ed.2d 278 (1984) (STEVENS, J., dissenting) ("In this case ... the regulation applies ... to a defined class of ... licensees [who] represent heterogenous points of view. There is simply no sensible basis for considering this regulation a viewpoint restriction—or ... to condemn it as 'content-based'—because it applies equally to station owners of all shades of opinion").

\*436 Finally, it is noteworthy that the St. Paul ordinance is, as construed by the Court today, quite narrow. The St. Paul ordinance does not ban all "hate speech," nor does it ban, say, all cross burnings or all swastika displays. Rather it only bans a subcategory of the already narrow category of fighting words. Such a limited ordinance leaves open and protected a vast range of expression on the subjects

of racial, religious, and gender equality. As construed by the Court today, the ordinance certainly does not "'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Ante*, at 2545. Petitioner is free to burn a cross to announce a rally or to express his views about racial supremacy, he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to "by its very [execution] inflict injury." Such a limited proscription scarcely offends the First Amendment.

In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

#### All Citations

505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305, 60 USLW 4667

Justice [Alito](#) filed a dissenting opinion.

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [March v. Mills](#), 1st Cir.(Me.), August 8, 2017

131 S.Ct. 1207

Supreme Court of the United States

Albert SNYDER, Petitioner,

v.

Fred W. PHELPS, Sr., et al.

No. 09–751.

|  
Argued Oct. 6, 2010.|  
Decided March 2, 2011.

### Synopsis

**Background:** Father of deceased military service member brought action against fundamentalist church and its members, stemming from defendants' anti-homosexual demonstration near service member's funeral, and asserting claims for intentional infliction of emotional distress (IIED), invasion of privacy by intrusion upon seclusion, and civil conspiracy. Following jury's verdict for father, the United States District Court for the District of Maryland, [Richard D. Bennett, J., 533 F.Supp.2d 567](#), remitted aggregate punitive damages award, but otherwise denied post-trial motions. Defendants appealed. The United States Court of Appeals for the Fourth Circuit, King, Circuit Judge, [580 F.3d 206](#), reversed. Certiorari was granted.

**Holdings:** The Supreme Court, Chief Justice [Roberts](#), held that:

[1] in light of content, form, and context, speech of church members who picketed near the funeral of military service member was of public concern and therefore was entitled to special protection under the First Amendment, and

[2] father was not a captive audience at the funeral, for purposes of captive audience doctrine.

Court of Appeals affirmed.

Justice [Breyer](#) filed a concurring opinion.

West Headnotes (24)

### [1] Federal Courts

[Presentation of Questions Below or on Review;Record;Waiver](#)

Supreme Court would decline to consider, on certiorari review of decision of Court of Appeals reversing on First Amendment free speech grounds monetary judgment in favor of military service member's father in tort action against church and church members relating to church members' picketing of service member's funeral, a message that one of the picketers posted on church's website a few weeks after the funeral containing religiously oriented denunciations of service member and his family; although the message had been submitted to jury and discussed in the courts below, the message was not mentioned in father's certiorari petition and potentially raised distinct issues. [U.S.C.A. Const.Amend. 1](#); [U.S.Sup.Ct.Rule 14.1\(g\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

### [2] Damages

[Elements in general](#)

To succeed on a claim for intentional infliction of emotional distress under Maryland law, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.

[13 Cases that cite this headnote](#)

### [3] Constitutional Law

[Particular Issues and Applications in General](#)

The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional

infliction of emotional distress. [U.S.C.A. Const.Amend. 1.](#)

[16 Cases that cite this headnote](#)

**[4] Constitutional Law**

[🔑 Matters of public concern](#)

Speech on matters of public concern is at the heart of the First Amendment's protection. [U.S.C.A. Const.Amend. 1.](#)

[62 Cases that cite this headnote](#)

**[5] Constitutional Law**

[🔑 Matters of public concern](#)

The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, because speech concerning public affairs is more than self-expression; it is the essence of self-government. [U.S.C.A. Const.Amend. 1.](#)

[27 Cases that cite this headnote](#)

**[6] Constitutional Law**

[🔑 Matters of public concern](#)

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. [U.S.C.A. Const.Amend. 1.](#)

[39 Cases that cite this headnote](#)

**[7] Constitutional Law**

[🔑 Freedom of Speech, Expression, and Press](#)

**Constitutional Law**

[🔑 Matters of private concern](#)

Not all speech is of equal First Amendment importance, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous, because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest; there is no threat

to the free and robust debate of public issues, there is no potential interference with a meaningful dialogue of ideas, and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import. [U.S.C.A. Const.Amend. 1.](#)

[43 Cases that cite this headnote](#)

**[8] Constitutional Law**

[🔑 Matters of public concern](#)

The boundaries of the public concern test for speech that is entitled to special protection under the First Amendment are not well defined, but guiding principles articulated by the Supreme Court accord broad protection to speech to ensure that courts themselves do not become inadvertent censors. [U.S.C.A. Const.Amend. 1.](#)

[9 Cases that cite this headnote](#)

**[9] Constitutional Law**

[🔑 Matters of public concern](#)

Speech deals with matters of “public concern,” for purposes of public concern test for speech that is entitled to special protection under the First Amendment, when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public. [U.S.C.A. Const.Amend. 1.](#)

[142 Cases that cite this headnote](#)

**[10] Constitutional Law**

[🔑 Matters of public concern](#)

The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern, for purposes of public concern test for speech that is entitled to special protection under the First Amendment. [U.S.C.A. Const.Amend. 1.](#)

[89 Cases that cite this headnote](#)

**[11] Constitutional Law**

🔑 Matters of public concern

**Constitutional Law**

🔑 Matters of private concern

Deciding whether speech is of public or private concern, for purposes of the public concern test for speech that is entitled to special protection under the First Amendment, requires the court to examine the content, form, and context of that speech, as revealed by the whole record. [U.S.C.A. Const.Amend. 1.](#)

[106 Cases that cite this headnote](#)

**[12] Federal Courts**

🔑 Scope and Extent of Review

In First Amendment free speech cases, the Supreme Court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. [U.S.C.A. Const.Amend. 1.](#)

[8 Cases that cite this headnote](#)

**[13] Constitutional Law**

🔑 Matters of public concern

**Constitutional Law**

🔑 Matters of private concern

In considering the content, form, and context of speech in order to determine whether speech is of public or private concern, for purposes of the public concern test for speech that is entitled to special protection under the First Amendment, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. [U.S.C.A. Const.Amend. 1.](#)

[56 Cases that cite this headnote](#)

**[14] Constitutional Law**

🔑 Picketing

**Constitutional Law**

🔑 Government property and facilities

**Damages**

🔑 Privilege or immunity; exercise of legal rights

Speech of church members who picketed near funeral of a military service member was of public concern and therefore was entitled to special protection under the First Amendment, with respect to tort liability of church and church members to service member's father for intentional infliction of emotional distress; picketers' signs related to broad issues of interest to society at large, including political and moral conduct of the United States and its citizens and homosexuality in the military, there was no pre-existing relationship suggesting the speech on public matters was intended to mask an attack on father over a private matter, and picketing was conducted in public place adjacent to a public street. [U.S.C.A. Const.Amend. 1.](#)

[5 Cases that cite this headnote](#)

**[15] Constitutional Law**

🔑 Government Property and Events

A public place adjacent to a public street occupies a special position in terms of First Amendment protection of speech. [U.S.C.A. Const.Amend. 1.](#)

[24 Cases that cite this headnote](#)

**[16] Constitutional Law**

🔑 Streets and highways

Public streets are the archetype of a traditional public forum, for purposes of First Amendment protection of speech. [U.S.C.A. Const.Amend. 1.](#)

[28 Cases that cite this headnote](#)

**[17] Constitutional Law**

🔑 Absolute nature of right

**Constitutional Law**

🔑 Reasonableness

Even speech that is protected under the First Amendment is not equally permissible in all places and at all times, and it may be subject to reasonable time, place, or manner restrictions. [U.S.C.A. Const.Amend. 1.](#)

[17 Cases that cite this headnote](#)

**[18] Constitutional Law**

🔑 [Offensive, vulgar, abusive, or insulting speech](#)

**Constitutional Law**

🔑 [Government Property and Events](#)

Speech at a public place on a matter of public concern cannot be restricted simply because it is upsetting or arouses contempt, because if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [U.S.C.A. Const.Amend. 1.](#)

[19 Cases that cite this headnote](#)

**[19] Constitutional Law**

🔑 [Particular Issues and Applications in General](#)

**Constitutional Law**

🔑 [Injurious speech](#)

The point of all speech protection under the First Amendment is to shield choices of content that in someone's eyes are misguided, or even hurtful. [U.S.C.A. Const.Amend. 1.](#)

[10 Cases that cite this headnote](#)

**[20] Constitutional Law**

🔑 [Offensive, vulgar, abusive, or insulting speech](#)

In public debate, insulting and even outrageous speech must be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment. [U.S.C.A. Const.Amend. 1.](#)

[10 Cases that cite this headnote](#)

**[21] Conspiracy**

🔑 [Conspiracy to injure in person or reputation](#)

**Constitutional Law**

🔑 [Picketing](#)

**Torts**

🔑 [Defenses in general](#)

Military service member's father, who brought tort claim for intrusion upon seclusion against church and church members who picketed service member's funeral, was not a captive audience at the funeral, for purposes of captive audience doctrine, which protects unwilling listeners from speech that is protected by the First Amendment; picketers stayed well away from funeral, father could see no more than the tops of picketers' signs when driving to funeral, and there was no indication that the picketing in any way interfered with the funeral service. [U.S.C.A. Const.Amend. 1.](#)

[10 Cases that cite this headnote](#)

**[22] Constitutional Law**

🔑 [Offensive, vulgar, abusive, or insulting speech](#)

In most circumstances, the First Amendment does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer; rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes. [U.S.C.A. Const.Amend. 1.](#)

[8 Cases that cite this headnote](#)

**[23] Constitutional Law**

🔑 [Receipt of information or ideas; listeners' rights](#)

The ability of government, consonant with the First Amendment, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially

intolerable manner. [U.S.C.A. Const.Amend.](#)

1.

[7 Cases that cite this headnote](#)

## [24] Constitutional Law

### 🔑 [Relation between state and federal rights](#)

The sensitivity and significance of the interests presented in clashes between First Amendment protection of speech and state-law rights counsel that courts rely on limited principles that sweep no more broadly than the appropriate context of the instant case. [U.S.C.A. Const.Amend. 1.](#)

[6 Cases that cite this headnote](#)

### \*\*1210 *Syllabus*\*

\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

\*443 For the past 20 years, the congregation of the Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military. The church's picketing has also condemned the Catholic Church for scandals involving its clergy. Fred Phelps, who founded the church, and six Westboro Baptist parishioners (all relatives of Phelps) traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. The picketing took place on public land approximately 1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs—stating, *e.g.*, “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You're Going to Hell”—for about 30 minutes before the funeral began. Matthew Snyder's father (Snyder), petitioner here, saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night.

Snyder filed a diversity action against Phelps, his daughters—who participated in the picketing—and the church (collectively Westboro) alleging, as relevant here, state tort claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. A jury held Westboro liable for millions of dollars in compensatory and punitive damages. Westboro challenged the verdict as grossly excessive and sought judgment as a matter of law on the ground that the First Amendment fully protected its speech. The District Court reduced the punitive damages award, but left the verdict otherwise intact. The Fourth Circuit reversed, concluding that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.

*Held:* The First Amendment shields Westboro from tort liability for its picketing in this case. Pp. 1215 – 1221.

\*\*1211 (a) The Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional infliction of \*444 emotional distress. [Hustler Magazine, Inc. v. Falwell](#), 485 U.S. 46, 50–51, 108 S.Ct. 876, 99 L.Ed.2d 41. Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. “[S]peech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values’ and is entitled to special protection.” [Connick v. Myers](#), 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708. Although the boundaries of what constitutes speech on matters of public concern are not well defined, this Court has said that speech is of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” *id.*, at 146, 103 S.Ct. 1684, or when it “is a subject of general interest and of value and concern to the public,” [San Diego v. Roe](#), 543 U.S. 77, 83–84, 125 S.Ct. 521, 160 L.Ed.2d 410. A statement's arguably “inappropriate or controversial character ... is irrelevant to the question whether it deals with a matter of public concern.” [Rankin v. McPherson](#), 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315. Pp. 1215 – 1216.

To determine whether speech is of public or private concern, this Court must independently examine the “ ‘content, form, and context,’ ” of the speech “ ‘as revealed by the whole record.’ ” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all aspects of the speech. Pp. 1216 – 1217.

The “content” of Westboro's signs plainly relates to public, rather than private, matters. The placards highlighted issues of public import—the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy—and Westboro conveyed its views on those issues in a manner designed to reach as broad a public audience as possible. Even if a few of the signs were viewed as containing messages related to a particular individual, that would not change the fact that the dominant theme of Westboro's demonstration spoke to broader public issues. Pp. 1216 – 1217.

The “context” of the speech—its connection with Matthew Snyder's funeral—cannot by itself transform the nature of Westboro's speech. The signs reflected Westboro's condemnation of much in modern society, and it cannot be argued that Westboro's use of speech on public issues was in any way contrived to insulate a personal attack on Snyder from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that the picketing did not represent Westboro's honestly held beliefs on public issues. Westboro may have chosen the picket location to increase publicity for its views, and its speech may have been particularly hurtful to Snyder. That does \*445 not mean that its speech should be afforded less than full First Amendment protection under the circumstances of this case. Pp. 1217 – 1218.

That said, “ [e]ven protected speech is not equally permissible in all places and at all times.’ ” *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420. Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is “subject to reasonable time, place, or manner restrictions.” *Clark v. Community for \*\*1212 Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221. The facts here are quite different, however,

both with respect to the activity being regulated and the means of restricting those activities, from the few limited situations where the Court has concluded that the location of targeted picketing can be properly regulated under provisions deemed content neutral. *Frisby, supra*, at 477, 108 S.Ct. 2495; *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593, distinguished. Maryland now has a law restricting funeral picketing but that law was not in effect at the time of these events, so this Court has no occasion to consider whether that law is a “reasonable time, place, or manner restrictio[n]” under the standards announced by this Court. *Clark, supra*, at 293, 104 S.Ct. 3065. Pp. 1217 – 1219.

The “special protection” afforded to what Westboro said, in the whole context of how and where it chose to say it, cannot be overcome by a jury finding that the picketing was “outrageous” for purposes of applying the state law tort of intentional infliction of emotional distress. That would pose too great a danger that the jury would punish Westboro for its views on matters of public concern. For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside. Pp. 1219 – 1220.

(b) Snyder also may not recover for the tort of intrusion upon seclusion. He argues that he was a member of a captive audience at his son's funeral, but the captive audience doctrine—which has been applied sparingly, see *Rowan v. Post Office Dept.*, 397 U.S. 728, 736–738, 90 S.Ct. 1484, 25 L.Ed.2d 736; *Frisby, supra*, at 484–485, 108 S.Ct. 2495—should not be expanded to the circumstances here. Westboro stayed well away from the memorial service, Snyder could see no more than the tops of the picketers' signs, and there is no indication that the picketing interfered with the funeral service itself. Pp. 1219 – 1220.

(c) Because the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the allegedly unlawful activity Westboro conspired to accomplish—Snyder also cannot recover for civil conspiracy based on those torts. P. 1220.

(d) Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. It did not disrupt Mathew Snyder's funeral, and its choice to picket at that time

and place did not alter the nature of its speech. \*446 Because this Nation has chosen to protect even hurtful speech on public issues to ensure that public debate is not stifled, Westboro must be shielded from tort liability for its picketing in this case. Pp. 1220 – 1221.

580 F.3d 206, affirmed.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion.

### Attorneys and Law Firms

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Margie J. Phelps, Esq., Counsel of Record, Topeka, KS, for Respondents.

### Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

\*447 A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

\*448 I

A

Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas, in 1955. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's

military. The church frequently communicates its views by picketing, often at military funerals. In the more than 20 years that the members of Westboro Baptist have publicized their message, they have picketed nearly 600 funerals. Brief for Rutherford Institute as *Amicus Curiae* 7, n. 14.

Marine Lance Corporal Matthew Snyder was killed in Iraq in the line of duty. Lance Corporal Snyder's father selected the Catholic church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. Local newspapers provided notice of the time and location of the service.

Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don't Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You're Going to Hell,” and “God Hates You.”

The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary \*449 fence. App. to Brief for Appellants in No. 08–1026(CA4), pp. 2282–2285 (hereinafter App.). That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. *Id.*, at 3758. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing. *Id.*, at 2168, 2371, 2286, 2293.

[1] The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder testified that he could

see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, \*\*1214 while watching a news broadcast covering the event. *Id.*, at 2084–2086.<sup>1</sup>

<sup>1</sup> A few weeks after the funeral, one of the picketers posted a message on Westboro's Web site discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations. Snyder discovered the posting, referred to by the parties as the “epic,” during an Internet search for his son's name. The epic is not properly before us and does not factor in our analysis. Although the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari. See Pet. for Cert. *i* (“Snyder's claim arose out of Phelps' intentional acts at *Snyder's son's funeral*” (emphasis added)); this Court's Rule 14.1(g) (petition must contain statement “setting out the facts material to consideration of the question presented”). Nor did Snyder respond to the statement in the opposition to certiorari that “[t]hrough the epic was asserted as a basis for the claims at trial, the petition ... appears to be addressing only claims based on the picketing.” Brief in Opposition 9. Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic. Given the foregoing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case. See *Ontario v. Quon*, 560 U.S. 746, ———, 130 S.Ct. 2619, 2629–31, 177 L.Ed.2d 216 (2010).

## B

Snyder filed suit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collectively Westboro or the \*450 church) in the United States District Court for the District of Maryland under that court's diversity jurisdiction. Snyder alleged five state tort law claims: defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. Westboro moved for summary judgment contending, in part, that the church's speech was insulated from liability by the *First Amendment*. See 533 F.Supp.2d 567, 570 (Md.2008).

The District Court awarded Westboro summary judgment on Snyder's claims for defamation and publicity given

to private life, concluding that Snyder could not prove the necessary elements of those torts. *Id.*, at 572–573. A trial was held on the remaining claims. At trial, Snyder described the severity of his emotional injuries. He testified that he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. *Id.*, at 588–589. Expert witnesses testified that Snyder's emotional anguish had resulted in severe depression and had exacerbated pre-existing health conditions.

A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. Westboro filed several post-trial motions, including a motion contending that the jury verdict was grossly excessive and a motion seeking judgment as a matter of law on all claims on First Amendment grounds. The District Court remitted the punitive damages award to \$2.1 million, but left the jury verdict otherwise intact. *Id.*, at 597.

In the Court of Appeals, Westboro's primary argument was that the church was entitled to judgment as a matter of law because the First Amendment fully protected Westboro's speech. The Court of Appeals agreed. 580 F.3d 206, 221 (C.A.4 2009). The court reviewed the picket signs and concluded that Westboro's statements were entitled to First \*451 Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric. *Id.*, at 222–224.<sup>2</sup>

<sup>2</sup> One judge concurred in the judgment on the ground that Snyder had failed to introduce sufficient evidence at trial to support a jury verdict on any of his tort claims. 580 F.3d, at 227 (opinion of Shedd, J.). The Court of Appeals majority determined that the picketers had “voluntarily waived” any such contention on appeal. *Id.*, at 216. Like the court below, we proceed on the unexamined premise that respondents' speech was tortious.

\*\*1215 We granted certiorari. 559 U.S. 990, 130 S.Ct. 1737, 176 L.Ed.2d 211 (2010).

## II

[2] [3] To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. See *Harris v. Jones*, 281 Md. 560, 565–566, 380 A.2d 611, 614 (1977). The Free Speech Clause of the First Amendment —“Congress shall make no law ... abridging the freedom of speech”—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).<sup>3</sup>

<sup>3</sup> The dissent attempts to draw parallels between this case and hypothetical cases involving defamation or fighting words. *Post*, at 1226 – 1227 (opinion of ALITO, J.). But, as the court below noted, there is “no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection, such as those for obscenity or ‘fighting words.’ ” 580 F.3d, at 218, n. 12; see *United States v. Stevens*, 559 U.S. 460, —, 130 S.Ct. 1577, 1585, 176 L.Ed.2d 435 (2010).

[4] [5] [6] Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. “[S]peech on ‘matters of public concern’ ... is ‘at the heart of the First Amendment’s \*452 protection.’ ” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)). The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted).

[7] “ ‘[N]ot all speech is of equal First Amendment importance,’ ” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. *Hustler, supra*, at 56, 108 S.Ct. 876 (quoting *Dun & Bradstreet, supra*, at 758, 105 S.Ct. 2939); see *Connick, supra*, at 145–147, 103 S.Ct. 1684. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public \*\*1216 import. *Dun & Bradstreet, supra*, at 760, 105 S.Ct. 2939 (internal quotation marks omitted).

[8] We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that “the boundaries of the public concern test are not well defined.” *San Diego v. Roe*, 543 U.S. 77, 83, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (*per curiam*). Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors.

[9] [10] \*453 Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” *Connick, supra*, at 146, 103 S.Ct. 1684, or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” *San Diego, supra*, at 83–84, 125 S.Ct. 521. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492–494, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387–388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report “concerns no public issue.” 472 U.S., at 762, 105 S.Ct. 2939. The content of the report, we explained, “was speech solely in the individual interest of the speaker and its specific business

audience.” *Ibid.* That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. *Ibid.* To cite another example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos “did nothing to inform the public about any aspect of the [employing agency’s] functioning or operation.” 543 U.S., at 84, 125 S.Ct. 521.

[11] [12] [13] Deciding whether speech is of public or private concern requires us to examine the “ ‘content, form, and context’ ” of that speech, “ ‘as revealed by the whole record.’ ” *Dun & Bradstreet, supra*, at 761, 105 S.Ct. 2939 (quoting *Connick, supra*, at 147–148, 103 S.Ct. 1684). As in other First Amendment cases, the court is obligated “to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’ ” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting *New York Times, supra*, at 284–286, 84 S.Ct. 710). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

[14] The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” *Dun & Bradstreet, supra*, at 759, 105 S.Ct. 2939. The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just \*\*\*1217 Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” App. 3781–3787. While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach

as broad a public audience as possible. And even if a few of the signs—such as “You’re Going to Hell” and “God Hates You”—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

Apart from the content of Westboro’s signs, Snyder contends that the “context” of the speech—its connection with his son’s funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern \*455 society. Its speech is “fairly characterized as constituting speech on a matter of public concern,” *Connick*, 461 U.S., at 146, 103 S.Ct. 1684, and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to “immunize their conduct by claiming that they were actually protesting the United States’ tolerance of homosexuality or the supposed evils of the Catholic Church.” Reply Brief for Petitioner 10. We are not concerned in this case that Westboro’s speech on public matters was in any way contrived to insulate speech on a private matter from liability. Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro’s picketing did not represent its “honestly believed” views on public issues. *Garrison*, 379 U.S., at 73, 85 S.Ct. 209. There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro’s speech on public matters was intended to mask an attack on Snyder over a private matter. Contrast *Connick, supra*, at 153, 103 S.Ct. 1684 (finding public employee speech a matter of private concern when it was “no coincidence that [the speech] followed upon the heels of [a] transfer notice” affecting the employee).

Snyder goes on to argue that Westboro’s speech should be afforded less than full First Amendment protection “not only because of the words” but also because the church members exploited the funeral “as a platform to bring their message to a broader audience.” Brief for Petitioner

44, 40. There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views—in the case of the military funeral, because Westboro believes that God is killing American soldiers as punishment for the Nation's sinful policies.

[15] [16] \*456 Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record \*\*1218 makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "[t]ime out of mind" public streets and sidewalks have been used for public assembly and debate." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).<sup>4</sup>

4 The dissent is wrong to suggest that the Court considers a public street "a free-fire zone in which otherwise actionable verbal attacks are shielded from liability." *Post*, at 1227. The fact that Westboro conducted its picketing adjacent to a public street does not insulate the speech from liability, but instead heightens concerns that what is at issue is an effort to communicate to the public the church's views on matters of public concern. That is why our precedents so clearly recognize the special significance of this traditional public forum.

[17] That said, "[e]ven protected speech is not equally permissible in all places and at all times." *Id.*, at 479, 108 S.Ct. 2495 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach—it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d

221 (1984). Maryland now has a law imposing restrictions on funeral picketing, Md.Crim. Law Code Ann. § 10–205 (Lexis Supp.2010), as do 43 other States and the Federal Government. See Brief for American Legion as *Amicus Curiae* 18–19, n. 2 \*457 (listing statutes). To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.<sup>5</sup>

5 The Maryland law prohibits picketing within 100 feet of a funeral service or funeral procession; Westboro's picketing would have complied with that restriction.

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence, 487 U.S., at 477, 108 S.Ct. 2495. In *Madsen v. Women's Health Center, Inc.*, we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; \*\*1219 there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

[18] [19] \*458 Given that Westboro's speech was at a public place on a matter of public concern, that

speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Indeed, “the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.” *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

[20] The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was “outrageous.” “Outrageousness,” however, is a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.” *Hustler*, 485 U.S., at 55, 108 S.Ct. 876 (internal quotation marks omitted). In a case such as this, a jury is “unlikely to be neutral with respect to the content of [the] speech,” posing “a real danger of becoming an instrument for the suppression of ... ‘vehement, caustic, and sometimes unpleasan[t]’ ” expression. *Bose Corp.*, 466 U.S., at 510, 104 S.Ct. 1949 (quoting *New York Times*, 376 U.S., at 270, 84 S.Ct. 710). Such a risk is unacceptable; “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (some internal quotation marks omitted). What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

\*459 For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

### III

[21] The jury also found Westboro liable for the state law torts of intrusion upon seclusion and civil conspiracy.

The Court of Appeals did not examine these torts independently of the intentional infliction of emotional distress tort. Instead, the Court of Appeals reversed the District Court wholesale, holding that the judgment wrongly “attache[d] tort liability to constitutionally protected speech.” 580 F.3d, at 226.

[22] [23] Snyder argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at \*\*1220 his son's funeral. Brief for Petitioner 45–46. We do not agree. In most circumstances, “the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (internal quotation marks omitted). As a result, “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.*, 397 U.S. 728, 736–738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and an ordinance prohibiting picketing \*460 “before or about” any individual's residence, *Frisby*, 487 U.S., at 484–485, 108 S.Ct. 2495.

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here.

Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful

activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.

#### IV

[24] Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us. As we have noted, “the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.” *Florida Star v. B.J.F.*, 491 U.S. 524, 533, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here — \*461 inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

\*\*1221 The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

*It is so ordered.*

Justice **BREYER**, concurring.

I agree with the Court and join its opinion. That opinion restricts its analysis here to the matter raised in the petition for certiorari, namely, Westboro's picketing

activity. The opinion does not examine in depth the effect of television broadcasting. Nor does it say anything about Internet postings. The Court holds that the First Amendment protects the picketing that occurred here, primarily because the picketing addressed matters of “public concern.”

While I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern. See *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (“fighting words”).

The dissent recognizes that the means used here consist of speech. But it points out that the speech, like an assault, seriously harmed a private individual. Indeed, the state \*462 tort of “intentional infliction of emotional distress” forbids only conduct that produces distress “so severe that no reasonable man could be expected to endure it,” and which itself is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Post*, at 1222 – 1223 (opinion of ALITO, J.) (quoting *Harris v. Jones*, 281 Md. 560, 567, 571, 380 A.2d 611, 614, 616 (1977); internal quotation marks omitted). The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm. Does our decision leave the State powerless to protect the individual against invasions of, *e.g.*, personal privacy, even in the most horrendous of such circumstances?

As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict. Cf. *Florida Star v. B.J. F.*, 491 U.S. 524, 533, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). That review makes clear that Westboro's means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers' signs as he drove to the \*\*1222 funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public \*463 concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro. As I read the Court's opinion, it holds no more.

Justice ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury.<sup>1</sup> The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

<sup>1</sup> See 580 F.3d 206, 213–214, 216 (C.A.4 2009).

## I

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that \*464 wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are “uninhibited,” “vehement,” and “caustic.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, “most if not all jurisdictions” permit recovery in tort for the intentional infliction of emotional distress (or IIED). *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

This is a very narrow tort with requirements that “are rigorous, and difficult to satisfy.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 12, p. 61 (5th ed.1984). To recover, a plaintiff must show that the conduct at issue caused harm that was truly severe. See *Figueiredo-Torres v. Nickel*, 321 Md. 642, 653, 584 A.2d 69, 75 (1991) (“[R]ecoverability will be meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves” (internal quotation marks omitted)); *Harris v. Jones*, 281 Md. 560, 571, 380 A.2d 611, 616 (1977) (the distress must be “‘so severe that no reasonable man could be expected to endure it’” \*\*1223 (quoting *Restatement (Second) of Torts* § 46, Comment j (1963–1964))).

A plaintiff must also establish that the defendant's conduct was “‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

in a civilized community.’ ” *Id.*, at 567, 380 A.2d, at 614 (quoting *Restatement (Second) of Torts* § 46, Comment *d*).

Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show \*465 that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. See 580 F.3d 206, 216 (C.A.4 2009). They did not dispute that Mr. Snyder suffered “ ‘wounds that are truly severe and incapable of healing themselves.’ ” *Figueiredo–Torres*, *supra*, at 653, 584 A.2d, at 75. Nor did they dispute that their speech was “ ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’ ” *Harris*, *supra*, at 567, 380 A.2d, at 614. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.

## II

It is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech. Indeed, what has been described as “[t]he leading case” recognizing this tort involved speech. Prosser and Keeton, *supra*, § 12, at 60 (citing *Wilkinson v. Downton*, [1897] 2 Q.B. 57); see also *Restatement (Second) of Torts* § 46, illustration 1. And although this Court has not decided the question, I think it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.

This Court has recognized that words may “by their very utterance inflict injury” and that the First Amendment does not shield utterances that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); see also *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (“[P]ersonal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution”). When grave injury is intentionally inflicted by \*466 means of an attack like the one at issue here, the First Amendment should not interfere with recovery.

## III

In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents' well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder's funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the \*\*1224 United States.<sup>2</sup>) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.<sup>3</sup>) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.<sup>4</sup>) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

<sup>2</sup> See Dept. of Transp., Federal Highway Administration, Highway Statistics 2008, Table HM–12M, <http://www.fhwa.dot.gov/policyinformation/statistics/2008/hm12m.cfm> (all Internet materials as visited Feb. 25, 2011, and available in Clerk of Court's case file).

<sup>3</sup> See Trust for Public Land, 2010 City Park Facts, [http://www.tpl.org/content\\_documents/CityParkFacts\\_2010.pdf](http://www.tpl.org/content_documents/CityParkFacts_2010.pdf).

<sup>4</sup> See United States Conference of Catholic Bishops, Catholic Information Project, <http://www.usccb.org/comm/cip.shtml#toc4>.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly 600 military funerals. *Ante*, at 1213. They have also picketed the funerals of \*467 police officers,<sup>5</sup> firefighters,<sup>6</sup> and the victims of natural disasters,<sup>7</sup> accidents,<sup>8</sup> and shocking crimes.<sup>9</sup> And in advance of these protests, they issue press

releases to ensure that their protests will attract public attention.<sup>10</sup>

<sup>5</sup> See [http://www.godhatesfags.com/fliers/20110124\\_St-Petersburg-FLDead-Police.pdf](http://www.godhatesfags.com/fliers/20110124_St-Petersburg-FLDead-Police.pdf).

<sup>6</sup> See [http://www.godhatesfags.com/fliers/20110120\\_Dead-Volunteer-Firefighter-Connecting\\_the\\_Dots-Baltimore-MD.pdf](http://www.godhatesfags.com/fliers/20110120_Dead-Volunteer-Firefighter-Connecting_the_Dots-Baltimore-MD.pdf).

<sup>7</sup> See [http://www.godhatesfags.com/fliers/20110104\\_Newburg-and-Rolla-MO-Tornado-Connecting-the-Dots.pdf](http://www.godhatesfags.com/fliers/20110104_Newburg-and-Rolla-MO-Tornado-Connecting-the-Dots.pdf).

<sup>8</sup> See [http://www.godhatesfags.com/fliers/20101218\\_Wichita-KS-Two-Dead-Wichita-Bikers.pdf](http://www.godhatesfags.com/fliers/20101218_Wichita-KS-Two-Dead-Wichita-Bikers.pdf).

<sup>9</sup> See [http://www.godhatesfags.com/fliers/20110129\\_Tampa-FL-God-Sent-Military-Mom-Shooter-to-Kill-Kids.pdf](http://www.godhatesfags.com/fliers/20110129_Tampa-FL-God-Sent-Military-Mom-Shooter-to-Kill-Kids.pdf).

<sup>10</sup> See nn. 5–9, *supra*.

This strategy works because it is expected that respondents' verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson—proclaiming that she was “better off dead”<sup>11</sup>—their announcement was national news,<sup>12</sup> and the church was able to obtain \*468 free air time on the radio in exchange for canceling its protest.<sup>13</sup> Similarly, \*\*1225 IN 2006, the church got air time on a talk radio show in exchange for canceling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.<sup>14</sup>

<sup>11</sup> See [http://www.godhatesfags.com/fliers/20110109\\_AZ-Shooter-Connecting-the-Dots-Day-2.pdf](http://www.godhatesfags.com/fliers/20110109_AZ-Shooter-Connecting-the-Dots-Day-2.pdf).

<sup>12</sup> See, e.g., Stanglin, Anti-Gay Church Group Plans to Picket Tucson Funerals, USA Today, Jan. 10, 2011, <http://content.usatoday.com/communities/ondeadline/post/2011/01/anti-gay-church-group-plans-to-picket-tucsonfunerals/1>; Mohanani, Group to Picket 9-Year-Old Tucson Victim's Funeral, Palm Beach Post, Jan. 11, 2011, <http://www.palmbeachpost.com/news/nation/group-to-picket-9-year-old-tucson-victims-1177921.html>; Mehta & Santa Cruz, Tucson Rallies to Protect Girl's Family from Protesters, Los Angeles Times, Jan. 11, 2011, <http://articles.latimes.com/2011/jan/11/nation/la-na-funeral-protest-20110112>; Medrano, Funeral Protest: Arizona Rallies to Foil Westboro Baptist Church, Christian Science Monitor, Jan. 11, 2011, <http://www.csmonitor.com/USA/2011/0111/Funeral-protest-Arizona-rallies-to-foil-Westboro-Baptist-Church>.

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<sup>13</sup> See Santa Cruz & Mehta, Westboro Church Agrees Not to Take Protest to Shooting Victims' Funerals, Los Angeles Times, Jan. 13, 2011, <http://articles.latimes.com/2011/jan/13/nation/la-na-funeral-protest-20110113>; [http://www.godhatesfags.com/fliers/20110112\\_AZ-Shooter-Mike-Gallagher-Radio-Exchange.pdf](http://www.godhatesfags.com/fliers/20110112_AZ-Shooter-Mike-Gallagher-Radio-Exchange.pdf).

<sup>14</sup> See Steinberg, Air Time Instead of Funeral Protest, N.Y. Times, Oct. 6, 2006, p. A14.

In this case, respondents implemented the Westboro Baptist Church's publicity-seeking strategy. Their press release stated that they were going “to picket the funeral of Lance Cpl. Matthew A. Snyder” because “God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God .... Now in Hell—sine die.” Supp.App. in No. 08–1026(CA4), p. 158a. This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating “God Hates You” and “Thank God for Dead Soldiers” reiterated the message that God had caused Matthew's death in retribution for his sins. App. to Brief for Appellants in No. 08–1026(CA4), pp. 3787, 3788 (hereinafter App.). Others, stating “You're Going to Hell” and “Not Blessed Just Cursed,” conveyed the message that Matthew was “in Hell—sine die.” *Id.*, at 3783.

Even if those who attended the funeral were not alerted in advance about respondents' intentions, the meaning of these signs would not have been missed. Since respondents chose to stage their protest at Matthew Snyder's funeral and not \*469 at any of the other countless available venues, a reasonable person would have assumed that

there was a connection between the messages on the placards and the deceased. Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents' signs—*e.g.*, “God Hates You,” “Not Blessed Just Cursed,” and “You're Going to Hell”—would have likely been interpreted as referring to God's judgment of the deceased.

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading “God Hates Fags,” “Semper Fi Fags,” “Fags Doom Nations,” and “Fag Troops.” *Id.*, at 3781–3787. Another placard depicted two men engaging in anal intercourse. A reasonable bystander seeing those signs would have likely concluded that they were meant to suggest that the deceased was a homosexual.

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled “The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!” *Id.*, at 3788.<sup>15</sup> Belying any suggestion that **\*\*1226** they had simply made general comments about homosexuality, the Catholic Church, and the **\*470** United States military, the “epic” addressed the Snyder family directly:

<sup>15</sup> The Court refuses to consider the epic because it was not discussed in Snyder's petition for certiorari. *Ante*, at 1214, n. 1. The epic, however, is not a distinct claim but a piece of evidence that the jury considered in imposing liability for the claims now before this Court. The protest and the epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress. See 580 F.3d, at 225 (“[T]he Epic cannot be divorced from the general context of the funeral protest”). The Court's strange insistence that the epic “is not properly before us,” *ante*, at 1214, n. 1, means that the Court has not actually made “an independent examination of the whole record,” *ante*, at 1216 (internal quotation marks omitted). And the Court's refusal to consider the epic contrasts sharply with its willingness to take notice of Westboro's protest activities at other times and locations. See *ante*, at 1217.

“God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the

child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.

.....

“Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

.....

“Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?” *Id.*, at 3791.

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures,<sup>16</sup> and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not.

<sup>16</sup> See 533 F.Supp.2d 567, 577 (Md.2008).

**\*471** Justice BREYER provides an apt analogy to a case in which the First Amendment would permit recovery in tort for a verbal attack:

“[S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's

use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected.” *Ante*, at 1221 (concurring opinion).

This captures what respondents did in this case. Indeed, this is the strategy that they have routinely employed—and that they will now continue to employ—inflicting severe and lasting emotional injury on an ever growing list of innocent victims.

#### IV

The Court concludes that respondents' speech was protected by the First Amendment for essentially three reasons, but none is sound.

First—and most important—the Court finds that “the overall thrust and dominant theme of [their] demonstration spoke to” broad public issues. *Ante*, at 1217. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on \*\*1227 Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently.

Second, the Court suggests that respondents' personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge, \*472 see *ante*, at 1217, but I see no basis for the strange distinction that the Court appears to draw. Respondents' motivation—“ to increase publicity for its views,” *ibid.*—did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern. Nor did their publicity-seeking motivation soften the sting of their attack. And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention.

Third, the Court finds it significant that respondents' protest occurred on a public street, but this fact alone should not be enough to preclude IIED liability. To be sure, statements made on a public street may be less likely to satisfy the elements of the IIED tort than statements made on private property, but there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free-fire zone in which otherwise actionable verbal attacks are shielded from liability. If the First Amendment permits the States to protect their residents from the harm inflicted by such attacks—and the Court does not hold otherwise—then the location of the tort should not be dispositive. A physical assault may occur without trespassing; it is no defense that the perpetrator had “the right to be where [he was].” See *ante*, at 1218 – 1219. And the same should be true with respect to unprotected speech. Neither classic “fighting words” nor defamatory statements are immunized when they occur in a public place, and there is no good reason to treat a verbal assault based on the conduct or character of a private figure like Matthew Snyder any differently.

One final comment about the opinion of the Court is in order. The Court suggests that the wounds inflicted by vicious verbal assaults at funerals will be prevented or at least mitigated in the future by new laws that restrict picketing \*473 within a specified distance of a funeral. See *ante*, at 1217 – 1218. It is apparent, however, that the enactment of these laws is no substitute for the protection provided by the established IIED tort; according to the Court, the verbal attacks that severely wounded petitioner in this case complied with the new Maryland law regulating funeral picketing. See *ante*, at 1218, n. 5. And there is absolutely nothing to suggest that Congress and the state legislatures, in enacting these laws, intended them to displace the protection provided by the well-established IIED tort.

The real significance of these new laws is not that they obviate the need for IIED protection. Rather, their enactment dramatically illustrates the fundamental point that funerals are unique events at which special protection against emotional assaults is in order. At funerals, the emotional well-being of bereaved relatives is particularly vulnerable. See \*\*1228 *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 168, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004). Exploitation of a funeral for the purpose of attracting public attention “intrud[es] upon their ... grief,” *ibid.*, and may permanently stain their

memories of the final moments before a loved one is laid to rest. Allowing family members to have a few hours of peace without harassment does not undermine public debate. I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.

## V

In reversing the District Court judgment in favor of petitioner, the Court of Appeals relied on several grounds not discussed in the opinion of this Court or in the separate opinion supporting affirmance. I now turn briefly to those issues.

First, the Court of Appeals held that the District Court erred by allowing the jury to decide whether respondents' speech was " 'directed specifically at the \*474 Snyder family.' " 580 F.3d, at 221. It is not clear whether the Court of Appeals thought that this was a question for the trial judge alone or a question on which the judge had to make a preliminary ruling before sending it to the jury. In either event, however, the submission of this question to the jury was not reversible error because, as explained above, it is clear that respondents' statements targeted the Snyders.

Second, the Court of Appeals held that the trial judge went astray in allowing the jury to decide whether respondents' speech was so " 'offensive and shocking as to not be entitled to First Amendment protection.' " *Ibid.* This instruction also did respondents no harm. Because their speech did not relate to a matter of public concern, it was not protected from liability by the First Amendment, and the only question for the jury was whether the elements of the IIED tort were met.

Third, the Court of Appeals appears to have concluded that the First Amendment does not permit an IIED plaintiff to recover for speech that cannot reasonably be interpreted as stating actual facts about an individual. See *id.*, at 222. In reaching this conclusion, the Court of Appeals relied on two of our cases—*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), and *Hustler*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41—but neither supports the broad proposition that the Court of Appeals adopted.

*Milkovich* was a defamation case, and falsity is an element of defamation. Nothing in *Milkovich* even hints that the First Amendment requires that this defamation element be engrafted onto the IIED tort.

*Hustler* did involve an IIED claim, but the plaintiff there was a public figure, and the Court did not suggest that its holding would also apply in a case involving a private figure. Nor did the Court suggest that its holding applied across the board to all types of IIED claims. Instead, the holding was limited to "publications such as the one here at issue," namely, a caricature in a magazine. 485 U.S., at 56, 108 S.Ct. 876. Unless a caricature of a public figure can reasonably be interpreted \*475 as stating facts that may be proved to be wrong, the caricature does not have the same potential to wound as a personal verbal assault on a vulnerable private figure.

Because I cannot agree either with the holding of this Court or the other grounds on which the Court of Appeals relied, I would reverse the decision below and remand for further proceedings.<sup>17</sup>

<sup>17</sup> The Court affirms the decision of the Fourth Circuit with respect to petitioner's claim of intrusion upon seclusion on a ground not addressed by the Fourth Circuit. I would not reach out to decide that issue but would instead leave it for the Fourth Circuit to decide on remand. I would likewise allow the Fourth Circuit on remand to decide whether the judgment on the claim of civil conspiracy can survive in light of the ultimate disposition of the IIED and intrusion upon seclusion claims.

## \*\*1229 VI

Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.

**All Citations**

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Distinguished by [Corlett v. Oakland University Bd. of Trustees](#), E.D.Mich., July 23, 2013

721 F.Supp. 852

United States District Court,

E.D. Michigan,

Southern Division.

John DOE, Plaintiff,

v.

UNIVERSITY OF MICHIGAN, Defendant.

Civ. No. 89-71683.

|

Sept. 22, 1989.

|

Addendum Sept. 25, 1989.

### Synopsis

Graduate student brought suit challenging the constitutionality of a university's policy on discrimination and discriminatory harassment of students. The District Court, Cohn, J., held that: (1) policy was overbroad, and (2) policy was so vague that its enforcement would violate the due process clause.

Order in accordance with opinion.

West Headnotes (5)

#### [1] Constitutional Law

##### 🔑 Discrimination in general

Psychology graduate student specializing in biopsychology, who alleged that his right to freely and openly enter into classroom discussion concerning controversial theories positing biologically based differences between sexes and races might be sanctionable under university's policy, had standing to challenge constitutionality of university policy on discrimination and discriminatory harassment of students.

[1 Cases that cite this headnote](#)

#### [2] Constitutional Law

#### 🔑 Particular Questions or Grounds of Attack in General

An individual has standing to challenge constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement; mere possibility that a person might be subject to sanctions of a statute is insufficient.

[2 Cases that cite this headnote](#)

#### [3] Constitutional Law

##### 🔑 Criminal Law

Threat of enforcement must be specific and direct and against a particular party in order to have standing to challenge constitutionality of a statute; however, it is not necessary that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter exercise of constitutional rights.

[3 Cases that cite this headnote](#)

#### [4] Education

##### 🔑 Speech and assembly;demonstrations

##### Constitutional Law

##### 🔑 Post-Secondary Institutions

University's policy on discrimination and discriminatory harassment of students, which prohibited "stigmatizing or victimizing" individuals or groups on basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, swept within its scope significant amount of "verbal conduct" which was protected speech under First Amendment, and therefore was overbroad both on its face and as applied. [U.S.C.A. Const.Amend. 1.](#)

[22 Cases that cite this headnote](#)

#### [5] Education

##### 🔑 Regulation of Conduct in General

##### Constitutional Law

##### 🔑 Duty to protect;failure to act

Terms of university's policy on discrimination and discriminatory harassment of students, which prohibited "stigmatizing or victimizing" individuals or groups on basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, were so vague that its enforcement would violate due process clause. [U.S.C.A. Const.Amend. 14.](#)

[6 Cases that cite this headnote](#)

## Attorneys and Law Firms

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## Opinion

### OPINION

COHN, District Judge.

[T]aking stock of the legal system's own limitations, we must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible and, again, extend the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and misdeeds.

L. Bollinger, *The*

*Tolerant Society* 78

(1986).

## I. INTRODUCTION

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of

our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor (the University), a state-chartered university, *see* Mich. Const. art. VIII, adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in an attempt to curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus. The Policy prohibited individuals, under the penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. However laudable or appropriate an effort this may have been, the Court found that the Policy swept within its scope a significant amount of "verbal conduct" or "verbal behavior" which is unquestionably protected speech under the First Amendment. Accordingly, the Court granted plaintiff \*854 John Doe's (Doe)<sup>1</sup> prayer for a permanent injunction as to those parts of the Policy restricting speech activity, but denied the injunction as to the Policy's regulation of physical conduct. The reasons follow.<sup>2</sup>

<sup>1</sup> Plaintiff proceeded under the pseudonym "John Doe" to preserve his privacy and protect himself from any adverse publicity arising from this case. The University did not contest plaintiff's right to proceed anonymously.

Doe was represented by counsel provided by the American Civil Liberties Union. His attorneys are to be commended for the consistently high quality of the representation they provided Doe in this case.

<sup>2</sup> The reasons for the Court's decision were stated on the record at a hearing held on August 25, 1989. At that time, the Court stated that it would issue a more detailed written opinion at a later date. To the extent that this opinion is at variance with the Court's August 25, 1989 bench opinion, it is the written opinion which controls. *See Schmidt v. Plains Electric Inc.*, 281 N.W.2d 794 (N.D.1979).

## II. FACTS GENERALLY

According to the University, in the last three years incidents of racism and racial harassment appeared to become increasingly frequent at the University. For example, on January 27, 1987, unknown persons

distributed a flier declaring “open season” on blacks, which it referred to as “saucer lips, porch monkeys, and jigaboos.” On February 4, 1987, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window. These events and others prompted the University's President on February 19, 1987 to issue a statement expressing outrage and reaffirming the University's commitment to maintaining a racially, ethnically, and culturally diverse campus. The University was unable to identify any of the perpetrators. It is unknown whether the culprits were students. Likewise, there was no evidence to suggest that these were anything other than isolated and purposeless acts.

On March 5, 1987, the Chairperson of the State House of Representatives Appropriations Subcommittee on Higher Education held a public hearing on the problem of racism at the University in Ann Arbor. Forty-eight speakers addressed the subcommittee and an audience of about 600. The speakers were uniformly critical of the University's response to racial incidents and accused it of generally ignoring the problems of minority students. At the close of the hearing, the Chairperson was quoted as stating

Michigan legislators will not tolerate racism on the campus of a state institution ... Racism has no place in this day and age.... [The subcommittee] will make our decision [on appropriations for the University] during their budget discussions of the next few weeks.... Some things have to change. The committee members want to meet with [the University's President]. Holding up funds as a club may be part of our response, but that will predicate on how the university responds.

Following the hearing, the United Coalition Against Racism (UCAR), a campus anti-discrimination group, announced that it intended to file a class action civil rights suit against the University “for not maintaining or creating a non-racist, non-violent atmosphere” on campus. Following discussions with a national civil

rights leader in March of 1987, the University adopted a six-point action plan to remedy the racial problems on campus. This included the adoption of “[a]n anti-racial harassment policy ... as a component of the University's rules and regulations with appropriate sanctions specified.”

On September 22, 1987, the University's President issued a memorandum to the various schools of the University directing them to refer complaints of discriminatory harassment to the Affirmative Action Office in the Office of the President for monitoring and evaluation. An analysis of the complaints which were filed reflects that the University had neither independently verified the accuracy of the complaints nor identified a specific perpetrator for most of the incidents described. Likewise, there is no way by which it can be determined whether such incidents occur more frequently \*855 at the University than other comparable institutions.

In December 1987, the University President resigned and a former University president was temporarily appointed to the post until a permanent successor was chosen. On December 14, 1987, the Acting President circulated a confidential memorandum to the University's executive officers detailing a proposal for an anti-discrimination disciplinary policy. The proposed policy prohibited “[h]arassment of anyone through word or deed or any other behavior which discriminates on the basis of inappropriate criteria.” The Acting President recognized at the time that the proposed policy would engender serious First Amendment problems, but reasoned that

just as an individual cannot shout “Fire!” in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus

disciplinary proceeding. I believe that position to be valid.

The other “American universities” to which the President referred to were not identified at any time. Nor was any document presented to the Court in any form which “valid[ates]” this “position.”

At the January 15, 1988 meeting of the Regents, the Acting President informed the Board that he been working on a proposed policy on student discipline dealing with racial harassment pursuant to his general authority under Regents' Bylaw 2.01.<sup>3</sup> He stated that he was taking this action in response to widespread complaints that the University could not or would not enforce its existing regulations concerning racial harassment. Adoption of a policy, he noted, “would enable the University to take the position that it was willing to do something about this issue.”<sup>4</sup> The Acting President conceded that any proposed policy would implicate serious civil liberties questions, but he expressed a commitment to pursue the problem nevertheless.

<sup>3</sup> Regents' By-law 2.01 provides that in addition to other duties and functions, the President of the University shall exercise such general powers as to general oversight of teaching and research programs; the libraries, museums, and other supporting services; the general welfare of the faculty and supporting staffs; the business and financial welfare of the University; and the maintenance of health, diligence, and order among the students.

<sup>4</sup> Regents' By-law 7.02, adopted in 1985, established the University Council, a formal body composed of faculty, students, and administrators, charged with the responsibility for drafting uniform regulations governing the conduct of members of the community. As of January, 1988, the University Council had failed to act. This was apparently the reason why the Regents bypassed the University Council in formulating the Policy.

Following the January meeting, the Acting President appointed the Director of the University Office of Affirmative Action (Director) to draft a policy. The proposed policy went through twelve drafts. Throughout this process, the Director consulted with a lawyer in the Office of University Counsel and perhaps several University of Michigan Law School professors.<sup>5</sup> On

February 29, 1988, a proposed policy was published in the *University Record* and faculty, students, and staff were invited to comment. A public hearing on the proposed policy was held on March 16, 1988 at which numerous speakers commented and suggested various changes and refinements. The next day, the Acting President introduced the draft policy for consideration at the monthly Regents meeting. In the ensuing discussion, one Regent expressed concern that the policy would unduly restrict students' free speech rights. A second Regent criticized the policy on the grounds that it failed to address the problem of students heckling outside speakers \*856 who came to the campus. The Regents agreed that the final draft incorporating the suggested changes would be presented at the next meeting. University officers also promised that an interpretive guide with examples of sanctionable conduct would be issued as an authoritative guide for the benefit of the University community. At the April 14, 1988 Regents meeting, the Policy was unanimously adopted. It became effective on May 31, 1988 and was set to expire on December 31, 1989 unless reenacted.

<sup>5</sup> This equivocation is attributable to the fact that consultations with law professors were unaccompanied by the exchange of any formal correspondence or memoranda.

### III. THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT

#### A. *The Terms of the Policy*

The Policy established a three-tiered system whereby the degree of regulation was dependent on the location of the conduct at issue. The broadest range of speech and dialogue was “tolerated” in variously described public parts of the campus. Only an act of physical violence or destruction of property was considered sanctionable in these settings. Publications sponsored by the University such as the *Michigan Daily* and the *Michigan Review* were not subject to regulation. The conduct of students living in University housing is primarily governed by the standard provisions of individual leases, however the Policy appeared to apply in this setting as well.<sup>6</sup> The Policy by its terms applied specifically to “[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]” In these areas, persons were subject to discipline for:

- 6 The constitutionality of the Policy as it relates to verbal conduct and verbal behavior in University housing is not raised in the complaint. The standard provisions of the University housing lease are not part of the record.
1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
    - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
    - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
    - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.
  2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
    - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
    - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
    - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

On August 22, 1989, the University publicly announced, without prior notice to the Court or Doe, that it was

withdrawing section 1(c) on the grounds that “a need exists for further explanation and clarification of [that section] of the policy.” No reason was given why the analogous provision in paragraph 2(c) was allowed to stand.

The Policy by its terms recognizes that certain speech which might be considered in violation may not be sanctionable, stating: “The Office of the General Counsel \*857 will rule on any claim that conduct which is the subject of a formal hearing is constitutionally protected by the first amendment.”

#### B. Hearing Procedures

Any member of the University community could initiate the process leading to sanctions by either filing a formal complaint with an appropriate University office or by seeking informal counseling with described University officials and support centers. The Policy states that it is the preference of the University to employ informal mechanisms for mediation and resolution of complaints whenever possible and in fact most complainants have chosen to proceed informally. University officers are authorized to act as mediators and employ educational sanctions, community service, disciplinary warnings, and restitution in attempting to reach a settlement acceptable to both the victim and the perpetrator. None of the records relating to enforcement of the Policy are to be included in a student's academic files, and the records so generated are to be maintained in accordance with applicable privacy laws.

Where a negotiated settlement proves impossible, a formal complaint would be filed with the Administrator of Complaints of Discriminatory Behavior in the Office of Vice-President of Student Services (Policy Administrator). The Policy Administrator would then undertake an independent investigation of the alleged incident to determine whether there is sufficient evidence of a violation to warrant the initiation of a formal hearing. If a hearing were necessary, a panel consisting of four students and one tenured faculty member would be convened to pass on the merits. The accused student would then be notified that a complaint had been filed against him or her, the specific charges, the identity of the complaining witness, and the facts of the complaint and investigation. At the hearing, the Policy Administrator would be responsible for presenting the charges against the accused student. Both the accused student and the

complainant had the right to call and cross-examine witnesses and give testimony. The accused student had the right to have an attorney present at the hearing, but the attorney could not participate fully in the hearing unless suspension or expulsion were likely sanctions. If a majority of the hearing panel found by clear and convincing evidence that the Policy had been violated, they were to recommend an appropriate sanction. If the accused student was dissatisfied with the panel's decision, he or she had the right to have an appellate tribunal consisting of two students and the Vice-President for Student Services independently review the conviction and sanction.

### C. Sanctions

The Policy provided for progressive discipline based on the severity of the violation. It stated that the University encouraged hearing panels to impose sanctions that include an educational element in order to sensitize the perpetrator to the harmfulness of his or her conduct. The Policy provided, however, that compulsory class attendance should not be imposed "in an attempt to change deeply held religious or moral convictions." Depending on the intent of the accused student, the effect of the conduct, and whether the accused student is a repeat offender, one or more of the following sanctions may be imposed: (1) formal reprimand; (2) community service; (3) class attendance; (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; (8) expulsion. The sanctions of suspension and expulsion could only be imposed for violent or dangerous acts, repeated offenses, or a willful failure to comply with a lesser sanction. The University President could set aside or lessen any sanction.

### D. Interpretive Guide

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*. The Guide purported to be an authoritative \*858 interpretation of the Policy and provided examples of sanctionable conduct. These included:

A flyer containing racist threats distributed in a residence hall.

Racist graffiti written on the door of an Asian student's study carrel.

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

A black student is confronted and racially insulted by two white students in a cafeteria.

Male students leave pornographic pictures and jokes on the desk of a female graduate student.

Two men demand that their roommate in the residence hall move out and be tested for AIDS.

In addition, the Guide contained a separate section entitled "You are a harasser when ..." which contains the following examples of discriminatory conduct:

You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.

You tell jokes about gay men and lesbians.

Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.

You display a confederate flag on the door of your room in the residence hall.

You laugh at a joke about someone in your class who stutters.

You make obscene telephone calls or send racist notes or computer messages.

You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

It was not clear whether each of these actions would subject a student to sanctions, although the title of the section suggests that they would. It was also unclear why these additional examples were listed separately from those in the section entitled "What is Discriminatory Harassment."

According to the University, the Guide was withdrawn at an unknown date in the winter of 1989, because “the information in it was not accurate.” The withdrawal had not been announced publicly as of the date this case was filed.<sup>7</sup>

<sup>7</sup> The Policy was published in pamphlet form with a blue cover and a yellow slash down the center. The Guide was published in pamphlet form with the opposite color scheme. The University's colors are maize and blue. The graphic layout of the Policy and Guide pamphlets served to reinforce the Court's view that the two statements were integrally related. Indeed, at the hearing on August 25, 1989, the Court observed that the withdrawal of the Guide while retaining the Policy was like taking the maize out of the “maize and blue.”

#### IV. STANDING

[1] Doe is a psychology graduate student. His specialty is the field of biopsychology, which he describes as the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe said that certain controversial theories positing biologically-based differences between sexes and races might be perceived as “sexist” and “racist” by some students, and he feared that discussion of such theories might be sanctionable under the Policy. He asserted that his right to freely and openly discuss these theories was impermissibly chilled, and he requested that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth.

The University in response questioned Doe's standing to challenge the Policy, saying that it has never been applied to sanction classroom discussion of legitimate ideas and that Doe did not demonstrate a credible threat of enforcement as to himself. The University also asserts that Doe could not base his claim on the free speech interests of unspecified third parties. These arguments served only to diminish the credibility of the University's argument on the merits because it appeared that it \*859 sought to avoid coming to grips with the constitutionality of the Policy.

Article III of the Constitution limits the judicial power of federal courts to live cases and controversies. Traditionally, federal courts have interpreted this

limitation to bar a party from maintaining a lawsuit unless the party had a sufficient stake in the outcome “as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 1703, 7 L.Ed.2d 663 (1962). To establish such an interest, a litigant must show that he or she has personally suffered some actual or threatened injury from the putatively illegal conduct of the defendant, that the injury could fairly be traced to the illegal conduct, and that it would be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The challenged conduct must cause or threaten to cause a direct injury, *Laird v. Tatum*, 408 U.S. 1, 14, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), which is distinct and palpable, *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Doe clearly met this standard.

[2] [3] It is well settled that an individual has standing to challenge the constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The mere possibility that a person might be subject to the sanctions of a statute is insufficient. *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C.Cir.1984). Rather, the threat of enforcement must be specific and direct and against a particular party. *Houston v. Hill*, 482 U.S. 451, 459 n. 7, 107 S.Ct. 2502, 2508 n. 7, 96 L.Ed.2d 398 (1987). It is not necessary, however, that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter the exercise of constitutional rights. *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973).

Were the Court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement. The Policy prohibited conduct which “stigmatizes or victimizes” students on the basis of “race, ethnicity, religion, sex, sexual orientation” and other invidious factors. However, the terms “stigmatize” and “victimize” are not self defining.<sup>8</sup> These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual

might not. Accordingly, the likelihood of a complaint being filed in response to Doe's anticipated classroom comments would be speculative at best. In addition, even if a complaint was filed, the Policy requires that considerations of freedom of speech and academic freedom be given due consideration by the Policy Administrator in determining whether a formal hearing is warranted. Even if a student were to find Doe's views victimizing or stigmatizing, the Policy Administrator might well conclude that his speech was protected by the First Amendment and refuse to take any action. Thus, if the plain language of the policy were all the Court had before it, it would probably conclude that Doe had failed to demonstrate a reasonable probability that the Policy would be construed to cover his anticipated speech.

8 “Stigmatize” is defined in *The American Heritage Dictionary* 1266 (1978) as “1. To characterize or brand as disgraceful or ignominious mark with stigma or brand. 2. To brand or mark with a stigma or stigmata. 3. To cause stigmata to appear on.” “Victimize” is defined as “1. To subject to swindle or fraud; to cause discomfort or suffering to. 2. To make a victim of as if by slaying.” *Id.* at 1428.

The slate was not so clean, however. The Court had before it not only the terms of the Policy, but also its legislative history, the Guide, and experiences gleaned from a year of enforcement. The record clearly shows that there existed a realistic \*860 and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories.

The legislative history demonstrated that the Policy was originally conceived as a remedy for racially insensitive and derogatory remarks which students found offensive. The Acting President's December 14, 1987 memorandum to the University's Executive Officers stated that the proposed anti-harassment policy would sanction any “remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus.” The University pointed out that the December 14 Memorandum was simply a tentative starting point for discussion and the Policy went through numerous drafts before it reached its final form. This may have well been so. However, the Memorandum nevertheless illustrated the *intent*, never subsequently contradicted, underlying the Policy and the University's general approach to the problems it perceived. Nothing in the legislative materials

filed with the Court suggested that the Acting President's theoretical approach was substantially altered as the Policy developed. On the contrary, as late as February 2, 1988, the University attorney who researched the law and assisted in the drafting of the Policy, wrote a memorandum in which he conceded that merely offensive speech was constitutionally protected, but declared that

[w]e cannot be frustrated by the reluctance of the courts and the common law to recognize the personal damage that is caused by discriminatory speech, nor should our policy attempt to conform to traditional methods of identifying harmful speech. Rather the University should identify and prohibit that speech that causes damage to individuals within the community.

The record before the Court thus indicated that the drafters of the policy intended that speech need only be offensive to be sanctionable.

The Guide also suggested that the kinds of ideas Doe wished to discuss would be sanctionable. The Guide was the University's authoritative interpretation of the Policy. It explicitly stated that an example of sanctionable conduct would include:

A male student makes remarks in class like “Women just aren't as good in this field as men,” thus creating a hostile learning atmosphere for female classmates.

Doe said in an affidavit that he would like to discuss questions relating to sex and race differences in his capacity as a teaching assistant in Psychology 430, Comparative Animal Behavior. He went on to say:

An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. [One] ... hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why

many more men than women chose to enter the engineering profession.

Doe also said that some students and teachers regarded such theories as “sexist” and he feared that he might be charged with a violation of the Policy if he were to discuss them. In light of the statements in the Guide, such fears could not be dismissed as speculative and conjectural. The ideas discussed in Doe's field of study bear sufficient similarity to ideas denounced as “harassing” in the Guide to constitute a realistic and specific threat of prosecution.

The University argued that it had withdrawn the Guide on the grounds that it contained some “inaccuracies.” However, at best, this decision was conveyed only to department heads and other responsible officials and, as noted, had not been announced to the general University community at the time this lawsuit was filed. For the purposes of determining Doe's standing, the University's action came too late to render Doe's fear of enforcement illusory. *See United States v. W.T. Grant & Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

\*861 Finally, the record of the University's enforcement of the Policy over the past year suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline. A review of the University's discriminatory harassment complaint files suggested that on at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting. These are discipline files 88–12–21, 88–9–05, and 88–9–07, discussed *infra*. At least one student was subject to a formal hearing because he stated in the context of a social work research class that he believed that homosexuality was a disease that could be psychologically treated. As will be discussed below, the Policy was enforced so broadly and indiscriminately, that plaintiff's fears of prosecution were entirely reasonable. Accordingly, the Court found that Doe had standing to challenge the policy.<sup>9</sup>

<sup>9</sup> In view of the fact that there was a substantial probability that the Policy might be enforced against Doe, there was no need to consider whether he has standing to assert the rights of third parties, *see, e.g., Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), or whether the mere existence of the Policy has sufficiently “chilled” the intellectual atmosphere of the University as to make

out a concrete injury-in-fact, *see, e.g., Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

#### V. VAGUENESS AND OVERBREADTH.

Doe initially moved for a preliminary injunction against the Policy on the grounds that it was unconstitutionally vague and overbroad and that it chilled speech and conduct protected by the First Amendment. The University in response said that the Policy has never been applied to reach protected speech and a preliminary injunction should therefore be denied. At the August 25, 1989 hearing on Doe's motion, the Court, without objection, consolidated the hearing on the motion with the trial on the merits pursuant to *Fed.R.Civ.P. 65(a)(2)*.<sup>10</sup> This obviated the need to consider whether Doe had made the requisite showing to warrant the issuance of a preliminary injunction. *See Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir.1977).

<sup>10</sup> The University reserved the right to supplement the record to clarify any disputed factual issues, which it subsequently did. Doe chose not to respond. Nothing in the University's clarification papers materially changed any of the facts the Court relied upon in reaching its decision.

##### A. Scope of Permissible Regulation

Before inquiring whether the policy is impermissibly vague and overbroad, it would be helpful to first distinguish between verbal conduct and verbal acts that are generally protected by the First Amendment and those that are not. It is the latter class of behavior that the University may legitimately regulate.

Although the line is sometimes difficult to draw with precision, the Court must distinguish at the outset between the First Amendment protection of so-called “pure speech” and mere conduct. *See* L. Tribe, *Constitutional Law* sec. 12–7 (2d Ed.1988). As to the latter, it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable by a variety of state and federal criminal laws and subject to civil actions. Discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes.<sup>11</sup> *See, e.g., U.S. Const. amends. V, XIV; Mich Const. art. I, sec. 2;*

42 U.S.C. sec. 2000e–16 (employment); Mich.Stat. Ann. sec. 3.548(202) [M.C.L.A. sec. 37.2202] (employment); 42 U.S.C. sec. 2000c (education); Mich. Const. art. VIII, sec. 2 (education); 42 U.S.C. sec. 2000d \*862 (government benefits). In addition, the state provides criminal penalties and civil remedies for assault and battery, Mich.Stat. Ann. secs. 28.276–28.278 [M.C.L.A. secs. 750.81–750.83]; Mich.Stat. Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (physical assault for purposes of ethnic intimidation).<sup>12</sup> *Tinkler v. Richter*, 295 Mich. 396, 295 N.W. 201 (1940) (civil action for assault and battery), and vandalism and property damage, Mich.Stat. Ann. 28.609(1) [M.C.L.A. sec. 750.377a]; Mich.Stat. Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (property damage and destruction for purposes of ethnic intimidation); *Thoma v. Tracy Motor Sales*, 360 Mich. 434, 104 N.W.2d 360 (1960) (civil action for property destruction). Federal law imposes civil and criminal sanctions against persons depriving or conspiring to deprive others of rights guaranteed by the United States constitution. 42 U.S.C. secs. 1983, 1985 (civil); 18 U.S.C. secs. 241–242 (criminal).

11 There are no federal statutory or constitutional provisions against discrimination on the basis of sexual orientation or Vietnam Veteran status. See *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). This hiatus does not mean that the University may not adopt regulations more protective than existing law, provided, of course, such regulation does not otherwise offend the state or federal constitutions.

12 Recently, the Michigan legislature enacted a law making it a criminal offense to commit an act of “ethnic intimidation,” which is defined as the causing of physical contact with another, the damaging of real or personal property, or making a credible threat to do so with the specific intent to “intimidate or harass another person because of that person’s race, color, religion, gender, or national origin [.]” Mich.Stat. Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. The statute prescribes a maximum penalty of not more than two years imprisonment or \$5,000 fine or both. It also establishes a civil remedy for such conduct entitling a successful plaintiff to treble damages or \$2,000, whichever is greater, and attorney’s fees.

For a survey of similar anti-hate crime legislation in other states, see Anti-Defamation League, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry* (1988).

Many forms of sexually abusive and harassing conduct are also sanctionable. These would include abduction, Mich.Stat. Ann. secs. 28.201–28.202 [M.C.L.A. secs. 750.11–750.12], rape, and other forms of criminal sexual conduct, Mich.Stat. Ann. sec. 28.788; *Totten v. Totten*, 172 Mich. 565, 138 N.W. 257 (1912) (civil action for rape). The dissemination of legally obscene materials is also a crime under state law. Mich.Stat. Ann. sec. 28.579 [M.C.L.A. sec. 750.347]. In addition, a civil remedy exists for women who are subjected to demands for sexual favors by employers as an express or implied *quid pro quo* for employment benefits. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Minorities or women who are exposed to such extreme and pervasive workplace harassment as to create a hostile or offensive working environment are also entitled to civil damages. *Id.* (and cases cited therein). The First Amendment presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct, over and above any remedies already supplied by state or federal law.

While the University’s power to regulate so-called pure speech is far more limited, see *United States v. O’Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), certain categories can be generally described as unprotected by the First Amendment. It is clear that so-called “fighting words” are not entitled to First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). These would include “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572, 62 S.Ct. at 769. Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University. In addition, such speech may also be sufficient to state a claim for common law intentional infliction of emotional distress. *Ledsinger v. Burmeister*, 114 Mich.App. 12, 18–19, 318 N.W.2d 558 (1982). Credible threats of violence or property damage made with the specific intent to harass or intimidate the victim because of his race, sex, religion, or national origin is punishable both criminally and civilly under state law. Mich.Stat. Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. Similarly, speech which has the effect of inciting imminent lawless action and which is likely to incite such action may also be lawfully punished. \*863 *Brandenburg v.*

Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Civil damages are available for speech which creates a hostile or abusive working environment on the basis of race or sex. *Meritor, supra*. Legally obscene speech is unprotected by the First Amendment, *Miller v. California*, 413 U.S. 15, 22, 93 S.Ct. 2607, 2613, 37 L.Ed.2d 419 (1973), as are materials involving the sexual exploitation of children. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Similarly, speech which is “vulgar,” “offensive,” and “shocking” is not entitled to absolute constitutional protection in all circumstances. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *FCC v. Pacifica Foundation, supra*. Certain kinds of libel and slander are also not protected. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), including possibly group libel, *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Finally, the University may subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. *Texas v. Johnson*, 491 U.S. 397, —, 109 S.Ct. 2533, 105 L.Ed.2d 342, 360 (1989); *Chicago Police Department v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289–90, 33 L.Ed.2d 212 (1972); *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *NAACP v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 852, 9 L.Ed.2d 405 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). As the Supreme Court stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943):

If there is any star fixed 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.

Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people. *Texas v. Johnson, supra*, 491 U.S. at —, 109 S.Ct. at 2544–45, 105 L.Ed.2d at 360; *Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988); *City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 745–46, 98 S.Ct. 3026, 3038–39, 57 L.Ed.2d 1073 (1978); *Collin v. Smith*, 578 F.2d 1197, 1205–07 (7th Cir.), cert. denied 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). As the Supreme Court noted in *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969):

It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See e.g. *Cox v. Louisiana (I)*, [379 U.S. 536 [85 S.Ct. 453, 13 L.Ed.2d 471] (1965) ]; *Edwards v. South Carolina*, [372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) ]; *Terminiello v. Chicago*, [337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) ]; cf. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission. *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211–12, 1 L.Ed.2d 1311 (1957). With these general rules in mind, the Court can now consider \*864 whether the Policy sweeps within its scope speech which is otherwise protected by the First Amendment.

## B. Overbreadth

### 1.

[4] Doe claimed that the Policy was invalid because it was facially overbroad. It is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, *supra* 371 U.S. at 433, 83 S.Ct. at 845–46. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. *Id.* 413 U.S. at 612, 93 S.Ct. at 2915; *Houston v. Hill*, 482 U.S. 451, 458–60, 107 S.Ct. 2502, 2507–08, 96 L.Ed.2d 398 (1987); *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983); *Gooding v. Wilson*, 405 U.S. 518, 521–22, 92 S.Ct. 1103, 1105–06, 31 L.Ed.2d 408 (1972).

The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad. In *Houston v. Hill*, *supra*, the Supreme Court struck down a City of Houston ordinance which provided that “[i]t shall be unlawful for any person to assault or strike or in any manner oppose, molest, and abuse or interrupt any policeman in the execution of his duty.” The Supreme Court also found that the ordinance was overbroad because it forbade citizens from criticizing and insulting police officers, although such conduct was constitutionally protected. *Id.* 482 U.S. at 460–65, 107 S.Ct. at 2508–10. The fact that the statute also had a legitimate scope of application in prohibiting conduct which was clearly unprotected by the First Amendment was not enough to save it. In *Gooding v. Wilson*, *supra*, the Supreme Court struck down a Georgia statute which made it a misdemeanor for “[a]ny person [to], without provocation, use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace.” The Supreme Court found that this statute was overbroad as well, because it punished speech which did not rise to the level of “fighting words,” as defined in *Chaplinsky v. New Hampshire*, *supra*. The Supreme Court struck down a similar ordinance in *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974), on the same grounds. In *Papish v. University of Missouri*, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973), the Supreme Court ordered the reinstatement of a university student expelled

for distributing an underground newspaper sporting the headline “Motherfucker acquitted” on the grounds that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of conventions of decency.” *Id.* at 670, 93 S.Ct. at 1199. Although the Supreme Court acknowledged that reasonable restrictions on the time, place, and manner of distribution might have been permissible, “the opinions below show clearly that [plaintiff] was dismissed because of the disapproved *content* of the newspaper.” *Id.* Most recently, in *Texas v. Johnson*, *supra*, the Supreme Court invalidated a Texas statute prohibiting burning of the American flag on the grounds that there was no showing that the prohibited conduct was likely to incite a breach of the peace. These cases stand generally for the proposition that the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infirmity of the Policy.

## 2.

The University repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment. It urged the Court to disregard the Guide as “inaccurate” and look instead to “the manner in which the Policy has been interpreted and applied by those charged with its \*865 enforcement.” However, as applied by the University over the past year, the Policy was consistently applied to reach protected speech.

On December 7, 1988, a complaint was filed against a graduate student in the School of Social Work alleging that he harassed students based on sexual orientation and sex. The basis for the sexual orientation charge was apparently that in a research class, the student openly stated his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight. *See* Discipline File 88–12–21, described *supra*. He also related to other students that he had been counseling several of his gay patients accordingly. The student apparently had several heated discussions with his classmates over the validity and morality of his theory and program. On January 11, 1989, the Interim Policy Administrator wrote to the student informing him that following an investigation of the complaints, there

was sufficient evidence to warrant a formal hearing on the charges of sex and sexual orientation harassment.<sup>13</sup> A formal hearing on the charges was held on January 28, 1989. The hearing panel unanimously found that the student was guilty of sexual harassment but refused to convict him of harassment on the basis of sexual orientation. The panel stated:

13 The letter stated in part:

One type of complaint alleges that you have engaged in discrimination and/or discriminatory harassment on the basis of sexual orientation. Specifically the complaints allege the following:

1. You have made harassing statements in class and in classroom buildings to other students and/or faculty that are intimidating, hostile, and demeaning on the basis of sexual orientation. Specifically ——— complains that you have stated repeatedly that homosexuality is an illness that needs to be “cured”.

2. You have made several anti-gay comments to other students, specifically to ——— stating that homosexuality is abnormal and unnatural.

Although the Policy required identification of the complainants, these names were withheld from the Court to protect their privacy.

In a divided decision the hearing panel finds that the evidence available to the panel indicates that ——— did not harass students on the basis of sexual orientation under the strict definition of “The University of Michigan Policy on Discrimination and Discriminatory Harassment by Students in the University Environment.” In accordance with First Amendment rights to free speech and the University's policy of academic freedom, ——— did not violate the policy by discussing either the origins or “curability” of homosexuality in the School of Social Work.

Although the student was not sanctioned over the allegations of sexual orientation harassment, the fact remains that the Policy Administrator—the authoritative voice of the University on these matters—saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research. Moreover, there is no indication that had the hearing panel convicted rather than acquitted the student, the University would have interceded to protect the interests of academic freedom and freedom of speech.

A second case, which was informally resolved, also demonstrated that the University did not exempt statements made in the course of classroom academic discussions from the sanctions of the policy. On September 28, 1988, a complaint was filed against a student in an entrepreneurship class in the School of Business Administration for reading an allegedly homophobic limerick during a scheduled class public-speaking exercise which ridiculed a well known athlete for his presumed sexual orientation. Complaint No. 88–9–05. The Policy Administrator was able to persuade the perpetrator to attend an educational “gay rap” session, write a letter of apology to the *Michigan Daily*, and apologize to his class and the matter was dropped. No discussion of the possibility that the limerick was protected speech appears in the file or in the Administrator's notes.

A third incident involved a comment made in the orientation session of a preclinical \*866 dentistry class. The class was widely regarded as one of the most difficult for second year dentistry students. To allay fears and concerns at the outset, the class was broken up into small sections to informally discuss anticipated problems. During the ensuing discussion, a student stated that “he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly.” Complaint No. 88–9–07. A minority professor teaching the class filed a complaint on the grounds that the comment was unfair and hurt her chances for tenure. Following the filing of the complaint, the student was “counseled” about the existence of the policy and agreed to write a letter apologizing for making the comment without adequately verifying the allegation, which he said he had heard from his roommate, a black former dentistry student.<sup>14</sup>

14 Only a single complaint involving allegedly harassing remarks made in the context of a classroom discussion was dismissed because of First Amendment concerns. A complaint of anti-semitic harassment was filed on March 27, 1989, by a Jewish student in a class on the Holocaust who was offended by another student's suggestion that Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians. Complaint No. 89–3–2. Accordingly to the Administrator's notes, the perpetrator refused to apologize for the comment. The Administrator phoned the complainant and informed her that the

comment was protected speech, not covered by the policy.

The manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy. The innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued. Moreover, the Administrator generally failed to consider whether a comment was protected by the First Amendment before informing the accused student that a complaint had been filed. The Administrator instead attempted to persuade the accused student to accept “voluntary” sanctions. Behind this persuasion was, of course, the subtle threat that failure to accept such sanctions might result in a formal hearing. There is no evidence in the record that the Administrator ever declined to pursue a complaint through attempted mediation because the alleged harassing conduct was protected by the First Amendment. Nor is there evidence that the Administrator ever informed an accused harasser during mediation negotiations that the complained of conduct might be protected. The Administrator's manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution. The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.<sup>15</sup>

<sup>15</sup> The Court's finding that the University interpreted the Policy to reach constitutionally protected speech makes it unnecessary to consider whether the Policy was susceptible to a saving construction. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 493–503, 105 S.Ct. 2794, 2796–2801, 86 L.Ed.2d 394 (1985).

### C. Vagueness

Doe also urges that the policy be struck down on the grounds that it is impermissibly vague. A statute is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning.” *Broadrick*, *supra* 413 U.S. at 607, 93 S.Ct. at 2913. A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it. *Id.* “No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct.

618, 619, 83 L.Ed. 888 (1939). These considerations apply with particular force where the challenged statute acts to inhibit freedoms affirmatively protected by the constitution. *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). However, the chilling effect caused by an overly vague statute must be both real and substantial, *Young v. American Mini-Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and a narrowing construction must be unavailable before a court will set it \*867 aside, *Screws v. United States*, 325 U.S. 91, 98, 65 S.Ct. 1031, 1033, 89 L.Ed. 1495 (1945).

[5] Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. The structure of the Policy was in two parts; one relates to cause and the other to effect. Both cause and effect must be present to state a prima facie violation of the Policy. The operative words in the cause section required that language must “stigmatize” or “victimize” an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.

The first of the “effects clauses” stated that in order to be sanctionable, the stigmatizing and victimizing statements had to “involve an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.” It is not clear what kind of conduct would constitute a “threat” to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.

Moving to the second “effect clause,” a stigmatizing or victimizing comment is sanctionable if it has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, etc. Again, the question is what conduct will be held to “interfere” with an individual's academic efforts. The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as “inaccurate,” an implicit admission that

even the University itself was unsure of the precise scope and meaning of the Policy.

During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285–88, 82 S.Ct. 275, 279–281, 7 L.Ed.2d 285 (1961).

## VI. CONCLUSION.

### A.

The foregoing constitutes the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52. However, at this juncture, a few additional observations of a general nature would seem to be in order. As the Court noted at the hearing on August 25, 1989, there is nothing in the record to suggest that the University looked at the experience of any other university in developing its approach to the problem of discriminatory harassment. Had it done so, it might have discovered that Yale University, a private institution not subject to the strictures of the First Amendment, faced a similar dilemma pitting its efforts to promote equality against its commitment to free speech. In 1986, a sophomore at Yale was put on probation for two years by a University discipline board for disseminating a malicious flier intended to ridicule the homosexual community. The board eventually reversed the sanction, but only after a second hearing was held at which the student was represented by historian C. Vann Woodward, author of the University's 1975 report on free speech. N.Y. \*868 Times, Oct. 15, 1986, at A27. That report concluded that "freedom of expression is a paramount value, more important than civility or rationality." N.Y. Times, Sept. 22, 1986, at B4. Writing about the case, Professor Woodward observed:

It simply seems unnatural to make a fuss about the rights of a speaker who offends the moral or political convictions passionately held by a majority. The far more natural impulse is to stop the nonsense, shut it up, punish it—anything but defend it. But to give rein to that inclination would be to make the majority the arbiters of truth for all. Furthermore, it would put the universities into the business of censorship.

New York Times, Oct. 15, 1986, at A27.

While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did. From the Acting President's December 14 memorandum forward to the adoption of the Policy and continuing through the August 25 hearing, there is no evidence in the record that any officials at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment. The apparent willingness to dilute the values of free speech is ironic in light of the University's previous statements of policy on this matter. In 1977, the Regents adopted the "Statement on Freedom of Speech and Artistic Expression: The Rights and Obligations of Speakers, Performers, Audience Members, and Protesters at the University of Michigan" (Statement) which "reaffirm[ed] formally [the University's] deep and lasting commitment to freedom of speech and artistic expression." The Statement provides in part that

freedom of speech must not ordinarily be restricted, governed or curtailed in any way by content except where the law, as interpreted by the Supreme Court of Michigan or the Supreme Court of the United States, holds that such an expression does not fall within constitutionally protected free speech. In all instances, the University authorities should act with maximum constraint, even in

the face of obvious bad taste or provocation. The belief that some opinion is pernicious, false, or in any other way detestable cannot be grounds for its suppression.<sup>16</sup>

<sup>16</sup> The Statement was redrafted by the University's Civil Liberties Board in 1988. The new Statement, substantially identical to the old, was formally re-enacted by the Regents at their July 1988 meeting.

Needless to say, the philosophy expressed in the Statement is diametrically opposed to that reflected in the Acting President's December 14 Memorandum. Apparently, no one involved in the drafting process noted the apparent inconsistency with the Regents' views as expressed in the Statement.

Throughout the case, the University's counsel strenuously urged that First Amendment concerns held a top priority in the development and administration of the Policy. Counsel repeatedly argued that the University interpreted the Policy to reach conduct such as racial slurs and epithets in the classroom directed at an individual victim. However, as the Court observed in its August 25, 1989 bench opinion,

what we have heard here this morning ... from University counsel is a revisionist view of the Policy on Discrimination and Discriminatory Harassment by Students in the University Environment, and it is a view and interpretation of the Policy that was not in the minds of the legislators when it was adopted. And there is nothing in the record that has been presented to the Court which suggests that this was an appropriate interpretation of the policy.

Not only has the administrative enforcement of the Policy been wholly inconsistent with counsel's interpretation, but withdrawal of the Guide, *see supra* at 13, and the eleventh hour suspension of section 1(c), *see supra* at 8, suggests that the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along.

**\*869 B.**

In his famous treatise on constitutional law, Thomas Cooley, Justice of the Michigan Supreme Court and Professor of Law at the University's Law School, came out as an early and forceful proponent of an expansive interpretation of the First Amendment. He reasoned that even if speech

exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

T. Cooley, *A Treatise on the Constitutional Limitations* 429 (Da Capo ed. 1972) (1st ed. 1868). This observation appears as compelling today as when it was first written over one hundred and twenty years ago.

**ADDENDUM**

Inexplicably the Court did not become aware of a conference on legal story telling at the University's Law School in April 1989 until after its Opinion was docketed. Important for consideration of a broader perspective of the issues put by the Policy and the Court's holding of unconstitutionality under the First Amendment is a paper delivered at the conference by Mari J. Matsuda, an associate professor of law at the William S. Richardson School of Law at the University of Hawaii: *Public Response To Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, August 1989. \* Professor Matsuda's description of her purpose amply describes the significance of the paper:

\* The Opinion was signed and filed around noon on September 22, 1989. The August 1989 issue of the Law Review, while delivered by mail to chambers that morning, was not first read by the Court until that evening. An earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues.

This Article attempts to begin a conversation about the first amendment that acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech. It suggests criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many

forms of racist speech to private remedies.... This is not an easy legal or moral puzzle, but it is precisely 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.

**All Citations**

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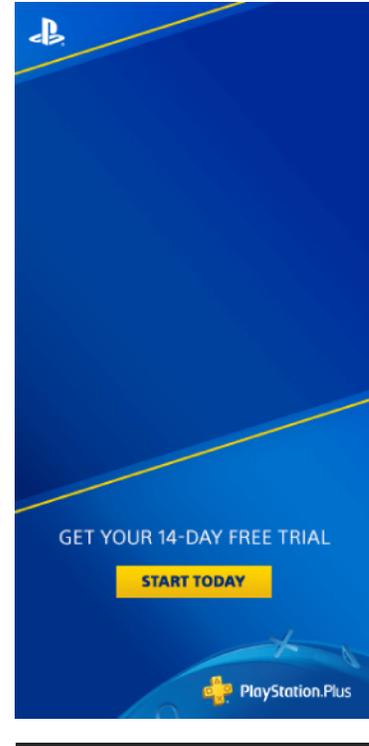
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DON'T BE EVIL —

# Google fired James Damore for a controversial gender memo—now he's suing

Damore argued few women program due to interest in "people rather than things."

TIMOTHY B. LEE - 1/9/2018, 8:35 AM




Nguyen Hung Vu

Enlarge / Google CEO Sundar Pichai.

1382

Google engineer James Damore was **fired last August** after he wrote a controversial memo arguing that Google had gone overboard in its efforts to promote diversity. He generated widespread outrage by suggesting that the under-representation of women at Google was a result of women's lesser interest in software engineering—rather than discrimination within the technology sector.

#### FURTHER READING

Google fires engineer who "crossed the line" with diversity memo

On Monday, Damore filed a **lawsuit** accusing the Mountain View search giant of systematic, illegal discrimination against conservatives and white men. He was joined in the lawsuit by David Gudeman, another Googler fired under similar circumstances.

"Damore, Gudeman, and other class members were ostracized, belittled, and punished for their heterodox political views, and for the added sin of their birth circumstances of being Caucasians and/or males," their lawsuit charges. Damore and Gudeman are seeking to represent all conservatives and white men who have allegedly faced discrimination at Google in a class-action lawsuit.

There doesn't seem to be much dispute about the facts in the case. Where Damore and Gudeman disagree with Google management, of course, is in how to interpret the events described in their lawsuit. Damore and Gudeman view themselves as bravely standing up to a left-wing political culture that systematically discriminates against conservatives and white men.

Their critics—including Google's management and many Google employees—viewed them as right-wing trolls who were systematically undermining Google's benign efforts to create a more diverse and inclusive workplace.

"We look forward to defending against Mr. Damore's lawsuit in court," a Google spokesman told Ars.

The challenge for Google is that while Damore and Gudeman's viewpoint is marginal inside Google, it's not entirely marginal in the broader world. Many conservatives—including the president of the United States—share the duo's view that "political correctness" has gone too far in corporate America. The lawsuit offers plenty of ammunition for people who hold this view—even as many other people will look at the same set of facts and conclude that Google justifiably fired a couple of recalcitrant troublemakers.

## Damore was a persistent critic of Google's diversity policies

One thing that's clear from the lawsuit is that James Damore wasn't shy about advocating the views laid out in his memo. Over the course of two months, he promoted them to everyone who would listen.

"In June 2017, Damore attended a 'Diversity and Inclusion Summit,'" the lawsuit reports. "Damore felt pressured to attend the event because Google proclaims 'commitment to diversity and inclusion' to be an important factor in deciding promotion to leadership positions."

At the summit, Damore told a Google HR representative that "he believed some of the positions taken by Google were divisive and misguided." At the end of the program, the lawsuit says, participants were asked to provide written feedback, so Damore wrote the first draft of his memo and sent it to Google's HR department as part of his feedback to the event.

Damore didn't stop there. In early July, Damore posted a copy of the memo to an internal Google forum used to discuss diversity issues.

He also "emailed individuals responsible for Google's diversity programs, the Women at Google Program, the Code of Conduct team, and Google HR." He pointed out that some of Google's training and recruitment programs were specifically reserved for women and minorities and asked whether it was legal to exclude white men from these programs. He told the Google Code of Conduct team that he believed "some of Google's policies were not being applied equally."

Unfortunately, the lawsuit says, "Damore's complaint about Google's illegal hiring and employment practices were never investigated or pursued by Google HR, other than by firing him."

Damore wasn't done. He went to another diversity event later in July, where he again raised concerns about viewpoint discrimination at Google. When Damore objected to the premise of one session focused on the concept of white male privilege, the lawsuit says, other Googlers "laughed at him derisively."

At the end of this event, Damore submitted yet another copy of his memo—updated with some changes suggested by some other Googlers who saw the first draft.

Damore still wasn't done. On August 2, he submitted the memo to an internal mailing list. Finally, the memo began to circulate more widely within Google, and it began to elicit the broader debate he had been craving. It also leaked to the technology press, causing a public furor.

The result was an intense backlash. "You're a misogynist and a terrible person," one Googler reportedly wrote to Damore in an email. "I will keep hounding you until one of us is fired. Fuck you."

"If Google management cares enough about diversity and inclusion, they should, and I urge them to, send a clear message by not only terminating Mr. Damore, but also severely disciplining or terminating those who have expressed support" for his memo, another Googler wrote in an internal discussion forum.

Damore's critic got his wish—he got fired on August 7.

## “Gudeman compared this document to that which slave owners would have written”

The story of Damore's fellow plaintiff David Gudeman was broadly similar. In 2015, Gudeman received a memo written by another Googler warning against "derailment." It was a plea for white men to be more deferential to women and minorities during discussions of social justice issues.

Gudeman wasn't convinced—and he chose a particularly inflammatory analogy to illustrate why. According to the lawsuit, "Gudeman compared this document to that which 'slave owners would have written for their slaves to help them understand how to interact with their masters.'"

That got Gudeman reported to the HR department, who (as the lawsuit puts it) "chastised him for attempting to stand up for Caucasian males and his conservative views." Gudeman got a verbal warning.

Gudeman became a supporter of Donald Trump, and after Trump won the 2016 election he pushed back against the widespread anti-Trump sentiment inside Google. Another Googler wrote that "as someone already targeted by the FBI (including at work) for being a Muslim, I'm worried for my personal safety and liberty."

Gudeman "responded skeptically" to his coworker's claim, arguing that if he had really been targeted based solely on his religion, he should have filed a civil rights lawsuit over it. Other Googlers didn't take kindly to Gudeman questioning a coworker's story, and he was once again reported to HR.

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### FURTHER READING

Google cancels all-hands diversity meeting over safety concerns

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"Google HR stated that Gudeman had accused [the Muslim employee] of terrorism based on [his] religion, and this was unacceptable." Gudeman was fired over the incident, according to the lawsuit.

## Lawsuit portrays pattern of anti-conservative bias

After describing Damore's and Gudeman's experiences, the lawsuit tells the stories of other, mostly unnamed Googlers who observed behavior that seemed to be biased against conservatives and/or white men.

For example, in one case a Google employee wrote in an internal company message board that "if I had a child, I would teach him/her traditional gender roles and patriarchy from a very young age. Our degenerate society constantly pushes the wrong message."

The lawsuit says Google HR responded by writing to the employee that "your choice of words could suggest that you were advocating for a system in which men work outside of the home and women do not, or that you were advocating for rigid adherence to gender identity at birth. We trust that neither is what you intended to say."

In the wake of the Damore controversy, a Google manager wrote, "you know, there are certain 'alternative views, including different political views' which I do not want people to feel safe to share here. You can believe that women or minorities are unqualified all you like—I can't stop you—but if you say it out loud, you deserve what's coming to you."

In another post, a Googler wrote about a promotion committee she served on. "2/4 committee members were women. Yay!" she wrote. "4/4 committee members were white. Boo! 12/15 candidates were white men. Boo!"

Many of these anecdotes will look different to people with different politics. Fans of aggressive pro-diversity efforts are likely to see all of these as examples of Googlers trying to cultivate a tolerant and diverse workplace. In their view, advocating these kinds of views creates a workplace environment where women and minorities don't

feel comfortable—and so the company is forced to choose between tolerating outspoken employees like Damore and Gudeman or attracting and retaining a more diverse workforce.

But for many conservatives, the lawsuit will read as a damning indictment of Google's corporate culture. Damore's defenders on the right will interpret a line like "4/4 committee members were white. Boo!" as straightforward evidence of discrimination against white people.

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## Troll Charles Johnson banned from Twitter

By DYLAN BYERS | 05/26/2015 01:22 PM EDT

Charles Johnson, a California based blogger and well-known political troll, has been permanently banned from Twitter after asking for donations to help "take out" an activist who's been protesting the recent police shootings in Baltimore and Ferguson.

Johnson was suspended on Sunday after soliciting support to "take out" DeRay McKesson, a civil rights activist. Johnson and his lawyers argue that he is a victim of censorship, and have threatened legal action. "Twitter doesn't seem to have a problem with people using their service to coordinate riots," Johnson wrote on his blog Sunday. "But they do have a problem with the kind of journalism I do."

A self-described "radical" and "revolutionary," Johnson is known for ginning up controversy with false accusations. He wrongly accused two New York Times reporters of revealing the address of the police officer in the Ferguson shooting. He wrongly accused another Times reporter of posing for Playgirl. He wrongly claimed that Sen. Cory Booker did not live in Newark when he served as that city's mayor. On one occasion, he was temporarily suspended from Twitter after posting photos of someone he claimed had been exposed to Ebola. His most high-profile moment came when he rightly cast doubt on the Rolling Stone article about the University of Virginia rape accusations. Then he threatened to expose the student who made the accusations, attacked her on social media and published a photo of a woman he thought was her -- but wasn't. Johnson has also suggested that President Obama is gay.

Writing of Johnson in December, the late media columnist David Carr summarized his efforts thusly: " In general, he has a knack for staking an outrageous, attacking position on a prominent news event, then pounding away until he is noticed. It is one way to go, one that says everything about the corrosive, underreported news era we are living through."

Johnson was noticed for the last time on Twitter when he requested funding to "take out" McKesson. Though as The Washington Post notes, "This does not, alas, mean we've seen the last of Chuck Johnson, uber-troll extraordinaire. Banned by Twitter, he can simply take up residence elsewhere — say Facebook, where he purportedly maintains a personal account, or Reddit, where he's promised an upcoming AMA."

Cornell Law School

U.S. Code › Title 47 › Chapter 5 › Subchapter II › Part I › § 230

## 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material

**(a) FINDINGS** The Congress finds the following:

- (1)** The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2)** These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3)** The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4)** The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5)** Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

**(b) POLICY** It is the policy of the United States—

- (1)** to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2)** to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3)** to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4)** to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5)** to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(c) PROTECTION FOR “GOOD SAMARITAN” BLOCKING AND SCREENING OF OFFENSIVE MATERIAL**

**(1) TREATMENT OF PUBLISHER OR SPEAKER**

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

**(2) CIVIL LIABILITY** No provider or user of an interactive computer service shall be held liable on account of—

**(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

**(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>[1]</sup>

**(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(e) EFFECT ON OTHER LAWS**

**(1) NO EFFECT ON CRIMINAL LAW**

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

**(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW**

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

**(3) STATE LAW**

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

**(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

**(f) DEFINITIONS** As used in this section:

**(1) INTERNET**

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) INTERACTIVE COMPUTER SERVICE**

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

**(3) INFORMATION CONTENT PROVIDER**

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

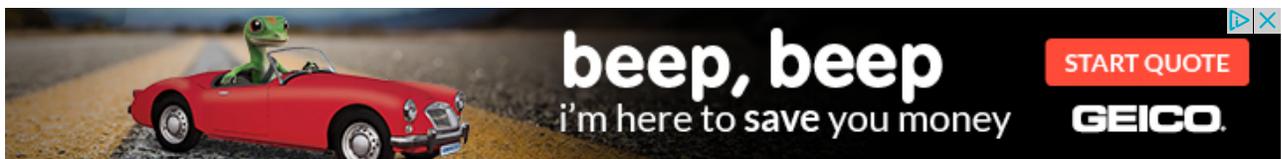
**(4) ACCESS SOFTWARE PROVIDER** The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A)** filter, screen, allow, or disallow content;
- (B)** pick, choose, analyze, or digest content; or
- (C)** transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739.)

[1] So in original. Probably should be “subparagraph (A).”

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