BURNING CROSSES AND BLAZING WORDS: HATE SPEECH AND THE SUPREME COURT'S FREE SPEECH CLAUSE JURISPRUDENCE

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> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .[1]

I. INTRODUCTION

Society's historical struggle with racial hatred and its commitment to liberty manifests the more fundamental struggle between the desire for a virtuous, ordered society and the republican ideal of liberty. Indeed, a civilized society submits to the rule of law upon the belief that such a resignation of power will produce justice.[2] When the rule of law fails to produce justice, a fundamental tension between the paramount commitment to a republican form of government and a thirst for justice emerges. This tension produces an immediate attempt to recapture the authority yielded to the republican state. Such an attempt to recapture democratic power demands a hasty, albeit just, resolution to the specific conflict, erroneously disregarding the philosophical and constitutional principles embodied in the rule of law. This reaction defines modern American society's political and legal life.

Furthermore, the moral and philosophical principles that precipitate this struggle transcend the subsequent political and legal conflicts the rule of law was empowered to resolve. Consequently, many jurists today have failed to realize the breadth of the issues the law seeks to resolve and, in so failing, have focused too narrowly on the legal consequences of their proposed solutions. Thus, the law is not capable of solving all of society's problems independent of those institutions and ideas which comprise the law.[3]

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[1]U.S. CONST. amend. I.

[2]*See infra* note 225 (examining Rousseau's belief in the benefits of a civilized state).

[3]Discussing a "rights-based approach" to interpreting the Constitution, Ronald Dworkin wrote:

> There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state . . . any more than they have been passive in the

This Comment addresses society's struggle with hatred and its commitment to liberty through an examination of the Supreme Court of the United States' First Amendment Free Speech Clause[4] jurisprudence and hate crime legislation.[5] This Comment presents a two-pronged thesis. First, the Supreme Court's holdings in *R.A.V. v. City of St. Paul, Minnesota*,[6] and *Wisconsin v. Mitchell*,[7] and the recent case law interpreting those holdings, have yielded a discernable and principled First Amendment analysis regarding hate crime legislation fundamentally consistent with the Court's traditional free speech jurisprudence. Nonetheless, larger questions regarding the Court's Free Speech Clause analysis remain unanswered. These questions are responsible for the current controversy regarding the Court's Free Speech Clause jurisprudence, requiring the Court to resolve these questions by establishing a coherent and complete First Amendment jurisprudence. Second, this Comment will propose, as a solution to the confusion which has followed *R.A.V.*, an interpretive theory that views the First Amendment, like the Preamble[8] and the Ninth Amendment,[9] as a

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development of legal sociology and legal economics. *They must recognize that law is no more independent from philosophy than it is from these other disciplines.*

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) (emphasis added).

[4]*See supra* note 1 and accompanying text.

[5]*See infra* notes 205-19 and accompanying text (comparing and analyzing the various types of hate crime legislation).

[6]112 S. Ct. 2538 (1992) (holding that content-based regulation of speech is presumptively invalid and thus declaring Minnesota ordinance unconstitutional on grounds of underinclusiveness). For a more detailed discussion, see *infra* notes 106-53 and accompanying text.

[7]113 S. Ct. 2194 (1993) (holding that the First Amendment does not prohibit the evidentiary use of protected speech to establish aggravating circumstances, regarding motive and intent, for purposes of determining the appropriate sentence). For further explanation, see *infra* notes 154-61 and accompanying text.

[8]U.S. CONST. pmbl. The Preamble to the Constitution states:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id. The Preamble sets out the purpose and basic philosophical values underlying the Constitution. *Cf.* Craig M. Lawson, *The Literary Force of the Preamble*, 39 MERCER L.

predicate provision[10] founded upon a belief in natural rights[11] and bound by the limits of natural law.[12] This Comment will demonstrate that these predicate provisions define the philosophical principles underlying the Constitution. Their full meaning cannot be understood independent of a proper historical and philosophical understanding of the Framers original intent as well as the social and political context in which the Constitution presently operates.

The unresolved constitutional issues presented by hate crime legislation

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REV. 879 (1988) ("One comes away with the sense that the Preamble walks before the Constitution primarily to introduce its purposes, as today many statutes begin with statements of purpose.").

[9]U.S. CONST. amend. IX. The Ninth Amendment reads, "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* Explaining the fundamentally important nature of the Ninth Amendment in American Constitutional Law, Calvin Massey wrote:

> As a guide, courts should keep in mind the Lockean principle which the [N]inth [A]mendment was intended to effectuate: the state can only exercise coercive powers which its constituent members could legitimately exercise in self-defense.
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> The result of this reading of the [N]inth [A]mendment is to revive the [A]mendment as a keystone of federalism and as a source of substantive, fundamental personal liberties.

Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L. J. 305, 344 (1987). *See also* Lawrence G. Sager, *You can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But what on Earth can you do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 239 (1988) ("The [N]inth [A]mendment is singular in a way that ought to command attention. It is one of a limited number of constitutional provisions that are *about* rather than *of* the Constitution.").

[10]The term "predicate provision" is intended to connote the fundamental, philosophical meaning of the constitutional provisions it is used to describe. Accordingly, these sections of the Constitution embody a political philosophy that gives the entire Constitution its meaning. Moreover, understanding these sections of the Constitution requires a historical and philosophical understanding of that document's evolution. Finally, the methodology employed by this Comment utilizes such an approach to understand the Free Speech Clause and, thus, provides a more comprehensive understanding of the Constitution itself. For a detailed discussion of the predicate provision theory and supporting authority, see *infra* notes 220-29 and accompanying text.

[11]*See infra* note 226 and accompanying text (defining the scope and character of natural rights).

[12]*See infra* notes 227-28 and accompanying text (discussing the limitations of natural law).

have resurfaced in a series of recent state court decisions applying *R.A.V.* and *Mitchell*, as well as efforts by some of the same states to rewrite their now unconstitutional hate crime statutes. This Comment will provide a workable legal analysis to resolve this current legal struggle by providing a broader understanding of the legal issues regarding hate speech and the First Amendment.

II. FREE SPEECH: THE COURT'S STRUGGLE WITH WORDS

The meaning and scope of the Free Speech Clause has provided a forum for some of the most intense and profound struggles American society has endured.[13] The Supreme Court of the United States in executing its constitutional duty,[14] has carried the burden of those struggles more so than any other American legal or political institution. The Court's struggle with the First Amendment has illuminated not only legal questions, but, more fundamentally, moral and philosophical dilemmas. The Court's Free Speech Clause jurisprudence, moreover, has evolved into a series of complex doctrines.[15] The recent developments in this area, however, have produced

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[13]*See, e.g.*, R.A.V. v. City of St. Paul, Minn., 113 S. Ct. 2538 (1992) (reversing the petitioner's conviction for burning a cross on an African-American family's lawn); Brandenburg v. Ohio, 395 U.S. 444 (1969) (reversing the convictions of Ku Klux Klan members for advocating racial hatred and intolerance toward Blacks and Jews); Debs v. United States, 249 U.S. 211 (1918) (upholding the conviction of politician Eugene Debs for "obstructing and attempting to obstruct the recruiting service of the United States" through the advocacy of socialism and for opposition to World War I); Schenck v. United States, 249 U.S. 47 (1918) (upholding the petitioner's convictions under the Espionage Act of 1917 for distributing through the mail a pamphlet advocating non-compliance with military conscription and recruitment laws). *See also* State v. Vawter, 642 A.2d 349 (N.J. 1994) (reversing the petitioner's convictions for spray painting Nazi swastika and the words "Hitler Rules" on a Jewish Synagogue and declaring two New Jersey statutes unconstitutional encroachments upon free speech); People v. Steven S., 31 Cal. Rptr.2d 644 (Cal. App. Ct. 1994) (upholding the petitioner's conviction for burning a cross on an African-American family's lawn).

[14]Chief Justice Marshall defined the duty of the judicial branch stating:

> It is emphatically the province and duty of the judicial department to [s]ay what the law is. Tho[s]e who apply the rule to particular ca[s]es, mu[s]t of nece[ss]ity expound and interpret that rule. If two laws conflict with each other, the courts mu[s]t decide on the operation of each.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[15]Among the several doctrines comprising the Court's larger Free Speech Clause jurisprudence are the "bad tendency" doctrine, the "fighting words" doctrine, overbreadth and vagueness tests, content neutrality doctrine, and the "true threat" doctrine. *See infra* notes 16-98 and accompanying text (discussing in detail these doctrines and the evolution

a substantial and principled, though complicated, First Amendment analysis. The relationship between those doctrines has spawned serious and complex questions regarding the Court's Free Speech Clause jurisprudence.

The following discussion will highlight the historical development and evolution of the Court's First Amendment jurisprudence. The relationship between the Court's present-day jurisprudence and the historical developments which brought the Court to its present position are vital to understanding the current law. Indeed, realizing the defects which may exist in the current law and fashioning a sound moral, philosophical, and legal solution to those defects requires a historical understanding of the law.

A. THE EVOLUTION OF A JURISPRUDENCE

Initially, the Court's Free Speech Clause jurisprudence focused on the nature of the utterance subject to regulation.[16] The purpose of this focus was to identify those categories of speech which were not worthy of First Amendment protection and, thus, were constitutionally proscribable.[17] The Court's focus on the nature of the utterance eventually shifted to a jurisprudence that allowed for invalidation of statutes that regulated speech without regard for the character of the utterance. This change in the Court's jurisprudence altered standing requirements, allowing the individual to challenge the constitutionality of a statute without requiring the individual to allege a deprivation of his or her specific rights.[18] Additionally, the Court

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of the Court's Free Speech Clause jurisprudence).

[16]*See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the Court's Free Speech analysis must first answer the question "whether the words used are in such circumstances and are of such a nature as to create a clear and present danger"); Patterson v. Colorado, 205 U.S. 454, 463 (1907) (upholding a contempt conviction based on comments critical of a state judge).

[17]*See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("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 . . . ." (citing Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149-50 (1941))).

[18]*See* Broadrick v. Oklahoma, 413 U.S. 601, 610-12 (1973) (holding § 818 of the Oklahoma Merit System of Personnel Administration Act constitutional while declaring that an unconstitutionally overly broad statute is one which may cause other persons, not before the Court, to refrain from engaging in constitutionally protected speech, thus allowing litigants to challenge the constitutionality of a statute on grounds that it affects the rights of other persons and not necessarily their own); Thornhill v. Alabama, 310 U.S. 88 (1940) (declaring an Alabama statute, regulating loitering and picketing, unconstitutional "on its

expanded its First Amendment jurisprudence by recognizing forms of expression, other than "pure speech,"[19] as protected speech under the First Amendment.[20] This evolution has entered a new stage of development, with the most recent Free Speech Clause debates centering around statutes that proscribe expressions of bias or hatred.[21]

The First Amendment, therefore, is no longer a misunderstood, abused provision. Rather, the First Amendment has become the centerpiece of the Constitution, representing most clearly, the natural law theory of individual

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face" because the statute's broad sweep proscribed protected forms of speech and was not justified by a sufficient state interest). For a more detailed explanation of *Thornhill* and *Broadrick*, see *infra* notes 75, 82-83 and accompanying text.

[19]*See infra* note 65 and accompanying text (discussing the Court's recognition of expressive conduct as "speech" worthy of First Amendment protection).

[20]*See infra* note 75, 82-84 and accompanying text (examining the overbreadth doctrine and its impact on the Court's jurisprudence).

[21]Since R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992) and Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), a series of state court decisions dealing with the constitutionality of hate crime statutes have attempted to interpret and apply these holdings. *See, e.g.*, State v. T.B.D., 638 So.2d 165 (Fla. Dist. Ct. App. 1994) (holding that § 876.18 of the Florida criminal code was constitutionally overbroad under the "traditional First Amendment overbreadth analysis"); People v. Steven S., 31 Cal. Rptr.2d 644 (Cal. Ct. App. 1994) (holding that § 11411 of the California Penal Code was a constitutional proscription of "various acts of racial, ethnic, and religious terrorism" under vagueness, overbreadth, content neutrality, and equal protection analyses); State v. Dyson, 872 P.2d 1115 (Wash. 1994) (upholding the constitutionality of WASH. REV. CODE § 9.61.230(1) and WASH. REV. CODE § 9.61.230(2) and rejecting Petitioner's vagueness and overbreadth challenges); State v. Mortimer, 641 A.2d 257 (N.J. 1994) (affirming the constitutionality of N.J. STAT. ANN. § 2C:33-4 through the application of the holdings in R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992) and Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993)); State v. Vawter, 642 A.2d 349 (N.J. 1994) (declaring N.J. STAT. ANN. § 2C:33-10, -11 unconstitutional based on the holding in R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992)); State v. Sheldon, 629 A.2d 753 (Md. 1993) (declaring MD. CODE ANN., CRIM. LAW (1957, 1992 Repl. Vol.) Art. 27 § 10A a "content-based regulation of that expression is neither exempt from, nor can survive, the First Amendment's presumption against its validity"); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993) (declaring S.C. CODE ANN. § 16-7-120 (1985) and § 16-11-550 (1985) unconstitutional under the holding in *R.A.V.* and the overbreadth doctrine respectively); Ohio v. Wyant, 597 N.E.2d 450 (Ohio 1992), *cert. granted*, 113 S. Ct. 2954 (1993) (vacating the lower court's judgment by distinguishing *Mitchell* and declaring OHIO REV. CODE ANN. § 2927.12 unconstitutional under the Supreme Court's holding in *R.A.V.*); Plowman v. Oregon, 838 P.2d 558 (Or. 1992) (upholding the constitutionality of OR. REV. STAT. § 166.165(1)(a)(A)), *cert. denied*, 113 S. Ct. 2967 (1993).

liberty upon which the United States was founded.[22] This change in the Court's understanding is the product of a continuously evolving jurisprudence. Although certain periods during this evolution, such as the late 1960's and early 1970's, appear more prominent than others, the roots of such change lie far earlier in the opinions of Justices such as Holmes and Brandeis and the Court's early decisions during the 19th century.[23] The current doctrine is the result of a constantly evolving process, which continuously changes the Court's previous interpretation of the First Amendment. Understanding this evolution indicates why and how the Court formulates its current jurisprudence.

1. THE COURT'S STRUGGLE BEGINS

The true beginnings of the Supreme Court's free speech jurisprudence pre-date World War I and the now famous constitutional challenges to the Espionage Act of 1917,[24] a period often marked as the dawning of a free speech jurisprudence.[25] During the 19th and early 20th centuries, however, free speech issues arose out of controversies regarding the Sedition Act of

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[22]*See infra* notes 230-39 and accompanying text (articulating the philosophical foundations of the American political tradition).

[23]*See infra* notes 39-44 and accompanying text (discussing Holmes-Brandeis reformulation of the clear and present danger test).

[24]The relevant portion of the Espionage Act provided:

> SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Espionage Act of 1917, Pub. L. No. 65-24, § 3, 40 Stat. 217, 219 (1917).

[25]David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514, 516-21 (1981). *See also* Eugene Gressman, *Bicentennializing Freedom of Expression*, 20 SETON HALL L. REV. 378, 380 (1990) ("Not until after the end of World War I did the nation or the Court begin to give serious heed to what was written in 1789.").

1798,[26] the mailing of anti-slavery literature and anti-war speech during the 1860's, the emergence of academic freedom, and the efforts of the Industrial Workers of the World ("IWW"), an organization which advocated the political philosophy of communism.[27] Prior to World War I, the Supreme Court took a very restrictive view of the First Amendment[28] and offered

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[26]The relevant portion of the Sedition Act of 1798 provided:

> SEC. 2. *And be it further enacted*, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Sedition Act of 1798, ch. 74, 2 Stat. 596, 597 (1798).

[27]Rabban, *supra* note 25, at 518 (discussing the historical events of the 19th century which raised important Free Speech issues).

[28]During the 19th and early 20th centuries, the Court had several opportunities to address and define the meaning of the Free Speech Clause but, in many cases, declined to do so. *See, e.g.*, Lewis Publishing v. Morgan, 229 U.S. 288, 314 (1912) (upholding congressional regulation of second class mail requiring publishers, newspapers and other mass produced publications to provide information about the business of the publisher); *In re* Rapier, 143 U.S. 110, 135-36 (1891) (affirming the holding in *Jackson*, the Court declared that "[t]he freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment, through the governmental agencies which it controls"); *Ex parte* Jackson, 96 U.S. 727, 736 (1882) ("In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."); United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The right [of free speech] was not created by the [A]mendment; neither was its continuance guaranteed, except as against congressional interference.").

There were instances, however, when the Court did address the meaning and scope of the Free Speech Clause, forming a restrictive view of the First Amendment. *See, e.g.*, Fox v. Washington, 236 U.S. 273, 275 (1915) (upholding the constitutionality of a Washington state statute criminalizing the "willful[] print[ing], publish[ing], edit[ing], issue[ing,]" or distribution of any material "advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace[,] or act of violence . . . .").

Finally, there were opinions from members of the Court advocating a more libertarian

little constitutional protection for individual expression.[29] This early period was characterized by a series of controversial and stormy events that lead the Court to develop its restricted view of the First Amendment. Issues raised by abolitionists during the 19th century and the IWW during the early 20th century, however, provoked significant constitutional interpretation.[30] The well-known cases which followed evolved from this restricted and burdened approach ultimately producing a more libertarian jurisprudence.

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view of the Free Speech Clause, a view that the Court would ultimately adopt decades later. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 465 (1906) (Harlan, J., dissenting) ("I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law."); *Ex parte* Curtis, 106 U.S. 371, 377 (1882) (Bradley, J., dissenting) ("The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammelled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question.").

[29]Doctrinally, this restrictive view was characterized by the notion that the potential "bad tendency" of speech to cause a breach of the peace or some other evil that legislatures legitimately were empowered to protect against provided the grounds for proscription of any speech driven by such inclinations. Rabban, *supra* note 25, at 520. *See also Patterson*, 205 U.S. 454 (Holmes, J.) (upholding a contempt conviction for a verbal criticism of judicial conduct); *Fox*, 236 U.S. 273 (Holmes, J.) (upholding a conviction for editing an article advocating a "boycott" of those who opposed public nude bathing).

[30]Rabban, *supra* note 25, at 519-20 (citing ROBERT WIEBE, THE SEARCH FOR ORDER (1967)). Rabban suggested that this early stage was characterized by social unrest and turmoil that was evidenced by the Homestead and Pullman strikes of the 1890's, the Haymarket riot of 1886, and the anti-anarchists sentiments which followed, the assassination of President McKinley, the nativist response to increased immigration, and the activities of the IWW and Emma Goldman in the early 1900's. *Id.* at 519. Rabban further proffered that this unrest provided for a meaningful consideration of the First Amendment prior to *Schenck*, which courts and commentators too often neglect. *Id.*

2. FROM *SCHENCK* TO *DENNIS*: MAINTAINING A RESTRICTIVE VIEW

Among the early post-World War I cases,[31] perhaps the most notable is *Schenck v. United States*.[32] In *Schenck*, the Court began to define the limits of the Constitution's protection of free speech. The Court maintained its restrictive interpretation of the First Amendment, established prior to *Schenck*, by first articulating the "clear and present danger" test.[33] Justice Holmes' famous statement of this test also illustrates the Court's focus on the nature of the speech regulated. Writing for the Court, Justice Holmes opined that speech which presents a "clear and present danger" is not speech protected by the First Amendment.[34] The Court determined the validity of the Espionage Act under the "clear and present danger" test in terms of its actual scope in relation to the disputed utterance, instead of examining the statute's plain meaning and its possible consequences.[35] Indeed, Justice

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[31]Following the Espionage Act of 1917, three important cases challenged the constitutionality of the Espionage Act on First Amendment grounds, marking the beginning of modern free speech jurisprudence. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

[32]249 U.S. 47 (1919). In *Schenck*, Defendant was convicted on two counts of violating the Espionage Act and a third count of illegal use of the mail to commit an offense against the United States. *Id.* at 48-49. Specifically, Defendant was found guilty for distributing a pamphlet urging others not to comply with conscription laws. *Id.*

[33]*Id.* at 52. Justice Holmes, writing for the majority, stated:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id.

[34]*Id.*

[35]*Id. See also Debs*, 249 U.S. at 214-15 ("The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that is natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."); *Frohwerk*, 249 U.S. at 209 ("But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.").

Holmes focused on the "circumstances" and the "nature" of the speech when determining whether that speech constituted a "clear and present danger."[36] Justice Holmes in affirming the indictments, accordingly reasoned that the circumstances under which the defendant's efforts to inhibit the execution of the conscription laws were conducted (during World War I), increased the likelihood that such statements would negatively impact Congress's constitutionally vested power to wage war.[37] These circumstances, therefore, justified the suppression of such expressions, which may have been otherwise constitutionally protected.[38]

The "clear and present danger" test marked the beginning of a new era in the Court's jurisprudential evolution. Indeed, the principles articulated by Justice Holmes in *Schenck* were rethought and subsequently altered by the Justice himself. In *Abrams v. United States*,[39] Justice Holmes dissented from the Court's application of the "clear and present danger" test, stressing that the regulated speech must produce or be intended to produce "a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[40] Justice

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[36]*Schenck*, 249 U.S. at 52.

[37]*Id.*

[38]*Id.*

[39]250 U.S. 616 (1919). In *Abrams*, five defendants were indicted on four counts of conspiring to violate the Espionage Act of 1917. *Id.* at 616-17. Defendants were all self-proclaimed un-naturalized Russian anarchists or socialists and, together, wrote and distributed materials opposing the United States form of government and the deployment of troops into Russia during World War I. *Id.* at 617. The majority, affirming the convictions, stated:

> These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government . . . the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe.

Id. at 623.

[40]*Id.* at 627 (Holmes, J., dissenting). The notion that proscribable speech must produce an imminent or immediate threat of lawlessness was planted firmly in the Holmes-Brandeis formulation of the "clear and present danger" test. In Gitlow v. New York, 268 U.S. 652 (1925), Justices Holmes and Brandeis dissented from the majority's holding that

Holmes' statement revealed his growing concern with the immediacy of the danger created by the speech as opposed to the likelihood that dangerous results would follow. While a majority of the Court continued to follow the unmodified version of the "clear and present danger" test set forth in *Schenck*, Justice Holmes and Justice Brandeis argued for a modification of that test.[41] Less than ten years later, in *Whitney v. California*,[42] Justice Brandeis, in a concurring opinion joined by Justice Holmes, continued to focus on the immediacy of the danger created by the regulated speech. Justice Brandeis consequently opposed the proposition that assembling or

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language advocating the overthrow of the Government was so inherently dangerous to the general welfare of the country that it always was proscribable. *Id.* at 672-73 (Holmes, J., dissenting). Justice Holmes, following the reasoning of his previous dissent in *Abrams*, argued that the Court should apply the "clear and present danger" test, thus distinguishing between advocacy of lawlessness and actual incitement. *Id.*

[41]For example, in *Gitlow*, Justice Holmes emphasized the delicate balance between the "expression of an opinion and an incitement," suggesting that advocacy of a political philosophy was not "incitement." *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) ("The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."). Justice Brandeis also focused on this delicate distinction, demanding a showing of some immediate threat of danger to justify any proscription of speech. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled." (citing Schenck v. United States, 249 U.S. 47, 52 (1919))).

[42]274 U.S. 357 (1927). Ms. Whitney, the petitioner, was charged with five counts in violation of the California Syndicalism Statute for participation in the organizing of a Communist Labor Party in Oakland, California and signed resolutions calling for the "spreading [of] communist propaganda," as well as increasing the "economic strength" and the "political power" of the "working class." *Id.* at 359, 363-64. Interestingly, Ms. Whitney did not support the adoption of a resolution that advocated terrorism or violence nor any provision encouraging the violation of the law. *Id.* at 366. The majority, however, concluded that the California statute did not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 366-71. The Court, moreover, reasoned that the statute was not an unconstitutional "restraint of the rights of free speech, assembly, and association" and stated:

> [T]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

Id. at 371 (citing *Gitlow*, 268 U.S. at 666-68).

participating in the activities of a political party that advocated the revolutionary overthrow of the government is not free speech protected by the First and Fourteenth Amendments.[43] The majority, however, maintained its restrictive view, declaring that the California syndicalism statute challenged in *Whitney* was not an unconstitutional restriction upon free speech.[44]

In *Chaplinsky v. New Hampshire*[45] Justice Murphy, writing for the majority, articulated the "fighting words" doctrine, which sharpened the Court's focus upon the actual utterance in dispute, while maintaining a relatively restrictive view of the First Amendment. "Fighting words," posited Justice Murphy, are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[46] More importantly, the Justice observed that utterances such as "fighting words" do not constitute an "essential part of any exposition of ideas, and are of such slight social value" that their proscription is justified.[47]

The Court, applying the "fighting words" doctrine, upheld the defendant's conviction under a New Hampshire statute that criminalized "offensive, derisive or annoying word[s]" directed at persons lawfully in

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[43]*Id.* at 379 (Brandeis, J., concurring). Justices Brandeis and Holmes, concurring in the judgment, explained that Petitioner failed to challenge properly the California Syndicalism Statute. *Id.* Justice Brandeis noted the existence of evidence that may have supported a jury finding that a serious danger from the activities of the communist party organization to which Ms. Whitney belonged did exist, thereby satisfying the "clear and present danger" test. *Id.*

[44]*Id.* at 371.

[45]315 U.S. 568 (1942). Justice Murphy articulated the "fighting words" doctrine:

> 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. 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. 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 to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (citations omitted).

[46]*Id.* at 572.

[47]*Id.*

"public places."[48] Justice Murphy upheld the statute as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power."[49] The violative utterances, or "fighting words," were a series of abusive names Chaplinsky directed toward the city marshall who was escorting Chaplinsky from the scene of a riot caused by the public's reaction to Chaplinsky's distribution of pamphlets advocating the religious practices of Jehovah's Witnesses.[50] Thus, by categorizing the defendant's utterance as "fighting words," the Court denied the defendant's statement full First Amendment protection.[51]

The significance of the "fighting words" doctrine is not limited to the evolution of the Court's free speech jurisprudence in the purely historical sense. Rather, the Court continues to ground its understanding of the First Amendment, at least in part, on *Chaplinsky* and the categorical approach

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[48]*Id.* at 569. Chapter 378, § 2, of the Public Laws of New Hampshire specifically stated, "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place . . . ." *Id.* (quoting N. H. Pub. L. ch. 378 § 2).

[49]*Id.* at 573.

[50]*Id.* at 569-70. The utterance itself was recorded in the opinion of the Court and read "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'" *Id.* at 569.

The facts in *Chaplinsky* have a striking resemblance to Feiner v. New York, 340 U.S. 315 (1951), and Terminello v. City of Chicago, 337 U.S. 1 (1949), in which individuals advocating controversial ideas or viciously criticizing others provoked listeners to cause a breach of the peace. Although the central issue in *Chaplinsky* centers around Chaplinsky's remarks directed at the city marshall, there is the unaddressed issue of Chaplinsky's removal from the street because of the crowd's reaction. Given *Chaplinsky's* holding, the Court's affirmation of Feiner's conviction for disorderly conduct ten years later is not surprising. *Feiner*, 340 U.S. at 321 ("The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."). Indeed, the *Feiner* holding is consistent with the Court's focus on the effect of controversial speech.

[51]In *R.A.V.*, Justice Scalia suggested that categorizing an utterance as "fighting words" does not deny that utterance all First Amendment protection. R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2543 (1992). This conclusion follows from the definition of the categorical approach, which states that any utterance categorized as "fighting words" is proscribable only to the extent that such an utterance, by its very nature, "inflicts injury or tends to cause an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941). This definition, consistent with established First Amendment principles, focuses upon the mode of communication and the immediate injury caused, not upon the expressed idea. *Id.* at 573 ("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.").

characterized by the "fighting words" doctrine.[52] State courts continue to cite the "fighting words" doctrine outlined in *Chaplinsky* as one of the major exceptions to the constitutional limitations against content-based restrictions on free speech.[53]

Categorically proscribing certain types of speech based on content and requiring that such speech have a specific causal effect upon the addressee began with *Chaplinsky*.[54] The relationship between this notion of injury-causing speech and the Holmes-Brandeis formulation of the "clear and present danger" test illustrates the evolution of the Court's jurisprudence. That only injury-causing speech or "fighting words" were proscribable based on their content is a notion strikingly similar to the Holmes-Brandeis reformulation of the "clear and present danger" test. Both the Holmes-Brandeis "clear and present" danger formulation and the "fighting words" doctrine require some form of injury to result or a high probability that some injury will result from the utterance of a particular type of speech. The

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[52]*See, e.g.*, *R.A.V.*, 112 S. Ct. 2538. While the holding in *R.A.V.* clearly was not a direct product of the "fighting words" doctrine, the role of that doctrine and its impact upon the First Amendment analysis was illustrated through the Court's statements regarding the categorical approach associated with the "fighting words doctrine." The Court, per Justice Scalia, accepted the Minnesota Supreme Court's construction of the St. Paul ordinance, which confined the scope of the ordinance to proscriptions of "fighting words." *Id.* at 2542. Justice Scalia, however, posited that the categorical approach rooted in the "fighting words" doctrine identified specific nonspeech elements of communication or "particularly intolerable . . . modes of express[ion]." *Id.* at 2549. Furthermore, Justice White, concurring in the judgment and referring to *Chaplinsky* as the "clearest" statement of his argument, argued that "[t]his Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression." *Id.* at 2551 (White, J., concurring). Justice Stevens, also concurring in the judgment, however, argued that the categorical approach to First Amendment analysis "sacrifices subtlety for clarity and is, I am, convinced, ultimately unsound." *Id.* at 2566 (Stevens, J., concurring).

[53]*See* People v. Steven S., 31 Cal. Rptr.2d 644 (Cal. Ct. App. 1994) (identifying the "fighting words" doctrine of Chaplinsky as one of "two doctrines that may remove certain speech and expressive conduct from the scope of the First Amendment"). *See also* State v. Vawter et al., 642 A.2d 349 (N.J. 1994) (applying the holding in *R.A.V.* and its interpretation of the "fighting words" doctrine); State v. Talley, 858 P.2d 217, 231 (Wash. 1993) (noting that the Supreme Court has "permitted content-based regulation of speech within certain well-defined categories of unprotected, low value speech") (citing Police Dept. v. Mosley, 408 U.S. 92 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

[54]*See R.A.V.*, 112 S. Ct. at 2561 (Stevens, J., concurring).

original "clear and present danger" test, however, was susceptible to manipulation enabling the Court and the Government to strike out against unpopular ideas such as communism. The reactions of Justices Holmes and Brandeis and the emergence of the "fighting words" doctrine demonstrate the Court's effort to create a more exacting standard. Thus, the Court began to more clearly distinguish ideas from inciteful, hurtful speech.[55] Although this distinction has existed at least since *Chaplinsky*, its exact definition has continuously eluded the Court.

In *Dennis v. United States*,[56] for example, the Court adopted the Holmes-Brandeis distinction between advocacy and incitement, preparing the way for the next stage in the Court's evolving free speech jurisprudence.[57]

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[55]The Court did not adopt the Holmes-Brandeis formulation of the "clear and present danger" test until Brandenburg v. Ohio, 395 U.S. 444 (1969). In *Brandenburg*, the Court, in a *per curiam* opinion, stated:

> Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overruled.

Id. at 449. The majority's jurisprudence, however, was founded upon a belief that advocacy of certain ideas or use of certain speech constituted an evil significant enough to warrant state action proscribing it. The Court's holding in *Chaplinsky* illustrates the majority's appreciation for "ideas," as opposed to injurious speech. *See Chaplinsky*, 315 U.S. at 571-72.

[56]341 U.S. 494 (1951).

[57]*Id.* at 506-08. In *Dennis*, the Court analyzed the constitutionality of the Smith Act, which stated in part:

> SEC. 2. (a) It shall be unlawful for any person —
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> (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
>
> (2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;
>
> (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States . . . or to be or become a member of, or affiliate with, any such society. . . .

In upholding the Smith Act, the Court focused on the defendant's actual efforts to overthrow the Government, concluding that the defendant's teachings, literature, and organized objectives were a clear manifestation of an intention to violently overthrow the United States Government.[58] The holding in *Dennis* once again illustrates the relationship between the "fighting words" doctrine and the Holmes-Brandeis reformulation of the "clear and present danger" test. In *Dennis*, the Court upheld the convictions of the petitioners under the Smith Act on the basis that the statute was directed at prohibiting the incitement to and organization of a violent overthrow of the Government, and not at proscribing "advocacy in the realm of ideas."[59]

While *Dennis* certainly marked a departure from the doctrine articulated in *Schenck*, the Court's methodology in considering the plain meaning of the statute under review, as opposed to its actual application,[60] may hold greater importance than the Court's actual holding. Although the Court in *Dennis* recognized that the distinction between advocacy and incitement was significant in the evolution of the Court's jurisprudence, this recognition was not made manifest in a holding which secured the right to teach or advocate an unpopular or controversial idea.[61] The Court's reluctance to invalidate the challenged statute on the grounds that its plain meaning potentially reached other valid expressions preserved the Court's restrictive free speech jurisprudence.

The *Dennis* Court's lengthy opinion, however, provided a comprehensive Free Speech Clause analysis, touching upon the many branches of the

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Id. at 496 (quoting 18 U.S.C. §§ 10, 11 (1946 ed.)). Petitioners were convicted under the Smith Act for their activities as leaders of the Communist Political Association, which advocated and organized the forceful overthrow of the United States Government. *Id.* at 498.

[58]In upholding the Act, the Court noted that "Congress did not intend to eradicate the free discussion of political theories or to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction." *Id.* at 502.

[59]*Id.* at 502.

[60]*Id.* at 501-02, 515-16. The Court rejected Petitioners' argument that the plain language or terms of the statute prohibited the "academic discussion of the merits of Marxism-Leninism." *Id.* at 501. Chief Justice Vinson, writing for the Court, also rejected Petitioners' vagueness argument, noting that Petitioners agreed that the "clear and present danger" test was the proper standard and that the statute required an intent to overthrow the Government, which the jury found Petitioners had. *Id.* at 515-16.

[61]*Id.* at 516-17.

Court's evolving jurisprudence.[62] During the years following *Dennis* and those preceding the late 1960's and early 1970's, the Court may have benefitted from the completeness of the *Dennis* holding, while continuing to lay the foundations for subsequent change.[63] Nonetheless, the *Dennis* decision itself did not fully discard the remnants of the Court's earlier more restrictive free speech jurisprudence. Justice Douglas' dissent in *Dennis*

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[62]The entire opinion spans ninety-eight pages with five separate opinions, three affirming the petitioners' convictions and two dissenting. Chief Justice Vinson announced the judgment of the Court and wrote the majority opinion. *Id.* at 495. Justice Frankfurter, concurring in the judgment, after a detailed historical discussion of the Court's free speech jurisprudence, concluded that:

> Civil liberties draw at best only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value . . . . Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. . . . Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law. . . .

Id. at 555-56 (Frankfurter, J., concurring). Justice Jackson also concurred in the judgment, emphasizing the conspiratorial nature of the crime and the focus of the statute on conspiracies to overthrow the Government. *Id.* at 561, 572-79 (Jackson, J., concurring). Justice Black dissented from the majority's holding and declared, "No matter how it is worded, this is a virulent form of prior censorship of speech and press . . . ." *Id.* at 579 (Black, J., dissenting). Finally, Justice Douglas also dissented, concluding:

> The Act, as construed, requires the element of intent — that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

Id. at 583 (Douglas, J., dissenting).

[63]*See, e.g.*, NAACP v. Button, 371 U.S. 415, 428-29 (1963) ("[T]he activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit . . . ."); United States v. Raines, 362 U.S. 17, 20 (1960) (reversing the district court decision which declared 42 U.S.C. § 1971 unconstitutional because it "allowed the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color"); Roth v. United States, 354 U.S. 476, 485, 494 (1956) (upholding the constitutionality of a federal criminal obscenity statute and declaring "that obscenity is not within the area of constitutionally protected speech or press"); Feiner v. New York, 340 U.S. 315, 321 (1951) (affirming the state court decision, which found that the "petitioner's deliberate defiance of the police officers" justified the conviction despite the free speech claims asserted by the petitioner).

elucidated this deficiency and provided a more secure foundation for even greater change.[64]

3. THE APPEARANCE OF A MODERN JURISPRUDENCE

The 1960's and 1970's represent the most intense and significant period during the evolution of the Court's First Amendment jurisprudence. Among other significant doctrinal changes, notions of protected speech were expanded to include unspoken, expressive conduct, thereby greatly broadening the scope of the First Amendment and further complicating the legal analysis.[65] This expansion of the First Amendment's scope is

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[64]Justice Douglas dissented from the Court's application of the Holmes-Brandeis formulation, focusing on the role of free speech in America's political culture:

> Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Dennis v. United States, 341 U.S. 494, 585 (1950) (Douglas, J., dissenting).

[65]*See, e.g.*, Spence v. Washington, 418 U.S. 405, 415 (1974) (reversing the petitioner's conviction for the "improper use" of the American flag and characterizing petitioner's placement of a peace symbol on the American flag as a direct message "likely to be understood, and within the contours of the First Amendment"); Cohen v. California, 403 U.S. 15, 18 (1971) (declaring that the petitioner's wearing of a jacket, upon which were written the words "Fuck the Draft," was "speech" and was not "any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message . . ."); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (declaring that the wearing of arm bands by students to protest the Vietnam war "was entirely divorced from actually or potentially disruptive conduct by those participating in it" and "was closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding the petitioner's conviction for burning a draft card and defining the limit of First Amendment protection for expressive conduct, as when "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"). Recently, the Court has affirmed this expansion of the First Amendment to include protections for expressive conduct such as burning the flag of the United States. *See* United States v. Eichman, 494 U.S. 310, 315 (1990) (affirming its holding in *Johnson* and declaring that the "Government's asserted *interest* is 'related 'to

particularly significant given the Court's recognition of First Amendment freedoms as fundamental rights within the meaning of the Fourteenth Amendment.[66] Unlike its doctrinal predecessors, the Court's recognition of unspoken expressions as free speech worthy of the Constitution's greatest protection carried the Holmes-Brandeis formulation to its logical conclusion, disallowing the proscription of any expression, whatever its form, based solely on the idea communicated.[67]

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the suppression of free expression . . . ." (citation omitted)); Texas v. Johnson, 491 U.S. 397 (1989) (holding that the petitioner's conviction for burning the American flag was a content-based proscription of free expression and was not justified by a compelling state interest). This line of cases does not begin in 1968 with *O'Brien*. Rather, the significance of this series of cases during the late 1960's and the early 1970's is that it was during this period that the Court's free speech jurisprudence underwent its greatest and most intense period of change.

[66]The relevant section of the Fourteenth Amendment specifically provides, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

Although the Court maintained a restrictive view of the First Amendment prior to the 1960's, the Court recognized during this early period that freedom of speech and freedom of the press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment . . . ." Gitlow v. New York, 268 U.S. 652, 666 (1925). The Court realized during the earliest stages of Free Speech Clause jurisprudence the fundamental importance of the First Amendment in relation to other rights and limitations of governmental power recognized by the Constitution. *See also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (reversing the petitioner's convictions for playing a record in a residential area attacking the Catholic religion and other organized religions, where the Court declared, "[t]he essential characteristic of these liberties [religious faith and political belief] is that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed"); Schneider v. State, 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation."); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (upholding a Connecticut appeals procedure in the face of Fourteenth Amendment incorporation arguments, where Justice Cardozo, writing for the majority, characterized "freedom of thought, and speech" and stated "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom"); Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property." (citing Stromberg v. California, 283 U.S. 359 (1931); Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 373 (1926); *Gitlow*, 268 U.S. at 666)).

[67]*See supra* note 65 (discussing the Court's recognition of expressive conduct as a legitimate exercise of free speech protected by the First Amendment).

The Court expanded upon the categorical approach established by *Chaplinsky* through the "true threat" doctrine.[68] The "true threat" doctrine provides for the proscription of speech which communicates a threat against the addressee and which the addressor intends to carry out.[69] This principle, although not widely applied, is not an isolated constitutional doctrine, and it has recently resurfaced given the apparent confusion surrounding the Court's current First Amendment jurisprudence.[70]

With its holding in *Watts v. United States*[71] the Court further developed the notion that proscribing speech based on its content requires a showing that the speech posed a tangible and immediate threat of danger. Declaring

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[68]An utterance is proscribable as a "true threat" when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." People v. Steven S., 31 Cal. Rptr.2d 644, 648 (Cal. Ct. App. 1994) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)). *See also* Watts v. United States, 394 U.S. 705 (1969) (upholding the constitutionality of 18 U.S.C. § 871, criminalizing any threat against the President, Vice-President or other officer next in succession, although declaring that the application of the law against the petitioner unconstitutional).

[69]*Steven S.*, 31 Ca. Rptr. at 707.

[70]*See id.* at 644; *Orozco-Santillan*, 903 F.2d at 1262; United States v. Mitchell, 812 F.2d 1250 (9th Cir. 1987); United States v. Merrill, 746 F.2d 458 (9th Cir. 1984). The most recent decision applying the "true threat" doctrine, *Steven S.*, applied the objective, reasonable person standard as to what constitutes a true threat. *Steven S.*, 31 Cal. Rptr.2d at 648 (citation omitted). The court in *Steven S.* rejected the argument that the statue, analyzed under the "true threat" doctrine, required an intent to terrorize. *Id.*

[71]394 U.S. 705 (1969). Petitioner was convicted under 18 U.S.C. § 871(a) for "knowingly and willfully threatening the President" when he stated:

> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." "They are not going to make me kill my black brothers."

Watts, 394 U.S. at 706. Petitioner's statement arose during a conversation with other young persons regarding police brutality. *Id.* Petitioner, when he made the above statement, was reacting to a statement that young people should get more education. *Id.* *See also supra* note 68-69 and accompanying text (discussing the "true threat" doctrine).

the federal statute[72] constitutional on its face, while striking down the conviction as an unconstitutional restriction of free speech, however, left open the issue of what controls the analysis, the plain meaning of the statute, or the nature of the utterance.[73]

The Court answered this question by breaking from its traditional focus on the nature of the proscribed utterance, subjecting government regulation of free speech to the requirements of vagueness[74] and overbreadth.[75] In

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[72]The federal statute stated:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of the President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 871(a) (1917). Applying the statutory language to Petitioner's statement, the Court concluded that "whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat' and [w]e do not believe that the kind of political hyperbole indulged in by Petitioner fits within that statutory term." *Watts*, 394 U.S. at 708.

[73]*See infra* notes 76-81 and accompany text (discussing the Court's holding in *Gooding*). One of the major problems with the Court's larger Free Speech Clause jurisprudence is that there remains several independent analyses that conflict and that provide very different results. For example, following the analysis established in *Watts* will cause courts to focus on the content of the utterance at issue in determining whether the utterance constituted a true threat. Conversely, if a court follows the analysis articulated in *R.A.V.* and its progeny, which focus on the scope and meaning of the challenged statute, courts will be forced to consider notions of overbreadth and vagueness, which provide the means for invalidating a statute regardless of its actual effect in the given case.

[74]*See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Colten v. Kentucky, 407 U.S. 104 (1972); Cameron v. Johnson, 390 U.S. 611 (1968); Connally v. General Constr. Co., 269 U.S. 385 (1926). *See also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."); United States v. Raines, 362 U.S. 17, 22 (1960) ("Perhaps cases can be put where their application to a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." (citations omitted)); NAACP v. Button, 371 U.S. 415, 432-33 (1963) ("The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the

Gooding v. Wilson,[76] for example, the Court held that a Georgia statute[77] proscribing the use of "opprobrious words and abusive language" was unconstitutional because it did "not define the standard of responsibility with requisite narrow specificity."[78] The Court not only affirmed the decision of the lower court, but also accepted the methodology of that court by focusing solely on the facial constitutionality of the statute at issue, while

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existence of a penal statute susceptible of sweeping and improper application.").

[75]The overbreadth doctrine allows litigants to challenge the constitutionality of a statute based on its broad scope and, therefore, its potential affect on another person's hypothetical right of free expression. Thus, a litigant, in fact, may engage in speech not protected by the First Amendment, yet successfully challenge a statute whose scope is such that other constitutionally protected forms of expression fall within its proscriptions. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1972) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). As early as 1940, the Court was determining whether the facial meaning of a given statute exceeded constitutional limitations. Thornhill v. Alabama, 310 U.S. 88 (1940). For example, in *Thornhill* the Court stated: "[w]e think that § 3448 is invalid on its face. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02. In concluding that the statute's constitutionality "must be judged upon its face," the Court declared that "[t]he existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on *all freedom of discussion* that might reasonably be regarded as within its purview." *Id.* at 97-98 (emphasis added).

[76]405 U.S. 518 (1971). In *Gooding*, Defendant was charged with both the use of "opprobrious words and abusive language," as well as assault and battery. *Id.* at 519-20 n.1. The defendant, along with a group of other people, was protesting the Vietnam War, and when the group was asked by police to move because they were blocking the entrance to a nearby building, a scuffle erupted. *Id.* The statements, which fell under the proscription of the Georgia statute, included: "White son of a bitch, I'll kill you"; "You son of a bitch, I'll choke you to death"; and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.*

[77]Section 26-6303 of the Georgia code stated in pertinent part, "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *Id.* at 518-19 (quoting GA. CODE ANN. § 26-6303).

[78]*Id.* at 527 (citing Ashton v. Kentucky, 384 U.S. 195 (1966); Cox v. Louisiana, 379 U.S. 536 (1965)).

ignoring the actual effect of the statute upon the proscribed utterance.[79] Doctrinally, the Court's decision in *Gooding* was reached by applying the vagueness doctrine, which requires a statute to provide a standard of responsibility that "person[s] of ordinary intelligence" may understand.[80] The Court's decision in *Gooding* is significant for that reason alone, however, the methodology embodied in that decision carries with it greater import than its legal result.[81] The Court declared the statute facially unconstitutional without regard to the statute's actual effect upon the defendant's free speech rights. This decision, moreover, came during a period of great change for the Court's free speech jurisprudence in which notions of vagueness and overbreadth became the center of the controversies before the Court, if not the specific focus of the Court's evolving jurisprudence.

During this period the Court radically changed and expanded its jurisprudence, no longer focusing primarily on the disputed utterance. For example, in *Broadrick v. Oklahoma*,[82] the Court applied the overbreadth doctrine narrowly, noting that the doctrine "has been employed by the Court sparingly and only as a last resort" and denied its legitimate use on the ground that the challenged statute's overbreadth was not "substantial."[83]

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[79]*Id.* at 519 n.1 (quoting the district court's statement of the issue presented by the case, the Court stated: "[a]ccordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of GA. CODE ANN. § 26-6303") (citing Gooding v. Wilson, 303 F. Supp. 952 (N.D.Ga. 1969)).

[80]Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[81]Gooding v. Wilson, 405 U.S. 518, 528 (1971) (Burger, C.J., dissenting). The very first criticism alleged by Chief Justice Burger against the majority was the "remarkable" way that the Court reached its "bizarre result." *Id.* at 528-29 (Burger, C.J., dissenting). Chief Justice Burger identified the primary reason for the majority's opinion as "the way courts of that State have applied the statute in a few isolated cases, decided as long ago as 1905 and generally long before this Court's decision in *Chaplinsky* . . . ." *Id.* at 529 (Burger, C.J., dissenting) (emphasis added).

[82]413 U.S. 601 (1972). Petitioners challenged the constitutionality of § 818 of Oklahoma's Merit System of Personnel Administration Act, which limits the ability of civil servants to participate in political activities, on vagueness and overbreadth grounds. *Id.* at 602. The petitioners were found to have violated that statute for participation in the re-election campaign of the petitioner's superior. *Id.* at 609.

[83]*Id.* at 611-15. Justice White posited that "as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute." *Id.* at 618. The Court based this conclusion on the principle that "where conduct . . . is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's

As is later discussed, however, overbreadth and vagueness challenges are an essential component of the Court's free speech jurisprudence as evidenced through the holdings in *R.A.V.*, *Mitchell*, and the several state court decisions which have followed.[84]

In addition to notions of overbreadth and vagueness is the doctrine of "content neutrality," or "content discrimination."[85] The content neutrality doctrine protects speech from government regulation on the basis that ideas are sacred and protected from government regulation provided that their *mode* of communication does not warrant regulation. This principle is an overriding theme in the evolution of the Court's Free Speech Clause jurisprudence.[86] Indeed, the doctrine of content neutrality has endured the

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plainly legitimate sweep." *Id.* at 615.

[84]*See infra* notes 106-203 and accompanying text (discussing the recent holdings by the Supreme Court, as well as several state courts, regarding the First Amendment).

[85]The doctrine of content neutrality imposes a general and presumptive ban on all proscriptions of speech that are based upon the content of the prohibited speech. *See* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2545 (1992). The doctrine's objective is to protect all ideas or viewpoints from being driven out of the "marketplace of ideas." *See* Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992) ("[T]his Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." (citing United States v. Grace, 461 U.S. 171, 177 (1983)); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 508 (1991) ("[T]he Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."); Leathers v. Melock, 499 U.S. 439, 449 (1991) ("[A] tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: it will distort the market for ideas."); Boos v. Barry, 485 U.S. 312, 320 (1988) ("So long as the justifications for regulation have nothing to do with content[,] . . . the regulation [is] properly analyzed as content neutral."); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (defining "content-neutral" regulations as those which "are *justified* without reference to the content of the regulated speech.") (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

[86]Some form or reference of content neutrality has been utilized in the Court's Free Speech Clause jurisprudence since *Schenck*. Even in *Schenck*, the Court did not justify its holding based solely upon the content of the speech uttered. Schenck v. United States, 249 U.S. 47 (1917). Rather, in *Schenck*, Justice Holmes justified the proscription of speech based upon the utterances' secondary effects, mainly the creation of a "clear and present danger." *Id.* at 52. Since *Schenck*, the Court has adhered to this principle and allowed proscriptions of speech where the Government's interest was significant, where the mode

Court's changing jurisprudence with greater durability than any other free speech doctrine. The doctrine's durability and doctrinal significance are primarily attributable to the general character of the First Amendment itself.[87] Moreover, this doctrine plays a vital, indeed, indispensable role in

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of speech was such that proscription was warranted, or where the circumstances justified a narrow exception. *See, e.g.*, Gitlow v. People of N.Y., 268 U.S. 652, 664 (1924) ("By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power."); Whitney v. California, 274 U.S. 357, 371 (1926) ("[A] State in the exercise of its police power may punish those who abuse [the freedom of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941) (allowing content-based proscriptions of those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); Dennis v. United States, 341 U.S. 494, 502 (1950) ("Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather[,] Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."); Cohen v. California, 403 U.S. 15, 24 (1970) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."); Gooding v. Wilson, 405 U.S. 518, 523 (1971) ("Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression . . . ."); *R.A.V.*, 112 S. Ct. at 2542 ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)).

The Court, however, has allowed the Government, acting in the capacity of an employer, to restrict employees from discussing matters not of "public concern" while acting as employees. *See* Water v. Churchill, 114 S. Ct. 1878, 1888 (1994) ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.").

[87]The essence of the First Amendment is to protect the fundamental beliefs which give individuals their identity. *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) ("This is true . . . of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."). *See also* Gressman, *supra* note 25, at 390-91 ("The important point is that protecting this rational, thinking component of the human psyche is part of our constitutional heritage. It is that rational, thinking component that makes freedom of expression so uniquely important, so much the matrix of all other forms of freedom."). By protecting ideas, the First Amendment prevents the Government from valuing one viewpoint or ideology over another. Content neutrality, then, is the logical extension of the First Amendment's most

the Court's current jurisprudence.[88]

Another doctrinal component of the Court's free speech jurisprudence is strict scrutiny.[89] The Court has applied strict scrutiny to determine whether an otherwise unconstitutional regulation of speech is justified by a compelling state interest and is narrowly tailored to accomplish that end. For example, in *Arkansas Writer's Project, Inc., v. Ragland*,[90] the Court held that discriminatory taxation of magazines based on the content of the magazine would be constitutional if such a regulation was "necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[91] Strict scrutiny, then, is applied in conjunction with the other doctrines discussed, to the extent that a statute determined to be overbroad or discriminatory in terms of content may still be permissible if it nonetheless satisfies strict scrutiny.[92] Similar to the previously discussed doctrines, strict scrutiny maintains a significant place in the Court's free speech jurisprudence.[93]

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fundamental premise: the protection of ideas. *See supra* note 86 (discussing the Court's adherence to the doctrine of content-neutrality).

[88]*See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993) ("But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.") citing Dawson v. Delaware, 112 S. Ct. 1093 (1992))); *R.A.V.*, 112 S. Ct. at 2542 ("Content-based regulations are presumptively invalid.").

[89]*See* Burson v. Freeman, 112 S. Ct. 1846, 1851-58 (1992) (upholding a Tennessee law establishing a "campaign-free zone" around polling places on election day); *Simon & Schuster*, 112 S. Ct. at 509-10 (holding that a New York statute limiting earnings from a criminal's commercialized statements regarding the crime the committed was not narrowly tailored to the state's compelling interest in fully compensating victims).

[90]481 U.S. 221 (1987).

[91]*Id.* at 231 (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591-92 (1983)).

[92]*Id.*

[93]*See, e.g.*, *R.A.V.*, 112 S. Ct. at 2550 ("The dispositive question . . . is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not."); *Burson*, 112 S. Ct. at 1857 ("In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case."); *Simon & Schuster*, 112 S. Ct. at 512 ("The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective.").

In addition to notions of overbreadth, vagueness, content neutrality, and strict scrutiny, which form the most significant doctrinal components of the Court's evolving jurisprudence during the late 1960's and early 1970's were cases such as *Gooding*, which contributed to the Court's larger understanding of the First Amendment.[94] Through cases such as *Gooding* the Court began to articulate a jurisprudence that perceived the First Amendment as a profoundly fundamental Constitutional provision and provided protections paradigmatic of the First Amendment's fundamental importance.

The Court's current jurisprudence can be found in *R.A.V. v. City of St. Paul, Minnesota*[95] and *Wisconsin v. Mitchell*.[96] Although controversial, these opinions nonetheless provide a principled analysis founded upon the complex evolution of the Court's Free Speech Clause jurisprudence. Indeed, the assertion that the most recent developments in the Court's Free Speech Clause jurisprudence violates the Court's "traditional First Amendment analysis," as some courts have suggested,[97] misconstrues the nature of the

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[94]*See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1972) (establishing revised guidelines for the trier of fact when distinguishing obscene speech from constitutionally protected expressions: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (quoting Roth v. United States, 354 U.S 476, 489 (1957))); Cohen v. California, 403 U.S. 15 (1971) (declaring that the petitioner's wearing of a jacket with the words "Fuck the Draft" on its back was a constitutionally protected form of expression); New York Times Co. v. United States, 403 U.S. 713, 717-18 (1970) (denying the Executive, the Judiciary, and the Congress the power to "[enjoin] publication of current news and abridging freedom of the press in the name of 'national security'"); *Id.* ("[I]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors."); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding that an Ohio Syndicalism Statute was unconstitutional because it "punish[ed] mere advocacy and . . . assembly with others merely to advocate the described type of action"); United States v. O'Brien, 391 U.S. 367, 377 (1967) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the [G]overnment; if it furthers an important or substantial governmental interest; if the [g]overnmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); .

[95]112 S. Ct. 2538 (1992).

[96]113 S. Ct. 2194 (1993).

[97]A Florida appellate court applied "traditional First Amendment analysis," suggesting that the Supreme Court's current free speech jurisprudence, as articulated in *R.A.V.*, is an erroneous deviation from the fundamental principles of the First Amendment. *See* State v. T.B.D., 638 So.2d 165, 167 (Fla. Dist. Ct. App. 1994) ("We . . . agree that the statute

judicial philosophy underlying the Court's doctrine. Understanding the doctrinal and practical implications of the Court's holdings in *R.A.V.* and *Mitchell* requires an examination of those holdings within the larger historical context of the Supreme Court's evolving First Amendment Free Speech Clause jurisprudence.[98]

B. THE LEGACY OF *R.A.V.* AND *MITCHELL*

The holdings in *R.A.V.*, *Mitchell* and their progeny have produced a dichotomy of hate crime statutes.[99] A hate crime statute may be defined as a statute which criminalizes manifested violence toward a person, persons or property based on bias toward race, religion, gender or some other group characteristic.[100] First Amendment jurisprudence, prior to and following

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is facially unconstitutional. However, we reach this conclusion based principally upon traditional First Amendment overbreadth analysis."); State v. Vawter, 642 A.2d 349, 357 (N.J. 1994) ("[W]e depart reluctantly from what we consider traditional First Amendment jurisprudence to analyze our statutes in light of Justice Scalia's five-member majority opinion in *R.A.V.* . . .").

[98]*See* Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 744 (1992) ("We might argue at length about whether United States constitutional history has struck the best balance between freedom and order; we should not argue about the actual balance this history has struck."); Rabban, *supra* note 25, at 522-59.

[99]*See* Anthony S. Winer, *Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality? The* R.A.V. *Case and the Distinction Between Hate Speech Laws and Hate Crime Laws*, 18 WM. MITCHELL L. REV. 971, 976 (1992). Professor Winer stated:

> The distinction drawn in this essay between hate speech laws and hate crime laws is evident in comparing this Vermont statute and the St. Paul city ordinance . . . . The St. Paul ordinance could (even as interpreted by the State supreme court) be violated simply by expressing a controversial viewpoint through the placement of a sign or poster on one's own property. The Vermont statute can only be violated if first an underlying crime has been committed.

Id. at 976.

[100]Hate crime statutes take several forms. Some criminalize defacement of property, others provide penalty enhancements, and still others focus on threats of physical violence or destruction of property. Frederick M. Lawrence suggests that bias crime laws or hate crime laws are grouped into two categories, "pure bias crimes" and "penalty enhancement" laws. Frederick M. Lawrence, *Resolving the Hate Crime/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 682

R.A.V., requires the regulation of all speech to remain content-neutral unless it narrowly serves a compelling state interest.[101] Regulations focusing on bias-motivated criminal conduct by penalizing such criminal behavior, however, do not violate the First Amendment because they are not regulations which prohibit expressions of a viewpoint.[102] Rather, such statutes or regulations focus on the harmful criminal conduct already considered illegal and punishable. Thus, the distinction lies between

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(1993). Professor Lawrence defines "pure bias crime" laws as those that prohibit specific manifestations of racial bias directed towards a person or property. *Id.* For a detailed discussion of the different hate crime statutes, see *infra* notes 204-19 and accompanying text.

[101]In *Boos v. Barry*, for example, the Court stated that "a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." *Boos*, 485 U.S. 312, 321 (1987). Among the cases that have followed *R.A.V.* and *Mitchell*, several have applied this reasoning. *See* People v. Steven S., 31 Cal. Rptr.2d 644, 649 (Cal. Ct. App. 1994) ("[C]ertain categories of speech and expressive conduct may be regulated, such regulation may not discriminate *within that category* on the basis of content."); *Vawter*, 642 A.2d at 355 ("If . . . we decide that Sections 10 and 11 relate to the suppression of free expression and that they are content based, the strictest judicial scrutiny is warranted: 'Content-based statutes are presumptively invalid.'" (quoting R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2542 (1992))); State v. Sheldon, 629 A.2d 753, 759 (Md. 1993) ("We believe the cross burning statute is a content-based regulation of speech, and therefore must be subject to strict scrutiny."); State v. Ramsey, 430 S.E.2d 511, 514 (S.C. 1993) ("[T]he First Amendment generally prevents government from proscribing speech or expressive conduct because it disapproves of the ideas expressed." (citation omitted)); State v. Talley, 858 P.2d 217, 223 (Wash. 1993) ("This court has upheld the constitutionality of other harassment laws where those statutes sought to regulate harmful conduct rather than the content of speech. . . . Like the statutes under review in those cases [the statute under review] specifically regulates conduct and only incidentally touches speech.").

Not all state courts, however, have followed the Supreme Court's reasoning in applying overbreadth and vagueness doctrines. *See, e.g.*, State v. Dyson, 872 P.2d 1115, 1120, 1122 (1994) (declaring that Washington's harassment statutes did not violate either the overbreadth or vagueness doctrines); *T.B.D.*, 638 So.2d at 167 ("We . . . agree that the statute is facially unconstitutional. However, we reach this conclusion based principally upon traditional First Amendment overbreadth analysis.").

[102]*See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); State v. Mortimer, 641 A.2d 257, 263 (N.J. 1994) ("Following *Mitchell's* lead we conclude that the Legislature did not run afoul of the First Amendment in enacting subsection d to enhance the punishment for a person acting with a motivation of bias."); *Talley*, 858 P.2d at 223 (citing *In re* Joshua H., 17 Cal. Rptr.2d 291 (1993); State v. Plowman, 838 P.2d 558 (Or. 1992), *cert. denied*, 113 S. Ct. 2967 (1993); Dobbins v. State, 605 So.2d 922 (Fla. Dist. Ct. App. 1992), *jurisdiction accepted*, 613 So.2d 3 (Fla. 1992); People v. Mulqueen, 589 N.Y.S.2d 246 (Dist. Ct. 1992); People v. Miccio, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992)).

punishable criminal conduct and nonpunishable expressions of ideas.[103]

Although the holdings in *R.A.V.* and *Mitchell* are readily detectable, their meaning is not easily understood. Each holding is understandable only when considered in light of the historical evolution of the Court's Free Speech Clause jurisprudence and the resulting constitutional principles produced. *R.A.V.* and *Mitchell* join a developing and growing legacy.[104] These holdings are not the product of a purely novel doctrine and generally are consistent with "the contours of established First Amendment law."[105]

1. *R.A.V.*

In *R.A.V.*, the Supreme Court reversed the petitioner's conviction under a St. Paul city ordinance that proscribed bias motivated forms of expression which "aroused anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[106] The petitioner, a juvenile, was convicted under this statute for burning a cross on the lawn of an African-

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[103]*See* Lawrence, *supra* note 100, at 676 ("This Article argues that the apparent paradox of seeking to punish the perpetrators of racially motivated violence while being committed to protecting the bigot's rights to express racism is a false paradox. . . . We must focus on the basic distinction between bias crimes — such as racially motivated assaults or vandalism — and racist speech."); Winer, *supra* note 99, at 974 ("'Hate crime' laws, as I suggest the phrase be used, are structured completely differently from the hate speech laws. . . . The focus of hate crime laws is not on restricting speech but on the appropriate level of punishment for certain violent behavior.").

[104]*See supra* notes 16-98 and accompanying text (discussing the historical evolution of the Court's Free Speech Clause jurisprudence and its many doctrines).

[105]*R.A.V.*, 112 S. Ct. at 2550-51 (White, J., concurring). *See also supra* note 97 and *infra* notes 181-82 and accompanying text (discussing arguments that *R.A.V.* is a departure from "traditional First Amendment analysis").

[106]*R.A.V.*, 112 S. Ct. at 2541. Section 292.02 of the MINN. STAT. stated:

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

Id. (quoting MINN. STAT. § 292.02 (1990)).

American family.[107] The Minnesota Supreme Court held that the statute passed constitutional scrutiny because its proscriptions only reached categories of speech "that the [F]irst [A]mendment does not protect."[108] The Supreme Court, per Justice Scalia, however, held that the Minnesota ordinance was "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses."[109]

Justice Scalia noted the categorical approach to proscribing speech based on the speech's "*constitutionally proscribable content*," suggesting that such a categorization of speech does not make such speech "invisible to the Constitution, so that [it] may be made the vehicle[] for content discrimination unrelated to [its] distinctively proscribable content."[110] Distinguishing

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[107]*Id.* Justice Scalia, writing for the majority, noted that Petitioner's conduct was certainly punishable under several Minnesota statutes that did not implicate First Amendment issues. *Id.* at 2541 n.1. Justice Scalia cited three separate statutes that provided a maximum sentence of five years in prison and up to a $10,000 fine and a minimum sentence of one year in prison and a $3,000 fine. *Id.* The statutes covered terroristic threats, enhanced penalties for arson aimed at valuable property and criminal damage to property. *Id.* (citing MINN. STAT. § 609.713(1) (1987); MINN. STAT. § 609.563 (1987); MINN. STAT. § 609.595 (Supp. 1992)).

[108]*In re* Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn. 1991). The Minnesota court also held that the content-based proscriptions within the scope of the ordinance were justified by a "compelling governmental interest in protecting the community against bias-motivated threats to public safety" and was narrowly tailored toward that end. *Id.*

[109]*R.A.V.*, 112 S. Ct. at 2542. Justice White attacked the majority's holding on several grounds, including the argument that the majority rested its holding upon reasoning not relevant to the parties' controversy. *Id.* at 2550-51 (White, J., concurring). Justice White, quoting Petitioner's petition for certiorari and outlining the Court's rule requiring the Court to consider only questions set forth in the petition, argued that "the majority reads . . . Rule [14.1(a)] so expansively that any First Amendment theory would appear to be 'fairly included' within the questions" presented by Petitioner. *Id.* at 2550-51 n.1. Justice Scalia responded to this argument by quoting Petitioner's statement during oral argument, "[i]t 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." *Id.* at 2542 n.3 (quoting Tr. of Oral Arg. at 8). The Justice then opined that the majority's reasoning was "fairly included within the petition." *Id.*

[110]*Id.* at 2543. While distinguishing between constitutionally proscribable categories of speech, Justice Scalia asserted that statements declaring that such proscribable categories of speech were not "speech" at all were not literally true. *Id.* Unfortunately this statement is confusing because it does not distinguish, in clear language, between constitutionally permissible content-based proscriptions and unconstitutional viewpoint discrimination. Free Speech Clause jurisprudence, however, clearly supports the notion that viewpoints or ideas are constitutionally protected regardless of their content. *See* Texas v. Johnson, 491 U.S.

between constitutionally permissible content-based proscriptions and unconstitutional viewpoint discrimination, Justice Scalia concluded that the constitutional authority to proscribe one content element does not enable the state to proscribe subcategories on the basis of some other content.[111]

397, 414 (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." (emphasis added)); Spence v. Washington, 418 U.S. 405, 415 (1974) ("[Appellant] displayed [his flag] as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey *ideas*. . . . Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated." (emphasis added)); Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as speech that does not involve the free discussion of ideas, but rather "taken as a whole, lacks serious literary, artistic, political, or scientific value"); Dennis v. United States, 341 U.S. 494, 503 (1951) ("We pointed out in *Douds* . . . that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of *ideas* will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse." (emphasis added)); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941) ("It has been well observed that [fighting words] are no essential part of any exposition of *ideas*, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (emphasis added)). Perhaps the most eloquent expression of this principle was articulated by Justice Brandeis in *Whitney*:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incident of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.*

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added).

[111] *R.A.V.*, 112 S. Ct. at 2544. Noting that even reasonable time, place, and manner restrictions must regulate speech without reference to the content of the speech regulated, Justice Scalia concluded:

> [J]ust 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

Additionally, the majority argued that its reasoning did not establish an "underinclusive" limitation upon a state's ability to proscribe certain categories of speech, but rather prohibited "viewpoint discrimination."[112] The basis of this distinction was Justice Scalia's application of the "fighting words" doctrine. Justice Scalia articulated the proposition that "fighting words" are proscribable because of their nonspeech elements or specific mode of communication.[113] The majority opinion, therefore, distinguished between those elements of the utterance that constitute "no essential part of any exposition of ideas" and the actual ideas or viewpoints communicated.[114]

Proscribable nonspeech elements are particular modes of expression which, regardless of the idea communicated, cause immediate injury and are unnecessary to rational communication. The idea of racial intolerance alone is not proscribable for facilitating racial hatred. The discussion or communication of racial hatred, however, in a manner or mode designed to inflict injury in another and which serves no purpose in the communication of the idea, *is* proscribable under the majority's opinion. This distinction, of course, does not save the St. Paul ordinance because that statute, while in effect regulated proscribable speech, did so in an unconstitutional manner by failing to distinguish between the intolerable mode of expression and the idea communicated.

In addition to articulating the majority's content-neutrality theory, Justice Scalia defined three exceptions. The first exception allows content-based proscriptions of a subcategory of speech in cases where the very basis of the subcategory's proscription is also the justification for proscribing the entire

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the basis of *other* content elements.

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 "non-speech" element of communication.

Id. at 2544-45.

[112]*Id.* at 2545. Justice Scalia explained that "[t]here 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." *Id.* (citations omitted).

[113]*Id.*

[114]*Chaplinsky*, 315 U.S. at 572.

class of speech within which the particular utterance falls.[115] For example, Justice Scalia suggested that the Government may proscribe only threats directed at the President because providing protections against threats of violence have "special force when applied to the person of the President."[116] Justice Scalia defined the second exception by asserting that content-based proscriptions are constitutionally allowable in cases where the Government proscribes a particular type of conduct based on its "secondary effects," without reference to any idea or viewpoint which that conduct may express.[117] Justice Scalia suggested that this exception allows the proscription of all obscene live performances involving minors, without proscribing performances not involving minors.[118] The "secondary effects" of the proscribed speech are those harms or evils which the Government may regulate "without reference to the content of the . . . speech."[119] The third exception identified by Justice Scalia is embodied in a broad statement

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[115]*R.A.V.*, 112 S. Ct. at 2545. Justice Scalia declared:

> 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 the class.

Id. at 2545-46. It is important to recall that Justice Scalia is referring to the mode of expression when referring to the neutral reason or reasons for proscribing categories of speech. In other words, simply because certain subcategories of speech are ideologically similar to the larger category within which they lie, does not alone make such a subcategory proscribable. Such a subcategory may be singled out based only on a neutral identification of those nonspeech elements which constitute "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572.

[116]*R.A.V.*, 112 S. Ct. at 2546.

[117]*Id.* Justice Scalia defined this "secondary effects" exception as "[a]nother valid basis for according differential treatment to even a content-defined subclass of prescribable 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.'" *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976))).

[118]*Id.* at 2546.

[119]*Id.* (citation omitted).

allowing content-based discriminations based on any "neutral" basis.[120] This exception, then, requires only a showing that "there is no realistic possibility that official suppression of ideas is afoot."[121] Justice Scalia then concluded that none of these exceptions saved the Minneapolis ordinance because the "unmodified terms [of the ordinance] 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,'" thus constituting "actual viewpoint discrimination."[122]

Concurring in the Court's judgment, but rejecting its reasoning, Justice White concluded that the Minnesota ordinance was unconstitutionally overbroad.[123] Justice White argued that the majority disregarded and ultimately confused the principles underlying the "fighting words" doctrine and strict scrutiny.[124] Justice White also suggested that Justice Scalia's reasoning was illogical and failed to replace established doctrine with a new coherent theory.[125] The Justice concluded that the "categorical approach

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[120]*Id.* at 2547. Justice Scalia defined this broad catch-all exception as follows:

> There may be other such bases as well. Indeed, to validate such selectivity (where total 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 not realistic possibility that official suppression of ideas is afoot. . . . 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.

Id. (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342-43 (1986)).

[121]*Id.* at 2547.

[122]*Id.*

[123]*Id.* at 2558-60 (White, J., concurring). Justice White concluded that the ordinance did not clearly identify the injuries it sought to prevent and which the proscribed speech caused. *Id.* at 2559 (White, J., concurring). The Justice stated that "[a]lthough 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." *Id.* at 2560 (White, J., concurring).

[124]*Id.* at 2554 (White, J., concurring).

[125]*Id.* at 2560 (White, J., concurring).

is a firmly entrenched part of our First Amendment jurisprudence."[126] Characterizing the majority's holding as one which requires the Government to criminalize either all fighting words or none at all, Justice White concluded that it was "at odds with common sense and with our jurisprudence as well."[127]

In addition, Justice White argued that the majority's holding was an outright rejection of the long standing strict scrutiny doctrine.[128] Supporting this argument, the Justice pointed to the Court's holding in *Burson v. Freeman*,[129] decided only a month earlier, which applied strict scrutiny and stated that "[t]he First Amendment does not require States to regulate for problems that do not exist."[130] Noting that Justice Scalia

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[126]*Id.* at 2552 (White, J., concurring) (citing New York v. Ferber, 458 U.S. 747, 764 (1982); Miller v. California, 413 U.S. 15, 20 (1973); Roth v. United States, 354 U.S. 476, 484-85 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941)); Schenck v. United States, 249 U.S. 47, 52 (1919).

[127]*Id.* at 2553 (White, J., concurring) (quoting R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2543 (1992)). Justice White concluded that "[i]t is inconsistent to hold that the [G]overnment may proscribe an entire category of speech because the content of that speech is evil, but that the [G]overnment 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." *Id.* (citations omitted). *Cf.* note 115 (explaining Justice Scalia's articulation of the content-neutrality doctrine).

[128]*Id.* at 2554 (White, J., concurring). Justice White declared, "[u]nder 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." *Id.*

[129]112 S. Ct. 1846 (1992). In *Burson*, the Court analyzed the constitutionality of a Tennessee statute that established an "election day 'campaign-free zone'" within 100 feet of all polling places. *Id.* at 1848. Respondent challenged the facial constitutionality of the statute asserting that her ability to communicate with voters was significantly limited. *Id.* at 1849. Respondent was not convicted under this statute, however, so there was no actual suppression of speech. *Id.* The only question before the Court was the facial constitutionality of the statute. *Id.* at 1848. Concluding that the Tennessee statute was a "facially content-based restriction on political speech in a public forum," the Court applied strict scrutiny. *Id.* at 1851. Noting the state's substantial interest in protecting "the [fundamental] right to cast a ballot in an election free from the taint of intimidation and fraud[,]" the Court held that the Tennessee statute survived strict scrutiny analysis. *Id.* at 1858.

[130]*R.A.V.*, 112 S. Ct. at 2555 (White, J., concurring) (quoting *Burson*, 112 S. Ct. at 1856).

concurred in *Burson*,[131] Justice White concluded that Justice Scalia's opinions in *Burson* and *R.A.V.* together suggest that in certain circumstances, political speech deserves less protection than "fighting words."[132]

Justice White, moreover, challenged the majority's three exceptions to the presumption against content-based proscriptions. Justice White declared that the majority's first exception "swallow[ed] the rule."[133] The reason for this exception, Justice White suggested, was an effort by the majority to avoid the consequences of their own rule.[134] Similarly, Justice White submitted that the purpose of the majority's "secondary effects exception" is explained as a reaction to the invalidation of "Title VII hostile work environment claims" by the majority's general rule.[135] Finally, Justice

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[131]*Id.* Justice Scalia explained that:

> Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the Tennessee statute] does not restrict speech in a traditional public forum, and the 'exacting scrutiny' that the Court purports to apply . . . is inappropriate. Instead, I believe that § 2-7-111, though content-based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum.

Burson, 112 S. Ct. at 1859 (Scalia, J., concurring).

[132]Challenging Justice Scalia's reasoning in light of his previous statements, Justice White posited:

> 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.

R.A.V., 112 S. Ct. at 2555 n.8 (White, J., concurring) (citations omitted).

[133]*Id.* at 2556 (White, J., concurring). For a more detailed discussion of the majority's exceptions to the presumption against content-based proscriptions, see *supra* notes 115-22 and accompanying text.

[134]*R.A.V.*, 112 S. Ct. at 2556 (White, J., concurring).

[135]*Id.* at 2557 (White, J., concurring). Justice White suggested that Title VII of the Civil Rights Act criminalizes discrimination "because of [an] individual's race, color, religion, sex, or national origin." *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (1964)). Justice White argued that "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.'" *Id.* (quoting R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2547 (1992)). Based on this analogy, Justice White concluded that "because a general ban on harassment in the workplace would cover the problem of sexual

White concluded that the majority's final "catch-all exclusion" was simply an effort to "protect against unforeseen problems."[136] Thus, according to Justice White, the majority's reasoning was unnecessary, illogical, and accomplished little except confusion of "settled First Amendment principles."[137]

Justice Blackmun joined Justice White in a separate concurring opinion, asserting that the majority's reasoning abandoned the categorical approach and strict scrutiny analysis.[138] Adding to the list of grievances regarding the majority's reasoning, Justice Blackmun suggested that perhaps the majority's holding would only act as "an aberration" and would not affect the Court's First Amendment jurisprudence.[139] Justice Blackmun further agreed with Justice White's conclusion that the Minnesota ordinance was unconstitutionally overbroad.[140]

Also concurring in the judgment, Justice Stevens argued that the Minnesota ordinance should fail because it was unconstitutionally overbroad.[141] More importantly, Justice Stevens suggested that the Court's traditional reliance upon the categorical approach was unfounded and misleading.[142] Specifically, Justice Stevens posited that the Court's categorical approach did not consider the "content or context of the regulated speech,"[143] arguing that the Minnesota ordinance "regulates speech . . . on

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harassment, any attempt to proscribe the subcategory of sexually harassing expression would violate the First Amendment." *Id.*

[136]*Id.* at 2557-58 (White, J., concurring).

[137]*Id.* at 2558 (White, J., concurring).

[138]*Id.* at 2560 (Blackmun, J., concurring).

[139]*Id.*

[140]*Id.* at 2561 (Blackmun, J., concurring) ("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.").

[141]*Id.* at 2561 (Stevens, J., concurring).

[142]*Id.* at 2566 (Stevens, J., concurring) ("[The categorical] approach sacrifices subtlety for clarity and is, I am convinced ultimately unsound.").

[143]*Id.* at 2567 (Stevens, J., concurring). Moreover, Justice Stevens suggested that "the categorical approach sweeps too broadly when it declares" that an entire class of speech is unworthy of constitutional protection. *Id.* at 2566-67 (Stevens, J., concurring). This conclusion is strikingly similar to Justice Scalia's statement that, "these areas of speech

the basis of the *harm* the speech causes" and not viewpoints.[144] Justice Stevens thus concluded that "the St. Paul ordinance is evenhanded" and was not "an unconstitutional content-based regulation of speech."[145] Like Justices White and Blackmun, however, Justice Stevens concluded that the St. Paul ordinance was unconstitutionally overbroad.[146]

Justice Scalia's conclusion that the Minnesota ordinance was unconstitutional, unlike Justices White, Blackmun and Stevens, rests upon the distinction between permissible content-based regulation and unconstitutional viewpoint discrimination. Indeed, this distinction lies at the heart of the First Amendment itself.[147] Prohibiting "actual viewpoint discrimination" is aimed at protecting the free exchange of ideas, while allowing certain content-based proscriptions identifies the communication of certain ideas through a particular *mode* of speech as unworthy of *full* First Amendment protection.[148] For example, in *Texas v. Johnson*[149] the Court identified

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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 content discrimination unrelated to their distinctively proscribable content." *Id.* at 2543. These two conclusions illustrate the notion that inclusive, categorical proscriptions alone do not cover all elements of expression. Justice Scalia's distinction between content-based proscriptions and viewpoint discrimination is an attempt to identify "a more complex and subtle analysis" that Justice Stevens argued is established by the Court's prior holdings. *Id.* at 2567 (Stevens, J., concurring).

[144]Justice Stevens maintained that the Court fundamentally misread the Minnesota ordinance. *Id.* at 2570 (Stevens, J., concurring). Justice Stevens stated:

> The Court describes the St. Paul ordinance as regulating expression 'addressed to one of [several] specified disfavored *topics*' . . . and as 'prohibit[ing] . . . speech solely on the basis of the *subjects* the speech addresses.' 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.

Id.

[145]*Id.* at 2571 (Stevens, J., concurring).

[146]*Id.* ("Thus, were the ordinance not overbroad, I would vote to uphold it.").

[147]*See supra* note 87 (discussing the essence of the First Amendment).

[148]*See* Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). After discussing in detail the tension between the valid expression of ideas and the Government's legitimate exercise of authority limiting such expression, Justice Frankfurter stated:

this general free speech principle when it posited, "[i]f 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."[150] Many misapplications of *R.A.V.* are rooted in a failure to understand this crucial distinction.[151]

Admittedly, this distinction is not readily ascertained from Justice Scalia's opinion. Although this distinction may be the most logical foundation for the majority's opinion, the opinion itself does not clearly define it as the foundation of its decision. Interpreting Justice Scalia's reasoning as underinclusiveness is understandable given the Minnesota ordinance's limited categorical proscription and Justice Scalia's obvious concern for content

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> The State cannot of course forbid public proselyting or religious argument merely because public officials disapprove the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and vehicular traffic, or for equally indispensable ends of modern community life.

Id. at 282 (Frankfurter, J., concurring).

[149]491 U.S. 397 (1988).

[150]*Id.* at 414 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 65, 72 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980); FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); United States v. O'Brien, 391 U.S. 367, 382 (1967); Brown v. Louisiana, 383 U.S. 134, 142-43 (1966); Stromberg v. California, 283 U.S. 359, 368-69 (1931)).

[151]Justice White failed to understand this distinction when he concluded that Justice Scalia's analysis in *R.A.V.* constituted "underinclusiveness." R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2553 (1992) (White, J., concurring). Several state courts, moreover, also have failed to recognize this distinction, suggesting that the Court's reasoning in *R.A.V.* contradicts established First Amendment principles. *See* State v. Vawter, 642 A.2d 349, 357 (N.J. 1994) ("Before applying strict scrutiny, however, we depart reluctantly from what we consider traditional First Amendment jurisprudence to analyze our statutes in light of Justice Scalia's five-member majority opinion in *R.A.V.* . . ."); State v. T.B.D., 638 So.2d 165, 167 (Fla. 1 Dist. Ct. App. 1994) ("The trial court agreed that the statute was facially unconstitutional, relying principally upon *R.A.V.* . . . . We, likewise, agree that the statute is facially unconstitutional. However, we reach this conclusion based principally upon traditional First Amendment overbreadth analysis.").

neutrality. Moreover, it is clear from Justice Scalia's opinion that the identification of hatred based on "race, color, creed, religion or gender" was the element of the statute which constituted viewpoint discrimination. Justice Scalia suggests, however, that the proscription of these ideas would be constitutional if proscribed because of a "particularly intolerable" or "socially unnecessary *mode*" of speech, not if the proscribed categories of speech were expanded.[152]

This reasoning suggests that the major flaw in the Minnesota ordinance was its failure to identify a particularly intolerable mode of communication such as threats of violence or intimidation. Indeed, Justice Scalia's refutation of the "underinclusive" criticism levied by his colleagues is that identifying a category of speech as proscribable under *Chaplinsky* requires a showing that the speech "embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[153] Unlike Justice White, Justice Scalia's understanding of categorical proscriptions under *Chaplinsky* focuses on the speakers mode of communication not the specific message communicated.

2. *MITCHELL*

In its most recent attempt to define the meaning and effect of the Free Speech Clause, the Court unanimously upheld a Wisconsin penalty-enhancement statute increasing the defendant's sentence for aggravated assault where the defendant had selected his victim on the basis of race.[154]

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[152]*R.A.V.*, 112 S. Ct. at 2549.

[153]*Id.*

[154]Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). Defendant Todd Mitchell was convicted of aggravated battery for encouraging a group of black males and participating in the beating of a young white male. *Id.* at 2196-97. Under WIS. STAT ANN. § 939.645, Defendant's sentence was enhanced to a maximum sentence of seven years, of which the defendant was sentenced to four. *Id.* at 2197. The evidence supporting the jury's conclusion that Defendant was motivated by race were statements made by Defendant immediately before the beating. *Id.* at 2196-97. For example, while discussing a scene from the movie "Mississippi Burning," depicting a white man beating a young black child, Defendant said, "Do you all feel hyped up to move on some white people?" *Id.* at 2196. After seeing the victim, Defendant asked, "You all want to fuck somebody up? There goes a white boy; go get him." *Id.* at 2196-97.

The relevant portion of the Wisconsin penalty-enhancement statute states:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by

The majority initially determined that committing a physical battery upon another person is not expressive conduct protected by the First Amendment.[155] The Court then considered its prior holdings regarding sentencing guidelines[156] and concluded that those holdings illustrated the constitutionality of considering a defendant's motive in determining a proper sentence, regardless of the motive's content.[157] Continuing to analyze prior holdings, the Court distinguished *Mitchell* from *R.A.V.* on the basis that the statute in *R.A.V.* criminalized a particular viewpoint where the Wisconsin penalty-enhancement statute was aimed at punishing conduct outside the First Amendment's protective reach.[158]

> the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

WIS. STAT. ANN. § 939.645 (1989-90).

Writing for a unanimous Court, Chief Justice Rehnquist concluded that the Court was not bound by the Wisconsin Supreme Court's holding because that holding, in fact, did not "construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase." *Mitchell*, 113 S. Ct. at 2198. The Chief Justice, therefore, concluded that the Court was bound only by state court statutory constructions of state laws and not by the "operative effect" of such statutes. *Id.* at 2198-99 (citing *R.A.V.*, 112 S. Ct. 2541 (1992); New York v. Ferber, 458 U.S. 747 (1982); Terminello v. Chicago, 337 U.S. 1 (1949)).

[155]*Mitchell*, 113 S. Ct. at 2199 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

[156]The Court cited its holding in Dawson v. Delaware, 112 S. Ct. 1093 (1992), declaring that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Mitchell*, 113 S. Ct. at 2200 (quoting *Dawson*, 112 S. Ct. at 1098). Moreover, the Court noted its holding in Barclay v. Florida, 463 U.S. 939 (1983), which allowed a judge to consider a defendant's "racial animus towards his victim" when such motives are relevant to determining the existence of aggravating circumstances. *Mitchell*, 113 S. Ct. at 2200 (citing *Barclay*, 463 U.S. 939).

[157]*Mitchell*, 113 S. Ct. at 2200.

[158]*Id.* at 2200-01. The Court further reasoned that crimes motivated by bias were singled out because they present a greater threat to society than other crimes. *Id.* at 2201. In this regard, the Chief Justice declared:

> The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it

The Court then rejected, as "too speculative," Mitchell's argument that the Wisconsin statute was unconstitutionally overbroad because it chilled bigoted beliefs in lieu of the possibility that statements of such beliefs may possibly be used against one who later commits a serious offense based on those beliefs.[159] Finding no constitutional infirmities in the Wisconsin penalty-enhancement statute, the Chief Justice plainly stated that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[160]

At first, *R.A.V.* and *Mitchell* may seem inconsistent or at least moving in opposite directions. These two opinions, however, are clearly linked by a common doctrinal theme which distinguishes between nonspeech elements of speech or modes of speech and the actual ideas or viewpoints communicated. In a case like *Mitchell*, where a crime is committed motivated by ideas of hatred towards a specific group, a clearly "intolerable" and "socially unnecessary *mode* of express[ion]" is identified. The First Amendment does not prohibit society from ranking criminal conduct according to the degree of injury inflicted or in its degree of offense to society. As with premeditated murder, society has deemed assaults and other crimes against individuals or groups based on their status as a member of a particular group more dangerous and egregious than similar crimes committed without such motivations.[161]

3. RECENT STATE APPLICATIONS

The current struggle to define and reconcile these two holdings is found within several state court decisions which apply the reasoning articulated in *R.A.V.* and *Mitchell*. An initial look at recent state court decisions applying *R.A.V.* suggests that many state courts are not fully convinced or do not completely understand the holding in *R.A.V.* A notable illustration is found

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is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive to the public safety and happiness."

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *16 (1809)).

[159]*Id.*

[160]*Id.*

[161]*See* Lawrence, *supra* note 100, at 717 (suggesting that concern of the punishment for motive is misplaced and is a clearly established proposition as a matter of criminal law); Daniel A. Farber, *Foreword: Hate Speech After* R.A.V., 18 WM. & MARY L. REV. 889, 895-97 (1993) (distinguishing *Mitchell* and *R.A.V.* on the ground that *R.A.V.* criminalized only expressive acts and was a "hate speech" statute not a "hate crime" statute).

in *State v. T.B.D.*,[162] where a Florida court of appeals held that a Florida cross burning statute was unconstitutionally overbroad.[163]

The court found that the Florida statute could not be construed to proscribe only unprotected speech.[164] Rather, the court concluded that the statute would proscribe protected speech such as Ku Klux Klan rallies held on the private property of a Klan member or consenting property owner.[165] Although basing its holding primarily on overbreadth grounds, the court noted that the statute, if susceptible to a limiting construction, would have

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[162]638 So.2d 165 (Fla. App. 1 Dist. 1994). The defendant was indicted for violation of FLA. STAT. ch. 876.18 (1993) for placing on the property of another a burning or flaming cross. *T.B.D.*, 638 So.2d at 167. The Florida Statute states:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree. . . .

Id. at 166-67 (quoting FLA. STAT. ch. 876.18 (1993)).

[163]*Id.* at 167. The court stated: "We likewise, agree that the statute is facially unconstitutional. However, we reach this conclusion based principally upon traditional First Amendment overbreadth analysis." *Id.* After analyzing the Florida statute under the overbreadth doctrine, the court declared once again that the statute was unconstitutionally overbroad citing Justice White's concurrence in *R.A.V.* as supporting authority. *Id.* at 169. The majority declared:

> [W]e believe that the foregoing is sufficient to demonstrate that the likelihood that fear of criminal prosecution under the statute will have a chilling effect on the exercise by those not before the court of expressive conduct protected by the First Amendment is both "real" and "substantial." Accordingly, we conclude that section 876.18 violates the First Amendment overbreadth doctrine and is, therefore, unconstitutional.

Id. at 168-69 (citation omitted).

[164]*Id.* at 168.

[165]*Id.* The court's example of a Ku Klux Klan ceremonial cross burning on the property of an individual who agrees or sympathizes with the Klan and has consented to the use of his property, demonstrates, according to the court, the statute's "chilling effect on the exercise by those not before the court of expressive conduct protected by the First Amendment." *Id.* at 168-69.

also failed the analysis presented in *R.A.V.*[166] The court concluded, however, that because the Florida statute was not "susceptible to a construction limiting its reach to only 'fighting words' or to conduct intended . . . to incite imminent lawlessness," *R.A.V.* did not apply.[167]

The court's holding in *T.B.D.* raises an important question regarding the Supreme Court's free speech jurisprudence. By deciding the case principally upon the overbreadth doctrine and not the majority's reasoning in *R.A.V.*, the Florida court's opinion assumes that, in order to apply *R.A.V.*, the court must first limit the statute's construction to proscribable unprotected speech.[168] This interpretation, then, limits the majority's opinion in *R.A.V.* to proscriptions of subcategories only. This may be too narrow an interpretation of *R.A.V.* because the majority's opinion is based upon a broader understanding of the Free Speech Clause that prohibits the Government from proscribing "the expression of an idea simply because society finds the idea itself offensive or disagreeable."[169]

T.B.D., however, is not the only state case to experience difficultly applying *R.A.V.* In *People v. Steven S.*,[170] a California court of appeals

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[166]*Id.* at 169. The court declared that the statute failed the majority's reasoning in *R.A.V.* "because (1) section 876.18 proscribes only one type of such conduct, based upon the content of the message; and (2) such content discrimination is not necessary to further the legitimate interest sought to be promoted by the statute." *Id.*

[167]*Id.* at 169.

[168]Although the court suggests that its holding would not change if the majority's reasoning in *R.A.V.* was applied, it is quite clear that the court did not consider that analysis as controlling and elected to determine the constitutionality of the statute on alternative grounds. *Id.* at 167. This holding clearly illustrates the still undefined relationship between the standard overbreadth analysis and the majority's content-discrimination analysis in *R.A.V.* Defining this relationship is necessary because a statute that is overbroad does not necessarily constitute viewpoint discrimination nor does viewpoint discrimination necessarily constitute overbreadth. The two doctrines, moreover, are not necessarily dependent upon one another, and failing to define their relationship, at least within the hate speech context, will continue to cause confusion regarding the proper application of each doctrine.

[169]Texas v. Johnson, 491 U.S. 397, 414 (1989). *See also* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2542 (1992) (concluding that the First Amendment "generally prevents [G]overnment from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed" (citing Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940); *Johnson*, 491 U.S. at 406)).

[170]31 Cal. Rptr.2d 644 (Cal. Ct. App. 1994). Defendant, a sixteen year-old, assisted in burning a cross on the front lawn of Ernest Foster, an African-American, and his wife Leanna Foster, who was white. *Id.* at 646. Steven S. and several other teenagers decided to play a "Friday the 13th joke" on the Fosters by first placing dog feces in a paper bag,

upheld the constitutionality of the California penal code § 11411, which criminalized the burning of a cross on another's property for purposes of terrorizing the owner or occupier.[171] The court reasoned that the statute "target[ed] only acts of terrorism on the private property of another person, not the expression of ideas," and therefore, its proscription of cross burning was constitutional.[172] In so holding, the court distinguished cross burning for the purpose of terrorizing a particular individual from "ritual cross burning," which expresses a constitutionally protected viewpoint.[173]

Perhaps more importantly, the California court of appeals proffered that the statute was, nonetheless, constitutional, even under the limitations upon

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setting it on fire, and placing the bag on the Foster's front porch. *Id.* The teenagers also placed an order for pizza and had it delivered to the Fosters' home. *Id.* One of the teenagers, Branson, suggested that the group "play a joke on the black man[,]" suggesting that they burn a cross. *Id.* After constructing a cross, the teenagers, including Steven S., placed the cross on the Fosters' lawn, doused it with lighter fluid, and set it aflame. *Id.* The California statute under which Defendant was prosecuted stated in part:

> Subdivision (c) of the statute provides, "Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that property" is guilty of a crime, which may be prosecuted as a misdemeanor or a felony.

Id. (quoting CAL. PENAL CODE § 11411(c) (1993)).

[171]*Id.* at 653.

[172]*Id.* The court analyzed the statute under various constitutional principles, including overbreadth, vagueness, the "true threat" doctrine, the "fighting words" doctrine, content neutrality (as articulated in *R.A.V.*) and equal protection. *Id.* at 647-53.

[173]*Id.* The court stated its reasoning as follows:

> Cross burning conveys a message — the Ku Klux Klan's creed of racial hatred. As such, it implicates the First Amendment's guarantee of freedom of speech. . . .
>
> But an *unauthorized* cross burning *on another person's property*, which we shall call "malicious" cross burning for shorthand purposes, as distinguished from a ritual cross burning at a Klan gathering, does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, an it conveys a threat of future physical harm.

Id. at 647 (citing *R.A.V.*, 112 S. Ct. at 2547-49; *Texas*, 491 U.S. at 404-06).

content-based proscriptions set forth in *R.A.V.*[174] The court first distinguished the Minnesota ordinance declared unconstitutional in *R.A.V.* from § 11411 of the California penal code, reasoning that the California statute was narrowly focused on "malicious" cross burning, not cross burning in general.[175] Therefore, the court concluded that the California statute satisfied the three exceptions articulated by Justice Scalia in *R.A.V.*[176] *Steven S.* illustrates *R.A.V.*'s limited impact upon a state's ability to proscribe hate speech. States may still criminalize specific malicious, wanton acts which go beyond mere expression and inflict a tangible injury. *Steven S.* and *T.B.D.*, however, are only two of many recent state court decisions applying *R.A.V.*

For example, in *State v. Vawter*,[177] the New Jersey Supreme Court

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[174]*Id.* at 649-51.

[175]*Id.* at 650-51. By construing the California statute's proscription narrowly, the court declared that it fell within all three of the exceptions articulated in *R.A.V.*:

> The present case differs fundamentally from R.A.V. Although the particular defendant in R.A.V. had burned a cross in a family's yard, the ordinance itself applied to any cross burning, not just the act we call *malicious* cross burning. The decision was based on *facial* unconstitutionality; the court was not concerned with the victimizing act actually committed in that case. Here, in contrast, the challenged statute applies *only* to an unauthorized cross burning on another person's private property. That distinction invokes all three of the exceptions set forth in R.A.V.

Id. at 650.

[176]*See supra* note 115-22 and accompanying text (discussing the three *R.A.V.* exceptions to the general presumption against content-based proscriptions of speech).

[177]642 A.2d 349 (N.J. 1994). Defendants were charged under N.J. STAT. ANN. § 2C:33-10 and -11 after spray painting a Nazi swastika along with the statement "Hitler Rules" on the jewish synagogue, Congregation B'nai Israel. *Id.* at 352. In addition, during the same evening, Defendants spray painted a satanic pentagram on the property of a Roman Catholic church. *Id.* The New Jersey bias crime statutes under which Defendants were convicted read:

> 2C:33-10. Putting or attempt to put in fear of violence by placement of symbol or graffiti on property
>
> A person is guilty of crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on public or private property a symbol, an object, a characterization, an appellation or graffiti that exposes another to threats of violence, contempt or hatred on the basis of race, color, creed or religion, including, but not limited to a burning cross or Nazi swastika. A person shall not be guilty of an attempt unless his actions cause serious and imminent likelihood of causing fear or

declared two New Jersey bias crime statutes "unconstitutionally underinclusive," following the majority's reasoning in *R.A.V.*[178] Before applying the Supreme Court's analysis in *R.A.V.*, however, the New Jersey Supreme Court declared that the New Jersey statutes proscribed expressive conduct based on content.[179] The most significant aspect of the court's reasoning in *Vawter*, however, were the court's statements disputing the analysis in *R.A.V.*[180] The court stated that it did not agree with the majority's reasoning in *R.A.V.*, suggesting that such reasoning was a departure from "traditional First Amendment jurisprudence."[181] The majority in *Vawter* did not expand on its disagreement, concluding only that absent *R.A.V.* they would have applied a traditional strict scrutiny analysis.

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unlawful bodily violence.

. . . .

2C:33-11. Defacement or damage of property by placement of symbol, object or graffiti

A person is guilty of a crime of the Fourth degree if he purposely defaces or damages, without authorization of the owner or tenant, any private premises or property primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed or religion by placing thereon a symbol, an object, a characterization, an appellation, or graffiti that exposes another to threat of violence, contempt or hatred on the basis of race, color, creed or religion, including but not limited to, a burning cross or Nazi swastika.

N.J. STAT. ANN. § 2C:33-10, -11 (1981).

[178]642 A.2d at 360.

[179]*Id.* at 354-56. In reaching these conclusions, the New Jersey court noted the unmistakable message of hatred conveyed by placing a Nazi swastika on a Jewish synagogue or a burning cross on the property of an African-American family. *Id.* at 354. The court concluded that the speech proscribed by the New Jersey statutes was speech protected by the First Amendment and that the statutes' proscriptions were content-based, and therefore required the statutes to pass strict scrutiny analysis. *Id.* at 355-56.

[180]The court began its analysis by stating, "[b]efore applying strict scrutiny, however, we depart reluctantly from what we consider traditional First Amendment jurisprudence to analyze our statutes in light of Justice Scalia's five-member majority opinion in *R.A.V.* . . ." *Id.* at 357. The court frankly "confess[ed] that [its] reasoning in that case would have differed from Justice Scalia's" yet recognized its "inflexible obligation to review the constitutionality of our own statutes using his premises." *Id.*

[181]*Id.* at 357.

Justice Stein, however, authored a twelve page concurring opinion devoted entirely to explaining his "disagreement and dismay over the United States Supreme Court's decision in *R.A.V.*"[182] Justice Stein's primary criticism of the majority opinion in *R.A.V.* was its central holding that, according to Justice Stein, denied Minnesota the ability to regulate speech based on its content and viewpoint even if the regulation was "narrowly tailored to serve compelling state interests."[183]

The statements made by the New Jersey Supreme Court raise serious questions about *R.A.V.*'s true impact and its intended meaning. Certainly, the majority in *R.A.V.* had no intention of depriving state's the authority to proscribe truly threatening and violent behavior.[184] Justice Scalia, moreover, did not ignore or disregard the role of strict scrutiny in deciding *R.A.V.*[185] The majority opinion in *R.A.V.* simply states that truly

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[182]*Id.* at 360 (Stein, J., concurring). Justice Stein declared:

> Had the *R.A.V.* majority accorded minimal deference to First Amendment precedent, it would have sustained the St. Paul ordinance (subject to overbreadth problems) by recognizing the obvious government interest in criminalizing that subset of fighting words addressed to the designated subjects . . . because bias-motivated threats that tend to incite violence are predominantly addressed to one or more of those subjects. . . . That St. Paul elected not to prohibit bias-motivated speech addressed to other topics reflects not a preference for one type of speech over another, but simply a decision by public officials to "address the problems that confront them."

Id. at 370 (Stein, J., concurring) (citations omitted).

[183]*Id.* at 362 (Stein, J., concurring).

[184]Justice Scalia reasoned:

> 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.

R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2544 (1992) (citations omitted).

[185]Justice Scalia noted that a proscription of speech is justified "only where it is '*necessary* to serve the asserted [compelling] interest.'" *Id.* at 2549-50 (quoting Burson v. Freeman, 112 S. Ct. 1846, 1852 (1992) (plurality) (emphasis added)). The Justice then concluded:

threatening conduct is proscribable because it is threatening, not because it expresses a particular viewpoint. After reading the New Jersey Supreme Court's opinion in *Vawter* and the holdings in *Steven S.* and *T.B.D.*, however, it does not seem that *R.A.V.*'s intended meaning has governed its impact.

This problem is further illustrated through the holdings in *State v. Talley*[186] and *State v. Sheldon*.[187] In *Talley*, the Washington Supreme

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

Id. at 2550.

[186]858 P.2d 217 (Wash. 1993). The first defendant in this consolidated case, David Talley, was convicted under the Washington malicious harassment statute when he placed a burning cross upon his property attracting the attention of an interracial couple purchasing a home next door. *Id.* at 220. Prior to setting the cross on fire, Defendant declared that "having niggers next door" would lower property values. *Id.* The second set of defendants, two teenagers, Daniel Myers and Brandon Stevens placed a burning cross on the property of a black family because they felt that a member of that family who attended school with them was acting "too cool at school." *Id.* Defendants were charged under the Washington malicious harassment statute which, provides in relevant part:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
>
> (a) Causes physical injury to another person; or
>
> (b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. . . . However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or
>
> (c) Causes physical damage to or destruction of the property of another person. . . .

WASH. REV. CODE § 9A.36.080 (1984).

Court held that the Washington malicious harassment statute was a constitutional exercise of the State's police power.[188] First, the court characterized the statute as a penalty enhancement provision, upholding its constitutionality under *Wisconsin v. Mitchell*.[189] The court posited, moreover, that the Supreme Court's reasoning in *R.A.V.* did not apply to the Washington statute, because, unlike the statute in *R.A.V.*, the Washington statute regulated criminal conduct, not speech.[190] The court also considered overbreadth, vagueness, and equal protection challenges to the statute, concluding that none rendered the statute unconstitutional.[191]

Conversely, in *Sheldon*, the Maryland Court of Appeals applied strict

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[187]629 A.2d 753 (Md. 1993). The first defendant in this consolidated case, Brandon Forrest Sheldon, placed a burning cross on the property of a black family without obtaining permission. *Id.* at 755. Thomas Eugene Cole, the second defendant, placed a burning cross on state property without permission and without properly notifying the fire department of his intentions. *Id.* Both defendants were charged under Maryland's cross burning statute:

> It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.

MD. CODE ANN., CRIM. LAW Art. 27, § 10A (1992).

[188]*Talley*, 858 P.2d at 231.

[189]*Id.* at 225. For a detailed discussion of the Supreme Court's holding in *Mitchell*, see *supra* notes 154-61 and accompanying text.

[190]*Talley*, 858 P.2d at 222. The court also noted Justice Scalia's first exception to the presumption against content-based proscriptions of speech, proscriptions based on the "very reason the entire class of speech at issue is proscribable[,]" and declared:

> In accord with this exception, RCW 9A.36.080(1) punished defendants who act with an even more depraved intent, an intent to target a crime victim because of that person's protected status. The resulting harm is greater than the harm caused by that same conduct absent the special animus underlying hate crimes. The greater harm of such acts justifies the increased punishment.

Id. at 225-26.

[191]*Id.* at 227-30.

scrutiny and declared the Maryland cross burning statute unconstitutional.[192] The Maryland statute under review, unlike the penalty enhancement statute in *Talley*, specifically regulated expressive conduct.[193] The Maryland court, therefore, applied both the analysis in *R.A.V.* and strict scrutiny, declaring that the statute passed neither.[194] More importantly, however, the court articulated the doctrinal connection between the two analyses, stating that "[*b*]*ecause* the cross burning statute [did] not fall within any of the *R.A.V.* exceptions" it was subject to strict scrutiny analysis.[195] This reasoning is very similar to Justice Scalia's application of strict scrutiny in *R.A.V.* Justice Scalia applied strict scrutiny only after determining that the Minnesota statute discriminated based on content and concluded that such discrimination was not "*necessary*" to serve the State's compelling interests.[196]

Additionally, the New Jersey Supreme Court in *State v. Mortimer*[197] held N.J. STAT. ANN. § 2C:33-4d constitutional pursuant to the Supreme Court's holding in *Mitchell*.[198] The court reversed the trial court's ruling

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[192]State v. Sheldon, 629 A.2d 753, 763 (Md. 1993). The court declared that "Maryland's cross burning law is not necessary to its asserted interest in reducing racial and religious bias; therefore, it cannot survive strict scrutiny." *Id.*

[193]*Id.* at 755-56 (quoting MD. CODE ANN., CRIM LAW Art. 27, § 10A (1992)).

[194]*Id.* at 759-63.

[195]*Id.* at 762 (emphasis added).

[196]R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2549-50 (1992) (quoting Burson v. Freeman, 112 S. Ct. 1846, 1852 (1992)).

[197]641 A.2d 257 (N.J. 1994), *cert. denied*, 115 S. Ct. 440 (1994). Defendant, David Mortimer, plead guilty to fourth-degree harassment for spray-painting "Dots U Smell" on the garage door of a Pakistani family's home. *Id.* at 260. Mortimer moved to dismiss the indictment before sentencing in leu of the Supreme Court's decision in *R.A.V. Id.* The trial court granted Defendant's motion and dismissed the case. *Id.* The New Jersey Supreme Court then granted direct certification from the appellate division. *Id.* at 261.

[198]*Id.* at 263. The challenged section states:

> d. A person commits a crime of the fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

N.J. STAT. ANN. § 2C:33-4 (West 1979).

that the New Jersey statute violated the defendant's free speech rights under *R.A.V.*[199] The New Jersey court initially concluded that the challenged statute did not have an effect on protected speech, but was a penalty-enhancement statute directed at the defendant's motive.[200] Finally, the court concluded that the state may punish bias-motivated conduct and may treat such conduct with enhanced sentences because "by [its] nature, [it has] distinct harmful effects."[201]

These cases illustrate not only the subtle distinction between penalty enhancement statutes and content-based proscriptions of speech, but they also illustrate the difficulty state courts have had in applying *R.A.V.* Upon a more detailed examination of the different state statutes analyzed in light of the above cases it becomes apparent that in some cases the state courts have exaggerated the scope of *R.A.V.* For example, the New Jersey Supreme Court in *Vawter* may have unnecessarily declared the New Jersey hate crime statutes unconstitutional. Unlike the Minnesota ordinance in *R.A.V.*, which specifically punished the placement of an object or appellation on public or private property, the New Jersey statutes criminalized "knowingly or recklessly put[ting] or attempt[ing] to put another in fear of bodily violence."[202] The communication of an idea through threatening or violent conduct may have constituted "a particularly intolerable (and socially unnecessary) *mode* of expressing" the idea conveyed, and thus, satisfied the majority's content-neutrality test.[203] This lack of understanding is certainly attributable, at least in part, to the confusing and deeply divided opinions in *R.A.V.*

C. THE HATE CRIME STATUTES

Understanding both the distinction between the Court's holdings in *R.A.V.* and *Mitchell* as well as the holdings themselves requires a thorough examination of the scrutinized statutes. The statutes themselves fall within three specific groups: (1) content-based proscriptions of hate speech;[204]

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[199]*Mortimer*, 641 A.2d at 260.

[200]*Id.* at 262.

[201]*Id.* at 263.

[202]N.J. STAT. ANN. § 2C:33-10 (1981).

[203]R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2549 (1992).

[204]*See, e.g.*, MINN. STAT. § 292.02 (1990) (criminalizing the placement of "a symbol, object, appellation, characterization, or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color,

(2) penalty-enhancement statutes;[205] and (3) content-neutral proscriptions of threatening or violent behavior.[206] These categories follow the Court's jurisprudence as defined in *R.A.V.* and *Mitchell*. Understanding these categories, therefore, is a vehicle for understanding the Court's free speech jurisprudence.

The first category consists of those statutes that proscribe expressive conduct based on the viewpoint expressed.[207] Such a statute attempts to proscribe expressions of hatred based on the specific content of the communication and not the injurious results which follow from the speaker's mode of expression.[208] The Minnesota bias-crime statute invalidated by the Court in *R.A.V.*, for example, specifically proscribed the expressions of hatred toward particular groups, not based upon the injurious mode used to communicate the idea, but rather, based upon the idea itself. Commentators and judges alike have incorrectly characterized this distinction as "underinclusiveness," arguing that such a distinction will require states to proscribe all forms of "fighting words."[209] This criticism is based

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creed, religion or gender").

[205]*See, e.g.*, WIS. STAT. ANN. § 939.645 (1)(b) (1989-90) (enhancing the penalty for certain crimes whose victim is selected "because of the race, religion, color, disability, sexual orientation, national origin or ancestry"); N.J. STAT. ANN. § 2C:33-4d (West 1979) ("A person commits a crime of the fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.").

[206]*See, e.g.*, CAL. PENAL CODE § 11411 (West 1982) (stating that "[a]ny person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property" is guilty of a crime).

[207]Declaring that a statute falls within this first category depends upon a proper application of the Court's hate speech jurisprudence articulated in *R.A.V.* Simply because state courts have justified their decisions holding that bias crime statutes unconstitutional under *R.A.V.* does not necessarily mean that, in all cases, such statutes, in fact, do fall within the first category. The purpose of identifying such a category is necessary to understand the Court's jurisprudence, not to assess its application.

[208]*See* Lawrence, *supra* note 100, at 690-91; Winer, *supra* note 99, at 972.

[209]*See* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2553 (1992) (White, J., concurring). Justice White argued:

primarily on the prohibition in *R.A.V.* against content-based proscriptions of a subcategory of proscribable speech. This distinction does not constitute underinclusiveness simply because it does not allow proscriptions of subcategories of proscribable speech based solely on the viewpoint expressed and without reference to the mode of speech. The focus in *R.A.V.* was on the "mode of speech," not the idea communicated.[210]

The second category of statutes includes those that provide enhanced criminal penalties for certain bias motivated crimes. These statutes only consider expressions of hatred when determining an appropriate punishment for certain criminal conduct.[211] Such statutes, therefore, do not

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> It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection. . . .
>
> Therefore, the Court's insistence on inventing its brand of First Amendment *underinclusiveness* puzzles me.

Id. (emphasis added).

[210]*Id.* at 2548-49. Justice Scalia articulated this fundamental principle:

> 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. . . .
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> . . .
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> As explained earlier . . . the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.

Id. at 2545, 2548-49.

[211]*See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993). The Court noted that traditionally many factors in addition to evidence of guilt are considered by sentencing judges. *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 818-19 (1991); United States v. Tucker, 404 U.S. 443, 446 (1972); Williams v. New York, 337 U.S. 241, 246 (1949)). Additionally, the Court noted that motive is among those factors. *Id.* ("Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." (quoting 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.6(b), 324 (1986))). *Cf.* Eric B. Levine, *Two Views of Offender Characteristics: A Comparative Look at the Federal Sentencing Guidelines and the New Jersey Sentencing Statutes*, 4 SETON HALL CONST. L. J. 661 (1994) (discussing, generally, discretion given to sentencing judges).

unconstitutionally proscribe expressive conduct.[212] Penalty enhancement statutes, rather, punish expressive conduct which, independent of its content, constitutes criminal conduct. Enhancing one's sentence based on the motivation for acting, therefore, correctly focuses upon the mode of expression.

Finally, the third category of statutes criminalizes truly threatening or violent *conduct* based upon the injurious nature of such *conduct*.[213] Similar to the second category, these statutes focus on the injury-causing activity, not the viewpoint of a communication. Focusing on injury prevents any infringement upon free speech rights because it considers only the "*mode* of expression," not its content. This distinction is an element of the Court's Free Speech Clause jurisprudence dating back to *Schenck* and the "clear and present danger" test.[214] Within this category are those statutes that create specific crimes, such as "aggravated harassment."[215] These statutes,

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[212]*Mitchell*, 113 S. Ct. at 2202; State v. Mortimer, 641 A.2d 257 (N.J. 1994), *cert. denied*, 115 S. Ct. 440 (1994).

[213]*See* CAL. PENAL CODE § 11411(c) (West 1982). Section 11411 states in part:

> (c) Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property [is guilty of a crime, which may be prosecuted as a misdemeanor or a felony].

Id.

[214]In *Schenck*, the Court stated that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1918).

[215]For example, in *Talley*, the Supreme Court of Washington upheld, as constitutional, RCW 9A.36.080, which states in part:

> (1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:
>
> (a) Causes physical injury to another person; or
>
> (b) By words or conduct places another person in reasonable fear of harm to his person or property . . . . Such words or conduct include but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words

therefore, will normally pass constitutional scrutiny because they focus upon injurious conduct, independent of any viewpoint communicated.

By definition, the first category of statutes are unconstitutional because they punish particular expressions based solely on the idea communicated and not the nonspeech elements which make the utterance proscribable. The second and third categories, however, avoid this outcome by focusing upon the nonspeech elements, or mode of communication, independent of any viewpoint communicated. Therefore, states such as New Jersey, which are attempting to rewrite their now unconstitutional bias crime statutes,[216] must

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on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass . . . ; or

(c) Causes physical damage to or destruction of the property of another person.

WASH. REV. CODE ANN. § 9A.36.080 (West 1989).

[216]In New Jersey, the State Senate adopted N.J.S.B. 402, which amended N.J. STAT. ANN. § 2C:33-10, -11 that previously was declared unconstitutional by the New Jersey Supreme Court's holding in *Vawter*. *See supra* note 177 and accompanying text (quoting N.J. STAT. ANN. § 2C:33-10). Senate Bill 402 amends N.J. STAT. ANN. § 2C:33-10 by restricting the scope of the law to include only the placement of objects upon private property "of another" and removes the underlying motive of hate by deleting the phrase "contempt or hatred on the basis of race, color, creed, or religion, including, but not limited to a burning cross or Nazi swastika." S. 402, 206th Leg., 1st Reg. Sess., 1994 N.J. 4. With these changes, the new statute would read:

1. A person is guilty of a crime of the third degree if he purposely, knowingly or recklessly puts or attempts to put another in fear of bodily violence by placing on private property of another a symbol, an object, a characterization, an appellation or graffiti that exposes another to threat of violence. A person shall not be guilty of an attempt unless his actions cause a serious and imminent likelihood of causing fear of unlawful bodily violence.

Id. *Cf. supra* note 177 (quoting N.J. STAT. ANN. § 2C:33-10 (1981)).

The second statute declared unconstitutional by *Vawter* was N.J. STAT. ANN. § 2C:33-11, criminalizing the "defacement or damage of property by placement of a symbol, object or graffiti." *See supra* note 177 and accompanying text (quoting N.J. STAT. ANN. § 2C:33-11 (1981)). As amended by Senate Bill 402, § 2C:33-11 would read:

2. A person is guilty of a crime of the fourth degree if he purposely defaces or damages, without authorization of the owner or tenant, any private premises or property primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons for purpose of exercising any right guaranteed by law or by the constitution of this state or of the United States by placing thereon a symbol, an object, a characterization, an appellation or graffiti exposes another to threat of violence.

focus upon the *type* of conduct proscribed. Merely enlarging the scope of a bias crime statute to include bias based on gender and physical handicap misinterprets *R.A.V.* and *Mitchell*. The New Jersey State Senate has correctly noted this distinction by altering the focus of N.J. STAT. ANN. § 2C:33-10 and -11 to conduct that causes "fear of bodily violence" or constitutes a "threat of violence."[217] The problem with statutes such as the Minnesota ordinance in *R.A.V.* was that they failed to focus on the mode of communication independent of the ideas communicated. The Minnesota ordinance criminalized illegal conduct, but did so solely on the basis of the idea communicated — racial, gender, and religious intolerance.[218] Thus, the statute invoked the Constitution's strictest statutory analysis and ultimately failed that analysis because it criminalized only certain disfavored views in a non-neutral manner.[219]

III. PREDICATE PROVISIONS: A JURISPRUDENCE OF INTERPRETATION

The opinions in *R.A.V.* coupled with the reasoning in *Mitchell* have created some confusion regarding the Court's free speech jurisprudence, particularly in the area of hate crime legislation. The confusion produced by *R.A.V.* is evidenced by the series of state court decisions applying *R.A.V.* and the failure of those courts to fully understand Justice Scalia's opinion.

S. 402, 206th Leg., 1st Reg. Sess., 1994 N.J. 4. *Cf. supra* note 177 (quoting N.J. STAT. ANN. § 2C: 33-11 (1981)). The New Jersey State Senate adopted S. 402 on June 13, 1994. A similar bill was introduced into the New Jersey Assembly proposing the same changes to N.J. STAT. ANN. § 2C:33-10 and -11. The bills also amend New Jersey's assault, harassment, and penalty enhancement statutes. *See* S. 402, 206th Leg., 1st Reg. Sess., 1994 N.J. 4, 5; A. 942, 206th Leg., 1st Reg. Sess., 1994 N.J. 4, 5. Both bills are still under consideration by the New Jersey Assembly.

[217]S. 402, 206th Leg., 1st Reg. Sess., 1994 N.J. 4, 5.

[218]The Minnesota statute stated: "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 . . . commits disorderly conduct . . . ." MINN. STAT. § 292.02 (1990). Under this ordinance the placement of a symbol or appellation on public or private property is criminalized because of the idea conveyed, not the manner in which it is conveyed. This proscription does not focus upon a socially intolerable or unnecessary mode of expression. Rather, it identifies certain ideas as disfavored and treats them as such.

[219]Section 292.02 only criminalized the communication of ideas "which one knows . . . arouses anger, alarm or resentment in others on the basis or race, color, creed, religion or gender." *Id.*

As a solution, this Comment offers an interpretive theory based on the fundamental aspects of the republican philosophy. This solution, however, does not claim to fully exonerate Justice Scalia's opinion. Rather, the following theory attempts to provide a broad, comprehensive understanding of the Constitution, and particularly the First Amendment, in an attempt to explain the principles belying Justice Scalia's opinion.

The contemporary classifications of constitutional theory are primarily the interpretivist or postivist school[220] and the noninterpretivist or natural law school.[221] Based upon the fundamental tenets of these theories, it appears that they are diametrically and irreconcilably opposed. Indeed, interpreting the Constitution as embodying notions of natural law and the natural rights of humanity requires a reading of the Constitution that considers its meaning in a broad scope, not confined to the specific meaning of its text. Reconciling these interpretive theories, however, may in fact produce an ordered yet flexible interpretive theory that is bound by rational limits and capable of recognizing immutable fundamental rights. This Comment, therefore, argues that such a reconciliation is achievable through an

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[220]Interpretivism maintains that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution. . . ." JOHN HART ELY, DEMOCRACY AND DISTRUST 73-84 (1980). Positivism is closely related to this theory because it calls for judges to act only upon the written law, thus legitimizing the exercise of judicial review within the context of a democratic society. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971). Bork stated his argument:

> The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. . . .
>
> . . . .
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> . . . This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

Id. at 2-3.

[221]Noninterpretivism suggests that "courts should go beyond [the text of the Constitution] and enforce norms that cannot be discovered within the four corners of the document." ELY, *supra* note 220, at 1-3. I have associated the term "natural law" with the noninterpretivist school not because I feel it necessarily belongs there but because of its use by noninterpretivist theorists and activist courts. *See id.* at 1 n.* ("The interpretivism-noninterpretivism dichotomy stirs a long-standing debate that pervades all of law, that between 'positivism' and 'natural law.' Interpretivism *is* about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism.").

understanding of the First Amendment as a "predicate provision" providing both textual support for recognizing the rights it protects and embodying principles of natural law.

Successfully advancing this argument requires a discussion of certain terms. Although the interpretivist theory is not *per se* a natural law theory its does utilize many of the same principles. Natural law theories vary according to methodology and purpose.[222] Generally speaking, natural law theories constitute a series of propositions concerning: (1) humanity's basic goods or goodness, (2) requirements that we choose right or just ends, and (3) the moral norms that follow logically from humanity's goodness and the choice of right or just ends.[223] Hence, natural law is concerned with the clarification of social theories such as political science.

Natural law requires the protection of individual liberty because liberty will produce good or just ends. Natural law, therefore, embodies the principle that a civilized society, governed by the rule of law, must protect those individual liberties which precede civilized government and which are immutable characteristics of the human spirit.[224] The very purpose of

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[222]*See* Robert P. George, *Foreword* to NATURAL LAW THEORY: CONTEMPORARY ESSAYS, at v (Robert P. George ed., 1992).

[223]*See* John Finnis, *Introduction* to I NATURAL LAW, at xi (1991). Professor Finnis identifies in greater detail the elements of the natural law tradition:

> 1 Critique and rejection of ethical skepticism, moral dogmatism, and conventionalism;
> 2 Critique and rejection of fundamentally aggregative conceptions of the right and the just (utilitarianism, or more generally, consequentialism or proportionalism or, more narrowly, wealth-maximization);
> 3 Clarification of the methods of the descriptive and explanatory social theories (political theory or political science, economics, jurisprudence or legal theory).

Id. at i-ii.

[224]In defining the state of nature, John Locke wrote:

> [Section] 4. TO understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (1690) (C.B. Macpherson ed. 1980). Locke further suggests that the "law of nature . . . [is] put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree, as

civilized government is to protect and preserve individual liberties.[225]

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may hinder its violation." *Id.* at 9. Although Locke is often perceived, and correctly so, as a bedrock of contemporary liberal thought, it is noteworthy that he recognizes that the right of man to "dispose of their possessions and persons, as they think fit" is bound by the "law of nature." *Id.* at 8. John Locke, however, is not alone in his concern for the law of nature. Thomas Aquinas, defining the "Essence of Law," wrote:

> *Objection* I, It would seem that promulgation is not essential to law. For the natural law, above all, has the character of law. But the natural law needs no promulgation. Therefore it is not essential to law that it be promulgated.
>
> Thus . . . the definition of law may be gathered. Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.
>
> *Reply Obj.* I. The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.

THOMAS AQUINAS, THE SUMMA THEOLOGICA 614-15 (Modern Library College ed., 1945).

[225]Niccolo Machiavelli arguing in favor of republican government, particularly the Roman Republic, suggested that "the creation of Tribunes . . . cannot be praised too highly; for besides giving to the people a share in the public administration, these Tribunes were established as the most assured guardians of Roman liberty . . . ." NICCOLO MACHIAVELLI, THE DISCOURSES, *reprinted in* THE PRINCE AND THE DISCOURSES 121 (1950). Machiavelli then discussed who should be entrusted with guarding liberty, stating:

> I will say, that one should always confide any deposit to those who have least desire of violating it; and doubtless, if we consider the objects of nobles and of the people, we must see that the first have a great desire to dominate, whilst the latter have only the wish not to be dominated, and consequently a greater desire to live in the enjoyment of liberty; so that when the people are intrusted with the care of any privilege or liberty, being less disposed to encroach upon it, they will of necessity take better care of it; and being unable to take it away themselves, will prevent others from doing so.

Id. at 121-22. Machiavelli, however, concludes that nobles may more effectively protect liberty under certain situations. *Id.* at 123. Nonetheless, Machiavelli general concern is with the political organization that most effectively would protect liberty. *See* MAX LERNER, *Introduction* to NICCOLO MACHIAVELLI, THE PRINCE AND THE DISCOURSES at xxv-xlvi (1950).

Perhaps a more familiar friend to liberty is Jean-Jacques Rousseau. Rousseau believed that upon entering into the "social compact," "[e]ach of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole." JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (1762), *reprinted in* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY 53 (Roger D. Masters ed., 1978). More importantly, for our purposes, Rousseau felt that civil society itself was an accomplishment of freedom:

> This passage from the state of nature to the civil state produces a remarkable

Closely related to the natural law tradition established by the Founders in 1787 was the notion of natural rights. The Framers believed that the rights of man flowed directly from the laws of nature.[226]

It is noteworthy that this natural law theory is not an unprincipled doctrine, providing a justification for any and all human activity. Rather, natural law is bound by a moral philosophy.[227] Moreover, natural law is not an easily defined or discernable doctrine. It has been defined in radically different ways and used to support drastically diverse political and legal philosophies.[228] Nonetheless, natural law has played an increasingly important role in modern legal and political philosophy.

Additionally, this Comment defines "predicate provisions" as those clauses or sections of the Constitution which embodied the fundamental principle of natural law and the values placed upon those fundamental rights

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> change in man, by substituting justice for instinct in his behavior and giving his actions the morality they previously lacked. Only then, when the voice of duty replaces physical impulse and right replaces appetite, does man, who until that time only considered himself, find himself forced to act upon other principles and to consult his reason before heeding his inclinations. . . .

Id. at 55-56.

[226]CLINTON ROSSITER, 1787: THE GRAND CONVENTION 61 (1966). Professor Rossiter articulates what he suggests is the framers' understanding of natural rights:

> The rights of man flow from the law of nature itself, and as such are natural, unalienable, and essential to meaningful existence.
>
> The greatest of these rights are: the right to life, which carries with it the power of self-preservation; the right to liberty, to act as one pleases without external restraint; the right to property, to use and dispose of the fruits of honest industry; the right to happiness, or at least to pursue it on equal terms with other men; and the right to a free conscience, to reach out for God without the permission or even help of any other man.
>
> In the good society these natural rights are recognized and protected by law, and thus take on the character of civil and constitutional rights.

Id. at 61-62.

[227]Even the great libertarian John Locke recognized the limitations upon natural law insofar as it protected natural rights. Locke clearly states that the state of nature "is, a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, *within the bounds of the law of nature* . . . ." LOCKE, *supra* note 224, at 8 (emphasis added).

[228]*See* George, *supra* note 222, at v.

derived from the natural law.[229] Most important is the notion that the United States Constitution embodies a political philosophy that demands the recognition of certain inalienable rights, such as free speech. Those inalienable rights are grounded in the political philosophy which gave birth to the United States Constitution, republicanism. Therefore, the term "predicate provision" is intended to connote most fundamentally, an understanding of the Constitution as a republican document, necessarily embodying the principles of a republican philosophy. Those sections of the Constitution labeled as predicate provisions are, therefore, provisions which most clearly illustrate and effectuate, philosophically, this republican foundation. The constitutional provisions, not deemed predicates, however, are not contrary to this republican foundation because the document as a whole establishes a republican government. Rather, the remainder of the Constitution follows logically from these few fundamentally important provisions.

Reconciling the interpretivist and noninterpretivist approaches to constitutional interpretation is achieved by examining the textual meaning of those constitutional provisions which articulate this republican political philosophy. The First Amendment is such a provision because of both the philosophical principles which it embodies as well as the more practical implications of its operation in American society.

THE FIRST AMENDMENT AS A PREDICATE PROVISION

To argue that the Constitution embodies a belief in natural law within the meaning of its text requires proof that the drafters of the original Constitution as well as the Bill of Rights intended[230] the Constitution to embody such a principle. Additionally, this textual analysis of the Constitution itself reveals the natural law philosophy upon which American political philosophy and the Constitution rests. The First Amendment is a predicate provision in that it provides a clear, textual articulation of the natural law principles originally embodied in the Framer's understanding of a republican form of

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[229]*See supra* note 10 (discussing the definition of the term "predicate provision").

[230]When discussing the founder's original intent, one must always be cognizant that such intent is not always dispositive. To conclude that the founders' intent is always the dispositive constitutional analysis presents several problems. First, ascertaining the founder's original intent is not always possible because a single united intent was never recorded. Second, the founder's intent, even when ascertainable, is not always applicable to the modern issues which the Constitution must address. Thirdly, and perhaps the most important, the founder's intent, in some cases, was misguided and even contrary to the general proposition that the Constitution of 1787 was written to protect individual rights. Certainly, the founders were unable to reconcile the institution of slavery with the natural law principles upon which the Constitution was founded.

government. This provision, moreover, deserves recognition as a predicate because of its practical role in the success of the republican state. As Justice Cardozo has suggested, the ability to speak freely is essential to maintaining and exercising the various other rights recognized under the Constitution.[231]

Proof of this proposition can be found in the debates of the Constitutional Convention of 1789. Through the course of those debates, the Founders articulated their belief that a representative form of government would best protect individual liberties.[232] The Constitution of 1789 was born from a

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[231]Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("Of [the freedom of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.").

[232]James Madison recorded his own remarks from Wednesday June 6, 1787, debating the manner of election for United States Senators:

> Mr. MADISON considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of free Gov[ernment] and that this mode under proper regulations had the additional advantage of securing better representatives, as well as of avoiding too great an agency of the State Governments in the General one.— He differed from the member from Connecticut [Mr. Sharman] in thinking the objects mentioned to be all the principal ones that required a National Gov[ernment]. Those were certainly important and necessary objects; but he combined with them the necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention. . . . We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man. What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? . . . The lesson we are to draw from the whole is that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a Republican Gov[ernment] the Majority if united have always an opportunity. The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and the 2d place, that in case they sh[ould] have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale & in such a form as will contro[]l all the evils w[hich] have been experienced.

JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 75-77 (3d ed. 1987). Considering the same issue, whether to elect representatives directly through the State Legislatures or popularly by the people, Colonel George Mason discussed the benefits of republican government:

new developing political philosophy grounded upon the Framers' own understanding of natural law.[233] Indeed, even before the articulation of such ideas during the Constitutional Convention, the Founders and their predecessors were arguing that as free people they were entitled to certain rights with which no government could interfere.[234]

> The requisites in actual representation are that the Rep[resentatives] should sympathize with their constituents; sh[ould] think as they think, & feel as they feel; and that for these purposes sh[ould] even be residents among them. Much he s[aid] had been alleged ag[ainst] democratic elections. He admitted that much might be said; but it was to be considered that no Gov[ernment] was free from imperfections & evils; and that improper elections in many instances, were inseparable from Republican Gov[ernment]. But compare these with the advantage of this Form in favor of the rights of the people, in favor of human nature.

Id. at 75.

[233]Defining this common political philosophy underlying the Constitution, Clinton Rossiter defined natural law as the framers understood it:

> The law of nature . . . is a set of moral standards governing private conduct, a system of abstract justice to which the laws of men should conform, a line of demarcation around the permissible sphere of political authority, and the grand source of natural rights.
>
> The law of nature is essentially a call to reasoned, moral action on the part of men as individuals and government as their servant. To men and nations that obey this law come happiness and prosperity; to men and nations that defy it come sadness and adversity.

ROSSITER, *supra* note 226, at 61. Rossiter further articulated the framers' understanding of government suggesting that "[t]he purpose of government is to protect men in the enjoyment of their natural rights, secure their persons and property against violence, remove obstructions to their pursuit of happiness, help them live virtuous and useful lives . . . ." *Id.* at 62. Rossiter also suggests that these natural rights "flow from the law of nature itself, and as such are natural, unalienable, and essential to meaningful existence." *Id.* at 61.

[234]In describing the "Logic of Rebellion," which brought the colonists to revolution in 1775, Bernard Bailyn wrote:

> The colonists believed they saw emerging from the welter of events during the decade after the Stamp Act a pattern whose meaning was unmistakable. . . . They saw about them, with increasing clarity, not merely mistaken, or even evil, policies violating the principles upon which freedom rested, but what appeared to be evidence of nothing less than a deliberate assault launched surreptitiously by plotters against liberty both in England and in America.

BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 94-95

The Founders' intent is also illuminated by the words of the Constitution itself. Perhaps the most compelling constitutional text, predating the Bill of Rights and embodying the principles of natural law, is the preamble. Setting forth the Constitution's purpose, Governour Morris wrote:

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[235]

The political struggles surrounding the ratification of the Constitution also illustrate the common concerns of the Founders and the American people. Although the political agendas pursued by the Federalist and Antifederalist factions during 1787-89 were vastly different, their philosophical objectives remained fundamentally similar.[236] By establishing a republican form of

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(1992).

[235]U.S. CONST. pmbl.

[236]The antifederalists felt that the adoption of the Constitution would jeopardize, if not destroy, the freedoms that the colonies had fought Great Britain to obtain. Robert A. Rutland notes that the antifederalist's "design was to frighten the people into believing that adoption of the Constitution meant that 'the rights & liberties of all American Citizens would be destroyed.'" ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL RIGHTS: 1776-1791, at 160 (1983) (quoting Letter from Tobias Lear to George Washington (June 2, 1788), *in Documentary History of the Constitution*, IV, 676). Discussing the English Bills of Rights, the context in which they were enacted and comparing them to the proposed United States Constitution Alexander Hamilton wrote:

> It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, "WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorism which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government.

THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, both Federalists and Antifederalists were concerned with securing the people's rights. Debate over the adoption of a bill or rights was one of form, not substance. Justice Chase, only ten years later, described the natural law foundations of the

government in the first three articles of the Constitution, the Founders sought to preserve those immutable rights secured through the revolution.[237] The

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Constitution, clarifying the Constitution's substantive foundations evidenced both through the Constitution proper and the Bill of Rights:

> I cannot [s]ub[s]cribe to the *omnipotence* of a *State Legi[s]lature*, or that it is *ab[s]olute and without [control]*; although its authority [s]hould not be *expre*[ss]*ly* re[s]trained by the *Constitution, or fundamental law*, of the State. The people of the *United States* erected their Con[s]titutions, or forms of government, to e[s]tabli[s]h ju[s]tice, to promote the general welfare, to [s]ecure the ble[ss]ings of liberty; and to protect their *per[s]ons* and *property* from violence. The purpo[s]es for which men enter into [s]ociety will determine the *nature* and *terms* of the [s]ocial compact; and as *they* are the foundation of the *legi[s]lative* power, *they* will decide what are the *proper* objects of it: The *nature*, and *ends* of *legi[s]lative* power will limit the *exerci[s]e* of it. This *fundamental* principle flows from the very nature of our free *Republican governments*, that no man [s]hould be compelled to do what the laws do *not* require; *nor to refrain from acts which the law permit*. . . . There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abu[s]e of *legi[s]lative* power . . . .

Calder v. Bull, 3 U.S. (1 Dallas) 386, 387-88 (1798).

[237]*See also* BAILYN, *supra* note 234, at 95-96 (discussing the "Logic of Rebellion," which characterized the American Revolution). John Stuart Mill, during the early years of the American Civil War, published *Considerations on Representative Government*, in which he concluded "that the ideal type of a perfect government must be representative." JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), *reprinted in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 234 (H.B. Acton ed., 1972). Alexis de Tocqueville also offered some enlightening sentiments on democracy in America, concluding:

> It is not, therefore, to be expected that the range of private independence will ever be so extensive in democratic countries; not is this to be desired; for among aristocratic nations the mass is often sacrificed to the individual, and the prosperity of the greater number to the greatness of the few. It is both necessary and desirable that the government of a democratic people should be active and powerful; and solely to prevent it from abusing its aptitude and its strength. . . .
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> . . . Instead of vesting in the government alone all the administrative powers of which guilds and nobles have been deprived, a portion of them may be entrusted to secondary public bodies temporarily composed of private: thus the liberty of private persons will be more secure, and their equality will not be diminished. . . .
>
> . . . Election is a democratic expedient, which ensures the independence of the public officer in relation to the government as much as hereditary rank can ensure it among aristocratic nations, and even more so.

ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 341 (Phillips Bradley ed., 1945) (1840). These statements illustrate both the founders belief in republican government and

Bill of Rights, therefore, is merely an extension of the natural law tradition established first and foremost by the Constitution proper.

This conclusion suggests that the entire Bill of Rights is a predicate provision insofar as it embodies notions of natural law found in the original Constitution. Such a conclusion, however, exceeds the previously identified definition of a predicate provision. As the term predicate connotes, predicate provisions precede the ultimate conclusion that the Constitution is a republican document. These provisions, therefore, are in a sense more fundamental. The First Amendment, I submit, is such a fundamental provision because of its importance to the operation of republican government.[238] The very nature of republican government requires open dialogue between those competing for the public's vote and between the electorate. This dialogue ensures that truth will play some role in the election of national representatives, and thus, in the creation of the nation's laws.[239]

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the philosophical grounds that underlie the conclusion that republican government preserves the vital, immutable rights inherent in a free society.

[238]Irving Brant made a similar suggestion, writing:

> By its nature a self-governing republic cannot be truly self-governing where the government is vested with power to punish its critics, and thus may silence them by the threat of punishment. Such a republic may preserve the forms of representative democracy, but the reality — either chronically or at recurring periods — will be enforced conformity, passive acquiescence, or revolt.
>
> No truth was better known than this to the framers of the Constitution of 1787 and its first ten amendments. . . .

IRVING BRANT, THE BILL OF RIGHTS, ITS ORIGIN AND MEANING 236 (1965). In support of this conclusion, Brant quoted James Madison's address to the House of Representatives during the House's consideration of the Whiskey Rebellion in 1794. *Id.* at 237. Madison concluded his speech with a succinct, eloquent statement, "[i]f we advert to the nature of Republican Government we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Id.* (quoting James Madison, Address before the United States House of Representatives (1794)).

[239]Mill articulates this theory best.

> Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if

The Constitution, then, embodies, within its text, a natural law tradition. That tradition provides the basis for recognizing those natural rights fundamental to the operation and success of republican government. Interpreting the Constitution proper in this light requires only a recognition that its first seven articles created a republican government which by its own definition sought to protect those fundamental, immutable rights often called "natural rights." Such an interpretive theory, then, recognizes certain provisions of the Constitution as predicates, embodying both the Constitution's most fundamental philosophical principles and providing the freedoms necessary for the efficient and effective operation of republican government. Thus, resolving the present struggles concerning the meaning and scope of the Free Speech Clause may find their resolution in an interpretive theory that recognizes the Constitution's textually implicit natural law foundations. That jurisprudence, although extremely complex, is not inconsistent with the basic meaning and scope of the Free Speech Clause. Any defects which remain in the Court's free speech jurisprudence, particularly in the area of hate speech, may be resolved through the development of an interpretive theory that combines principled textual analysis with sound philosophical reasoning.

IV. CONCLUSION

Absent a coherent and comprehensive First Amendment jurisprudence, applicable to the various First Amendment controversies now before the Court, it is extremely difficult, if not impossible, to predict where the Court will move next. Perhaps, however, it is not necessary to ask what direction the Court will take next. The problem with the Court's Free Speech Clause jurisprudence is more fundamental than mere unpredictability. The four opinions in *R.A.V.* each propose a fundamentally different understanding of the Court's previous jurisprudence. Providing an achievable solution to the legal struggles, therefore, requires an interpretive theory that clarifies that doctrine and provides both flexibility and principled analysis. Such an interpretive theory addresses not only the specific legal questions presented, but also the more essential human struggle with right and wrong.

> wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

MILL, *supra* note 237, at 85. *See also* Gressman, *supra* note 25, at 387 (suggesting that "[w]hat is needed, rather, is a broader vision of the source and meaning of the First Amendment guarantees of free expression, a vision that encompasses all three of these traditional viewpoints and yet is not subject to their theoretical constrictions and limitations"). Professor Gressman suggests "that individual sovereignty, or individual autonomy, provides the source and the foundation" for freedom of speech. Gressman, *supra* note 25, at 387-89.

Thus, considering the nature of the legal issues in a broad context and developing an interpretive theory based on the principals of both positivism and natural law, the Supreme Court must provide an inclusive and unabridged statement of its Free Speech Clause jurisprudence. Perhaps this is asking too much of such a sharply divided Court. Such a goal, however, is within the Court's reach. Both the interpretive theories and the substantive doctrine already exist amidst plentiful and voluminous case law.[240] Thus, focusing on the Court's common First Amendment jurisprudence, as it has developed over the past two hundred years, will enable the Court to put those ideas together into a workable and coherent jurisprudence. More importantly, American society must recognize that America is a republican nation governed by laws not people. Faithful adherence to those laws, moreover, is how a republican society resolves the struggle between moral righteousness and individual liberty.

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[240]Professor Amar suggests:

> Notwithstanding the high pitched rhetoric, the Justices share more common ground than they openly acknowledged in the heat of battle. Despite their disagreement at doctrinal margins, all of the Justices share a common First Amendment Tradition and a commitment to basic First Amendment principles. Only after we understand these principles — the hard core of a hard-won tradition — can we appreciate the modesty of marginal disagreement in *R.A.V.*

Akil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 132 (1992).