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Comment**

**\*124 THE CASE OF THE MISSING AMENDMENTS: R.A.V. v. CITY OF ST. PAUL**

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In *R.A.V. v. City of St. Paul*, [\[FN1\]](#) the Justices claimed to disagree about a good many things, but they seemed to stand unanimous on at least two points. First, the 1989 flag burning case, *Texas v. Johnson* [\[FN2\]](#) - itself an extraordinarily controversial decision - remains good law and indeed serves as an important font of First Amendment first principles. Second, the First Amendment furnishes a self-contained and sufficient framework for analyzing government regulation of racial hate speech such as cross burning.

The first apparent ground of agreement - the vitality of *Johnson* - is big news. *Johnson* was decided by a bare 5-4 margin over a passionate dissent authored by the Chief Justice of the United States. [\[FN3\]](#) One of the Justices in the majority even wrote separately to concede that the dissenters "advance d powerful arguments." [\[FN4\]](#) When announced, the decision was greeted by a hailstorm of protest, including a congressional statute designed to evade, if not eviscerate, its holding. [\[FN5\]](#) When the Court struck down that statute by the same 5-4 vote [\[FN6\]](#) (with none of the original dissenters willing to back down in the name of stare decisis), [\[FN7\]](#) leading members of Congress proposed a constitutional amendment to overrule the Court and came within thirty-four votes of the necessary two-thirds in the House [\[FN8\]](#) and within nine votes in the Senate. [\[FN9\]](#) Since all of the hullabaloo, *Johnson*'s author and a second member of the *Johnson* majority have stepped down and been replaced by Justices chosen by a President who had led the crusade against *Johnson* and confirmed by a Senate whose majority had followed the flag and the President in the *Johnson* affair.

\*125 Before last Term, *Johnson*'s fate was thus in some doubt, [\[FN10\]](#) but after *R.A.V.*, it would be difficult for the Court to undo *Johnson*. The *R.A.V.* majority pointedly invoked the 1989 flag case, and more importantly, reaffirmed its basic principles, fixing it as a polestar in the First Amendment

firmament. The R.A.V. minority also regularly cited Johnson - with less fervor, perhaps, but with no sign of disapproval - and accepted its basic teachings. With only one possible exception (and a small one at that), none of the Justices attempted to revive any of the arguments from the Johnson dissent. Unlike, say, *Lemon v. Kurtzman* [FN11] or *Roe v. Wade*, [FN12] Johnson is no longer up for grabs.

All this is not simply big news but good news because, notwithstanding the sound and fury of its initial critics on and off the Court, *Texas v. Johnson* was plainly right, and even easy - indeed, as right and easy a case in modern constitutional law as any I know. R.A.V. makes clear that a good many of the current Justices understand this: they see and feel, and will steer their course by, the rightness of Johnson. And as for the other Justices, they now all seem willing at least to accept Johnson as a fait accompli.

Thus, R.A.V.'s first point of apparent consensus - Johnson lives! - is nothing less than an "occasion for dancing in the streets." [FN13] R.A.V.'s second point of seeming unanimity, however, is more sobering. All nine Justices analyzed cross burning and other forms of racial hate speech by focusing almost exclusively on the First Amendment. They all seemed to have forgotten that it is a Constitution they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well.

The issues lurking beneath R.A.V. are far more difficult than those that Johnson presented. May government treat racial hate speech \*126 differently from other forms of hate-filled expression? Within the category of racial hate speech, can government treat words such as - and I apologize in advance [FN14] - "nigger" differently from words such as "racist," "redneck," "honky," or "cracker"? Although not posing and answering these questions in so many words, the R.A.V. majority strongly implied that nothing in the First Amendment authorizes such differential treatment. However, the majority failed to consider whether the Reconstruction Amendments might provide a principled basis for such distinctions. The minority in R.A.V. seemed more willing to allow hate-speech regulations specifically tailored to protect "groups that have long been the targets of discrimination." [FN15] Yet the minority also failed to organize its analysis and intuitions around the Reconstruction Amendments.

Thus, none of the Justices forcefully framed and engaged the most difficult question hiding behind R.A.V.: whether, and under what circumstances, words such as "nigger" and symbols such as burning crosses cease to be part of the freedom of speech protected by the First and Fourteenth Amendments, and instead constitute badges of servitude that may be prohibited under the Thirteenth and Fourteenth Amendments.

Part I of this Comment focuses on what all the Justices saw in R.A.V.: the importance of *Texas v. Johnson* and its underlying principles. Part II focuses on what all the Justices missed: the centrality of the Reconstruction Amendments in the hate-speech debate.

## I. THE CASE OF THE FIRST AMENDMENT

### A. Overview: What the Justices Said

The Court's opinion in *R.A.V.* opened with a crisp, if bloodless, statement of the facts:

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely-made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. [\[FN16\]](#)

This conduct, if proved, might well have violated various Minnesota laws against arson, criminal damage to property, and terroristic \*127 threats. [\[FN17\]](#) But the city of St. Paul chose instead to prosecute *R.A.V.* (Robert A. Viktora - then a juvenile [\[FN18\]](#)) under a St. Paul ordinance that made it a misdemeanor to:

place[] 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. [\[FN19\]](#)

The ordinance was sloppily drafted and, taken literally, obviously overbroad. It would seem to criminalize the display of swastikas, burning crosses, and other emblems of white supremacy at, say, a political rally in support of David Duke's presidential campaign. The Minnesota Supreme Court, however, slapped a judicial gloss on the ordinance in an effort to salvage its constitutionality. The state's high court, in effect, rewrote the ordinance, purporting to limit its application to "fighting words." [\[FN20\]](#) Such fighting words, claimed the Minnesota court, had already been held by the United States Supreme Court in the 1942 case of *Chaplinsky v. New Hampshire* [\[FN21\]](#) to be unprotected by the First Amendment. The state high court went on to uphold the city ordinance as glossed, even though the rewritten ordinance prohibited not all fighting words but only those fighting words based on race, color, gender, and religion. [\[FN22\]](#)

The United States Supreme Court unanimously struck down the ordinance but splintered over the rationale. In an opinion for the Court, Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas, offered an ambitious reconceptualization and synthesis of First Amendment doctrine. Justice Scalia pointedly declined to decide whether the Minnesota Supreme Court's gloss had indeed been true to *Chaplinsky* and, if so, whether *Chaplinsky*'s precise formulation of the fighting words doctrine remains good law. [\[FN23\]](#) Instead, the majority assumed, *arguendo*, the continued vitality of *Chaplinsky*'s formulation and the Minnesota Supreme Court's fidelity to *Chaplinsky*, but held that even "fighting words" are \*128 not "entirely invisible" to the First Amendment. [\[FN24\]](#) Although entitled to much less protection than other speech, fighting words and other disfavored doctrinal categories (for example, obscenity and defamation) are not - contrary to the overenthusiastic rhetoric of earlier cases - wholly unprotected "nonspeech." [\[FN25\]](#) Even fighting words are sometimes "quite expressive indeed," said Justice Scalia. [\[FN26\]](#)

Although he allowed that less favored categories of speech might be altogether prohibited (putting to one side the precise formulation of the boundaries of fighting words), Justice Scalia resisted the facile idea that the power to prohibit entirely necessarily subsumes the power to prohibit selectively - in other words, to discriminate. Government could prohibit all intentional libel, but not only intentional libel of

Republicans or incumbents. Government could prohibit all obscenity (even obscenity with some tiny political content), but not "only those legally obscene works that contain criticism of the city government." [\[FN27\]](#) So too with fighting words. Government could prohibit all fighting words, but not only those fighting words deemed politically incorrect. In a nutshell, "government may not regulate use based on hostility - or favoritism - towards the underlying message expressed." [\[FN28\]](#)

With this refurbished doctrinal framework in place, the Scalia Five turned to the glossed ordinance and found it wanting. On its face, the ordinance "discriminated" on the basis of content, treating race-based fighting words ("Nigger!") differently from other fighting words ("Bastard!"). [\[FN29\]](#) Even more ominous, in "its practical operation" [\[FN30\]](#) the ordinance discriminated on the basis of viewpoint, according to Justice Scalia:

One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules. [\[FN31\]](#)

When considered along with various statements made by St. Paul officials during the R.A.V. litigation, [\[FN32\]](#) the ordinance, said the Scalia Five, presented a "realistic possibility that official suppression of ideas is afoot." [\[FN33\]](#)

**\*129** Justice Scalia conceded that the government might regulate certain messages in certain contexts if those messages are "swept up incidentally within the reach of a statute directed at conduct rather than speech." [\[FN34\]](#) He acknowledged, for example, that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." [\[FN35\]](#) Justice Scalia also cited a federal anti-housing-discrimination statute, section 1982, which proscribes certain messages in certain contexts, such as the words "For Whites Only" on a residential "For Sale" sign. [\[FN36\]](#) Yet when he later analyzed the St. Paul ordinance, Justice Scalia all but ignored this concession and offered no detailed explanation of how the St. Paul ordinance differed from the "incidental" regulation of speech under Title VII or section 1982. Apparently the Scalia Five thought it obvious that, unlike the federal statutes, the local ordinance targeted only "speech" and not "conduct."

In a sharply worded separate opinion, Justice White - joined by Justices Blackmun and O'Connor, and in large part by Justice Stevens - concurred in "the judgment, but not the folly of the [Scalia] opinion." [\[FN37\]](#) The minority began its challenge of the Court's opinion by questioning the Court's decision to break new doctrinal ground and to decide the case on a theory that, Justice White insisted, "was never presented to the Minnesota Supreme Court" and was not "briefed by the parties before this Court." [\[FN38\]](#)

Focusing their analysis on the main theory presented by the parties, the White Four voted to strike down the St. Paul ordinance not because it discriminated among fighting words, but because it reached beyond fighting words. The limiting gloss of the Minnesota Supreme Court, said the White Four, was a failure. [\[FN39\]](#) The state judges had misread Chaplinsky; thus, their Chaplinsky-inspired surgery had not been probing enough - it failed to excise the ordinance's threat to speech outside the category of

fighting words, properly defined. [FN40] In \*130 doctrinal terms, the ordinance was "overbroad"; it fell not because its application to R.A.V. would violate his First Amendment rights - for he had none, Justice White said - but because its application to other speakers might violate their First Amendment rights, rights that R.A.V. could assert under special third-party standing rules in First Amendment cases. [FN41]

At times, Justice White insisted that fighting words are simply not "speech" at all for First Amendment purposes [FN42] and that the Amendment "does not apply" [FN43] to such "worthless" words. [FN44] The language from earlier cases describing fighting words as "unprotected" meant just that, Justice White said, contrary to Justice Scalia's revisionist effort to dismiss these dicta as not "literally true." [FN45] Yet the minority conceded that even within unprotected categories such as fighting words and intentional libel, government power is limited: the state could not, for example, enforce a "defamation statute that drew distinctions on the basis of political affiliation." [FN46] The minority's real break with the majority, then, was that the White Four simply did not believe that the St. Paul ordinance, had it truly been limited to fighting words, would present a "realistic possibility that official suppression of ideas is afoot." [FN47] To the extent the ordinance discriminated on the basis of content - by prohibiting only hate speech involving racial, gender, and religious bias - it was nonetheless legitimate:

This selective regulation reflects the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public \*131 concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable.... [Fighting words are] at [their] ugliest when directed against groups that have long been the targets of discrimination. [FN48]

The minority pointed to Title VII, which, like the St. Paul ordinance, targets only certain words. [FN49] For example, a personnel officer with the sign "No Niggers" on his desk would violate Title VII, but not if he instead had a sign that read "No Bastards." Under what theory, Justice White asked, could Title VII be distinguished from the St. Paul ordinance (as applied only to fighting words)?

Although willing to countenance certain content-based discriminations, the minority stopped short of giving the government carte blanche to engage in viewpoint-based discrimination, even within "unprotected" categories. Indeed, in a separate opinion, Justice Stevens (writing only for himself on this point) challenged head on Justice Scalia's claim that the St. Paul ordinance was in fact viewpoint-discriminatory. [FN50] Justice Scalia's claim that St. Paul had rigged the rules of verbal boxing was itself rigged, Justice Stevens argued:

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

The St. Paul ordinance is evenhanded.... [It] does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar both sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic

metaphor, the St. Paul ordinance simply bans punches "below the belt" - by either party. It does not, therefore, favor one side of any debate. [\[FN51\]](#)

Writing only for himself, Justice Stevens proposed a more multifaceted, contextual First Amendment approach than that proposed by either Justice Scalia or Justice White. [\[FN52\]](#) Other portions of his \*132 concurrence echoed Justice White's view that the St. Paul ordinance would have posed a minimal threat to free expression if indeed it had been limited to fighting words; [\[FN53\]](#) these portions were joined by Justices White and Blackmun.

Justice Blackmun also wrote a short separate statement expressing sympathy for racial minorities victimized by cross burnings and concern about Justice Scalia's reconceptualization of First Amendment doctrine. The Court's approach so troubled Justice Blackmun that he wondered aloud whether the Court could really have meant what it said. Perhaps, he darkly suggested, in the future the case will be seen as a sport - "a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words." [\[FN54\]](#)

## B. Analysis: Finding the First Amendment and Missing the Reconstruction

1. Common Ground: The Reaffirmation of Texas v. Johnson. - It is tempting, in light of the close vote [\[FN55\]](#) and the sharp rhetoric in R.A.V., to begin analysis with the issues that divided the Court. The temptation grows stronger when one notices the interesting way in which the Court split - no other major case has yielded the particular 5-4 line up so visible in R.A.V. [\[FN56\]](#)

But we should resist this temptation. 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 [\[FN57\]](#) 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. The deep issues underlying R.A.V. make it in many ways a difficult case, and the best way to see this is to reconsider an easy case: Texas v. Johnson. For in spite of their heated disagreements about how to treat the First Amendment periphery, all nine Justices in R.A.V. now pledge allegiance to the flag-burning case.

\*133 My choice of Johnson as the best window into R.A.V. reflects more than the obvious surface similarities between cross burning and flag burning and between the particular voting alignments in the two cases. [\[FN58\]](#) It also reflects my belief that Johnson illuminates with exceptional clarity, and in a way that few other cases do, much of the hard core of the First Amendment. [\[FN59\]](#) To understand Johnson and its main antecedents - the court of history's repudiation of the Sedition Act of 1798, and the Warren Court's seminal opinions in *New York Times v. Sullivan* [\[FN60\]](#) and *United States v. O'Brien* [\[FN61\]](#) - is, I believe, to understand the heart of our First Amendment Tradition. Conversely, to fail to see that Johnson is an easy case is, quite bluntly, to misunderstand First Amendment first principles.

In *Johnson*, the Court recognized a First Amendment right to criticize, dishonor, heap contempt on, shout words about, scribble words and symbols on, mutilate, decorate, "desecrate," or disrespectfully burn the American flag. [\[FN62\]](#) In so doing, the Court reaffirmed at least five basic First Amendment principles, each of which (with one possible exception) was unanimously endorsed in *R.A.V.*

Principle One: Symbolic Expression Is Fully Embraced by the First Amendment. - The flag is a symbol. So is the cross. The right to wield and manipulate these symbols is fully protected by "the freedom of speech, [and] of the press." [\[FN63\]](#) The First Amendment does not speak of protecting only "words." The Amendment vests Americans \*134 with a broad right to communicate with each other. This communication takes place through symbols that represent ideas, events, persons, places, objects, and so on. In fact, words are themselves symbols. In English, words are made by combining 26 standard letters, but surely the Amendment protects communication in languages that rely on unique word-pictures, pictograms, or hieroglyphics. Surely there is no First Amendment difference between the word "cross" and the pictographic symbol "+"; between the letters "NAZI" and the crooked cross swastika hieroglyph that represents the same ugly ideas; or between the words "American flag" and the unique red, white, and blue, star-spangled symbol impressed upon banners. [\[FN64\]](#)

Nor is it relevant for First Amendment purposes that one does not orally "speak" a flag or a cross the way one orally speaks words. Is a deaf citizen's communication by sign language unprotected because it is not oral? Does the flag not "speak" to us, in every relevant and nontrivial sense? Does not the cross in a worship service? Does not the written Constitution? [\[FN65\]](#) In any event, even the most willful and stubborn literalist must recognize that the First Amendment yokes the freedom of speech to the freedom of the press and thereby signals an intent to embrace all communication, regardless of the precise medium of transmission. [\[FN66\]](#) Quite literally, the unique ink marks printed and pressed upon a cloth are what make the cloth a flag in exactly the same way that the unique ink marks printed and pressed upon a sheet of paper make it the *New York Times*. And if thin slivers of processed wood pulp - papers - are obviously protected when crafted to carry a message, why are thicker pieces of wood that carry messages - crosses - any different? Of course, if the wooden cross is used as \*135 other than an expressive symbol - say, to clobber someone over the head - then the cross loses its First Amendment protection. It becomes a physical weapon, not an ideational symbol. But the same is true of the *Sunday New York Times*.

If all of this seems to belabor the obvious, I hasten to point out that many of the participants in the flag-burning debate failed to understand these simple points. Again and again, they confused the physical and the symbolic in speaking of their desires to protect the "physical integrity" of the flag. [\[FN67\]](#) But the flag is, in its deepest sense, not physical. Like a word, it is a symbol, an idea. It cannot be destroyed; it is fireproof. One can destroy only single manifestations, iterations, or copies of the symbol. [\[FN68\]](#)

Justice Stevens, dissenting in *Johnson*, tried to analogize flag mutilation to "spray[ing] paint ... on the facade of the Lincoln Memorial." [\[FN69\]](#) The proper analogy, however, is to mutilating a toy model - a replica, a copy, a symbol - of the Lincoln Memorial. And of course, that expression is wholly protected. Chief Justice Rehnquist's dissent in *Johnson* was even more embarrassing. He repeated the Lincoln Memorial canard and bubbled on about the "physical integrity" of the flag. [\[FN70\]](#) At one point he even

put the phrase "symbolic speech" in quotation marks, apparently to rhetorically distance such speech from the real speech protected by the First Amendment. [\[FN71\]](#) The implied distinction is bankrupt; all speech is symbolic in the sense of being conducted through symbols. As the Johnson majority put it, the First Amendment's "protection does not end at the spoken or written word.... Pregnant with expressive content, the flag as readily signifies that is, symbolizes this Nation as does the combination of letters found in 'America.'" [\[FN72\]](#)

**\*136** Most important for our purposes here, this principle underlying Johnson received new life in R.A.V., in which the facts, of course, involved not words, but the symbol of the cross. Citing Johnson, the R.A.V. majority began its substantive First Amendment analysis by equating laws "proscribing speech" with laws "proscribing ... expressive conduct, because of disapproval of the ideas expressed." [\[FN73\]](#) Later, the majority spoke explicitly about the need to protect "symbols that communicate a message." [\[FN74\]](#) The White Four also reaffirmed the protection of "expressive activity," [\[FN75\]](#) and elsewhere, Justice White made clear that the First Amendment would fully protect "burning a cross at a political rally." [\[FN76\]](#) On both occasions, Justice White cited Texas v. Johnson.

Justice Stevens sounded the only possibly sour note in this happy chorus. Although he joined most of Justice White's opinion (including its reaffirmation of protection for "expressive activity"), Justice Stevens also wrote separately. In a passage no other Justice joined, he quoted Johnson for the proposition that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." [\[FN77\]](#) This is true enough, but as we shall see, dangerously incomplete. For Justice Stevens omitted the very next sentences of Johnson: "Government may not, however, proscribe particular conduct because it has expressive elements.... A law directed at the communicative nature of conduct must be treated like a law directed at speech itself." [\[FN78\]](#) Or as the Johnson Court stated a few pages later: "The distinction between written or spoken words and nonverbal conduct ... is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression ...." [\[FN79\]](#)

Was Justice Steven's selective quotation significant? His confusion between symbol and reality in Johnson does raise concern, as does one other passage in his R.A.V. opinion, in which he seemed to treat the St. Paul ordinance more deferentially because "the ordinance regulates 'expressive conduct [rather] than ... the written or spoken word.'" Texas v. Johnson, 491 U.S., at 406." [\[FN80\]](#) There are real problems with this. First, any analytic distinction between words and **\*137** symbols is, as we have seen, silly. Second, Johnson says so, on the very page Justice Stevens quoted and elsewhere. What possible practical sense would it make to say that St. Paul can ban the crooked cross swastika symbol but not the words behind the symbol? Do they not cause the same harm? Do they not communicate the same message?

But perhaps Justice Stevens misspoke. Perhaps he had a point after all. Perhaps his reference to "expressive conduct" referred not to "the ordinance" generally, but to the particular (alleged) facts before him - the burning of a cross. For burning has real physical, and not merely symbolic, effects. A burning cross might set fire to the yard. The question thus becomes: Can cross burning and flag burning be prohibited, not because they involve symbols, rather than words, but because they involve burning? To answer this, we must consider Johnson's second principle.

Principle Two: Government May Not Regulate the Physical Medium with the Purpose of Suppressing the Ideological Message. - The presence of a flame does not somehow cause the First Amendment to evaporate. The founding generation was well aware of - and presumably meant to protect - a venerable political practice in which the flame was itself an intrinsic part of the message: burning one's political opponents in effigy. (Unlike the Johnson dissenters, the Founders understood the obvious difference between burning a real person, and burning a symbol - an effigy.) Chief Justice Rehnquist's Johnson dissent described flag burning as akin to "an inarticulate grunt" [\[FN81\]](#) and thus unworthy of serious protection. However, few political expressions in American history have been more eloquent than abolitionist William Lloyd Garrison's 1854 burning of the Constitution to protest its original pro-slavery bias. [\[FN82\]](#)

Of course, involvement in First Amendment activity provides no automatic exemption from generally applicable laws unrelated to the suppression of expression: the New York Times has no First Amendment license to ignore air pollution regulations. For this point, the Johnson Court cited the famous O'Brien case, in which the Court upheld the prosecution of a Vietnam War protester who intentionally burned his government-issued official draft card. [\[FN83\]](#) Although the Court, in an opinion authored by Chief Justice Warren, claimed that the law under which O'Brien was prosecuted was unrelated to the suppression of expression, skeptics remain unconvinced. [\[FN84\]](#) Did the Court not wink at the obvious censorial purpose underlying O'Brien's \*138 prosecution? And isn't the holding of O'Brien - that draft-card burning can be criminalized - almost fatal for those who would claim the right to burn flags and crosses?

In fact, a closer look reveals that O'Brien dramatically supports the Johnson holding. The government had issued official draft cards for legitimate identification purposes. Tampering with such cards implicated genuine concerns about "false identification," "counter-feit[ing]," "forgery," and "deceptive misuse." [\[FN85\]](#) Thus, Congress passed a law punishing anyone "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes his official card ...." [\[FN86\]](#) But how can a judge tell whether the claimed purpose of the law is the real purpose, rather than a smokescreen for censorship? One way is to closely parse the law itself and examine its operation, to test whether the legitimate purpose can fully account for the law's sweep - both what it includes and what it omits. [\[FN87\]](#) The draft-card law meets this test because it was perfectly tailored to fit the government's claimed and legitimate purpose of preventing draft fraud. The law criminalized even nonexpressive intentional tampering with official draft cards, and it did not touch wholly expressive burnings of unofficial draft card replicas. A key tipoff here was that it would have been no crime to make a lifesize or postertime copy, a replica - a symbol - of the draft card and burn the symbol as a purely ideological protest. Yet in Johnson, the government was trying to do just that: criminalize the mutilation of any symbol of government authority (that is, a flag) that a citizen might make or buy. Unlike a draft card, every replica of a flag is itself a flag.

Here, too, R.A.V. reaffirmed Johnson's approach. In the words of the majority:

[N]onverbal 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.

... The government may not regulate use based on hostility - or favoritism - towards the underlying

message expressed. [\[FN88\]](#)

Justice Stevens, in a passage joined by Justices White and Blackmun, concurred on this point:

**\*139** It is true that loud speech in favor of the Republican Party can be regulated because it is loud, but not because it is pro-Republican; and it is true that the public burning of the American flag can be regulated because it involves public burning and not because it involves the flag. [\[FN89\]](#)

R.A.V.'s endorsement of the O'Brien-Johnson line calls for judicial vigilance to flush out unconstitutional motivations that hide behind a seemingly neutral law. Thus, truly neutral anti-burning ordinances must apply evenhandedly to speakers and nonspeakers alike. If the government allows ordinary cloth to be burned, it cannot invoke environmental protection as a reason to ban flag burning. The only difference between the flag and any other cloth is the ideological symbol printed on the former, and that is, of course, wholly unrelated to the claimed environmental purpose. The same principles apply, of course, to wood and crosses. [\[FN90\]](#)

Both the majority and the minority in R.A.V. agreed that laws that restrict speech must be scrutinized to flush out illegitimate motivation. They simply disagreed about whether the lines St. Paul had drawn were rooted in a legitimate minority protection policy akin to Title VII and housing discrimination laws, or in an illegitimate desire to suppress ideas. [\[FN91\]](#)

**\*140** Principle Three: Political Expression - Especially Expression Critical of Government - Lies at the Core of the First Amendment. - Freedom of speech means both more and less than freedom of words. Merely because words are used to communicate a threat - "your money or your life!" - does not mean that government may not punish the threat. Thus, even the Scalia Five conceded that burning a cross in the dead of night on the yard of a black family might be punishable as a terroristic threat [\[FN92\]](#) - in the same way as would the explicit words: "Move out niggers, or we will kill you or torch your house!" [\[FN93\]](#)

If freedom of speech, then, means both more and less than freedom of words, exactly what does it mean? Is there any unifying principle of inclusion and exclusion? Two prominent candidates exist. The first focuses on freedom of speech as a guarantee of individual self-expression and autonomy. [\[FN94\]](#) Under this theory, threats of imminent illegal physical violence, even if communicated through words, may be prohibited precisely because they undermine the autonomy of others and thus betray the very reason for generally protecting words. Although the Supreme Court has protected self-expressive speech in many contexts, its case law stops short of enshrining autonomy and **\*141** self-expression as the centerpiece of the First Amendment. Nude dancing, for example, even if remarkably self-expressive, is "only marginally" within "the outer perimeters of the First Amendment." [\[FN95\]](#)

A more promising descriptive theory of Supreme Court case law, and one rooted in the history and popular sovereignty ideology behind the First Amendment, builds on the work of Alexander Meiklejohn. [\[FN96\]](#) As with its explicit textual counterpart in Article I, Section 6, which guarantees freedom of "Speech or Debate" in Congress, the Freedom of Speech Clause was designed, at a minimum, to safeguard the necessary preconditions of collective, democratic self-government. In order to vote and deliberate on public policy, citizens must be free to exchange political opinions and

information with each other. Threats of imminent unlawful violence play no part in legitimate political persuasion and may be punished, as may offers to buy votes with money. Such threats and bribes - even if made with words - are a corruption of the democratic self-governance ideal that underlies the First Amendment.

The Supreme Court embraced this underlying vision in the landmark First Amendment case of *New York Times v. Sullivan*, [\[FN97\]](#) and reaffirmed it in *Texas v. Johnson*. [\[FN98\]](#) In *Sullivan*, the Court, per Justice Brennan, spoke

of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

....

... It is as much [the citizen's] duty to criticize as it is the official's duty to administer. As Madison said, "the censorial power is in the people over the Government, and not in the Government over the people." [\[FN99\]](#)

In *Johnson*, Justice Brennan again delivered the opinion of the Court: "Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." [\[FN100\]](#)

This theme also resounded through the *R.A.V.* opinions. We have already noted that Justice White, although deeming *R.A.V.*'s arguable \*142 self-expression "evil and worthless" [\[FN101\]](#) and "unprotected," [\[FN102\]](#) explicitly recognized that cross-burning at a "political rally would almost certainly be protected expression." [\[FN103\]](#) Why? Because "political discourse ... enjoys the greatest social value." [\[FN104\]](#) Justice Stevens was even more emphatic: "Speech about public officials or matters of public concern receives greater protection than speech about other topics.... Core political speech occupies the highest, most protected position ...." [\[FN105\]](#) Although the minority accused the majority of disrupting this doctrinal hierarchy, [\[FN106\]](#) the *Scalia Five* did no such thing. The majority did not explicitly speak of "political speech" as such, but again and again used examples of citizen criticism of government officials as the epitome of core First Amendment activity. [\[FN107\]](#)

Principle Four: Courts Must Guard Vigilantly Against De Jure and De Facto Discrimination Against Disfavored Viewpoints. - "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." [\[FN108\]](#)

So wrote the Court in *Johnson*. And so said the Justices in *R.A.V.* Indeed, Justice Stevens quoted this "bedrock principle" language in its entirety and then added: "[V]iewpoint discrimination is censorship in its purest form' ...." [\[FN109\]](#) The *Scalia Five* were no less insistent that "the government may not regulate use based on hostility or favoritism towards the underlying message expressed." [\[FN110\]](#) Nor did Justice White's opinion really take issue with any of this. As we have seen, the minority simply disagreed with the *Scalia Five* about whether the ordinance truly did rig the verbal boxing match. In the minority's view, the ordinance was no different from Title VII and housing discrimination laws and had

nothing to do with "official suppression of ideas." [\[FN111\]](#)

**\*143** How can judges tell whether a law is indeed designed to penalize disfavored ideas? Sometimes the illegitimate purpose will be prominent on the face of the law. Flag-burning ordinances, for example, typically outlawed "contempt" or "desecration" of the flag, but not "respect" or "reverence" for it. So too, the infamous Sedition Act of 1798 made it a crime to criticize federal officials, but not to praise them; a crime for challengers to heap contempt on incumbents, but not vice-versa. Conveniently (and suspiciously), the Act was written to expire after the next election. [\[FN112\]](#)

Often, however, judges must go beyond the formal words of a law and consider its real-life effect. A Federalist administration predictably used the Sedition Act to punish Republican critics of Federalists, but not Federalist critics of Republicans. [\[FN113\]](#) (The office of the Vice-Presidency - held by the Republican Thomas Jefferson - was revealingly gerrymandered out of the Act's protection of federal officeholders.) A hippie radical with a flag rump patch would more likely be prosecuted under flag mutilation laws than would a suburban grandmother with a flag-inspired scarf. In *Johnson*, the Chief Justice expressed genuine pain and outrage over Leftist disrespect for the flag that our brave soldiers fought and died for, and were buried with. But his pain was selective. What about the Reactionaries who show disrespect for the stars and stripes by prancing around with Confederate and Nazi flags - flags literally used to wage war against Old Glory, flags that actually led to the death of many of our soldiers? Why did flag protection laws not treat Confederate flag waving as a desecration of Old Glory? [\[FN114\]](#)

Even a law that is applied evenhandedly can be designed to disadvantage one side of the public debate. In the 1960s, for example, a law that banned anyone from using the words "baby-killing" or "napalm" in public discourse would, of course, have disadvantaged critics of the government. So would a ban on even a crude, filthy word like "motherfucker," given its prominence in various Leftist slogans (as in "Up Against the Wall ...."). [\[FN115\]](#)

**\*144** Once again, in principle if not in application, all this was common ground among the Justices in *R.A.V.* The Scalia Five believed that the St. Paul ordinance "[i]n its practical operation" [\[FN116\]](#) would discriminate among viewpoints by taking certain words and symbols, but not others, off the table. Justice White saw little reason to fear censorship, given that speech consisting of "fighting words" has virtually no value; had *Chaplinsky* been applied properly, the ordinance simply would not have threatened any important public speech in the public square. Justice Stevens added that even if the ordinance did take certain words within the fighting words category off the table, the exclusions were, he believed, truly symmetric, prohibiting "low blows" all around.

Principle Five: Exceptions to These Principles Must Not Be Ad Hoc. - In the end, one searches the *Johnson* dissents in vain for any plausible legal argument. Apart from those we have already canvassed (which simply will not wash) and scraps of dicta from earlier cases (none of which contains even a plausible argument, as opposed to an assertion or intuition), the Chief Justice's dissent consisted mostly of references to, and quotations from, hymns, anthems, poems, marches, pledges, and the like, celebrating Old Glory. To borrow John Hart Ely's words about another famous case, the problem is not so much that the dissent "is bad constitutional law" but that "it is not constitutional law and gives almost no sense of an obligation to try to be." [\[FN117\]](#)

Indeed, the most interesting rhetorical move in the Johnson dissents came close to throwing down the mask, abandoning all pretense, and openly admitting the weakness of the dissenters' legal analysis. The flag, the dissenters passionately and urgently insisted, is different. It is "unique." [\[FN118\]](#) Therefore (the implicit argument whispered), ordinary First Amendment rules don't apply.

The call was seductive, but almost literally lawless. The Johnson majority virtuously resisted seduction:

We have not recognized an exception to [bedrock First Amendment principles] even where our flag has been involved.

....

... There is, moreover, no indication - either in the text of the Constitution or in our cases interpreting it - that a separate juridical category exists for the American flag alone.... We decline, therefore, **\*145** to create for the flag an exception to the joust of principles protected by the First Amendment. [\[FN119\]](#)

The problem was not that the First Amendment and the Republic for which it stands are so fragile that they would crumble under the tiniest deviation from principle. Nor was it that it would be impossible to craft a narrow and self-contained exception for the flag. Thus, if a narrow flag exception to the First Amendment had been ratified in 1990 as the Twenty-Seventh Amendment, the Republic would have survived. Such an explicit amendment, if expressly limited to the flag, would not necessarily have exerted a downward gravitational pull on the rest of First Amendment doctrine. It merely would have made clear "in the text of the Constitution ... that a separate juridical category exists for the American flag alone," [\[FN120\]](#) in keeping with the Johnson test. [\[FN121\]](#)

The creation by the Supreme Court of such an exception, however, would be a different matter. [\[FN122\]](#) The Johnson dissenters, to their credit, were uncomfortable with the knowledge that they were simply making up - out of whole cloth, as it were - a flag exception. They felt compelled to at least go through the motions of standard doctrinal argument. But in the process they said things that utterly warped the basic framework of the First Amendment Tradition; they made implicit and explicit arguments that might indeed have spilled over into non-flag First Amendment cases. [\[FN123\]](#)

All the members of the R.A.V. Court claimed to reject the legitimacy of ad hoc exceptions to bedrock principles of the First Amendment. In fact, the majority tried to reconceptualize First Amendment doctrine to lend it greater coherence and rationalize the profusion of First Amendment categories. And just as the Johnson Court resisted the idea that "the flag is different, so all bets are off," the R.A.V. majority was skeptical of the naked policy claims that "race, gender and religion are different" and that "the burning cross is different." [\[FN124\]](#) The majority had no monopoly, however, on anti-exception rhetoric. Indeed, a recurring motif of the minority was that the majority's proposed reconceptualization was itself riddled with "ad hoc" exceptions, and perhaps for one day only, Justice Blackmun worried. [\[FN125\]](#)

**\*146** If, indeed, racial hate speech is different, and within that category certain words - such as "nigger" - are different, friends of the First Amendment would do well to follow Johnson's explicit advice and root their intuitions "in the text of the Constitution or in [the Court's] cases interpreting it." [\[FN126\]](#) As we shall see in Part II, the most obvious places to look are the Reconstruction Amendments

and the case law interpreting them. As with a hypothetical flag-burning amendment, any modification of the First Amendment framework may be easier to cabin if derivable from a separate amendment. A "badge of servitude" exception to, or gloss on, First Amendment doctrine would not provide a general springboard for other First Amendment modifications. Such a gloss, based on the language and history of the Reconstruction Amendments, would not amount to a naked policy statement that "race is different" - a statement that leaves the censorship door wide open to other ad hoc exceptions: "If race is different, so is ...."

Before considering the Reconstruction Amendments, however, we must examine why, if the R.A.V. Justices indeed agreed on so much (as I have claimed), they seem to have split so sharply.

2. Disputed Ground: Hate Speech Regulation as Censorship or Minority Protection? - The particular 5-4 split in R.A.V. may help us locate the true fault lines of dispute. First we should note that the R.A.V. line up parallels, in many ways, the Court's 5-4 split in Johnson. [\[FN127\]](#) A nose counter might thus have predicted that the Scalia Five's opinion would reflect an especially strong commitment to Johnson, a prediction confirmed by a close reading of the opinion - through we have seen that even the minority accepted Johnson. [\[FN128\]](#)

**\*147** The line up was interesting in a second way. The majority featured the four most junior Associate Justices joined by the Chief Justice, while the four most senior Associate Justices comprised the minority. Here is a small sign - again, confirmed by a close reading of the opinions - that the majority opinion was not simply a restatement, but a remodeling, of past case law. This remodeling was most evident in the majority's insistence that the Court's prior descriptions of fighting words and libel as wholly unprotected were not "literally true." [\[FN129\]](#)

Finally, and most importantly, we should note that three of the four Justices in the minority have in the past voted to uphold government schemes specially targeted to benefit racial minorities, [\[FN130\]](#) whereas no member of the Court majority has (yet) done so. This fault line also left strong traces in the opinions, with Justice White expressing open approval of laws specially tailored to protect "groups that have long been the targets of discrimination" [\[FN131\]](#) and Justice Blackmun speaking of the need to protect "minorities" from "racial threats," "race-based fighting words" and "prejudice." [\[FN132\]](#)

Yet when we closely examine the opinions themselves, it seems that there were other intertwining and more complicated issues also lurking just beneath the surface of the case. Let us begin by noting that some of the claimed grounds for disagreement did not in fact exist. For example, contrary to the rhetorical excess of the minority, the majority did not place "fighting words" on a par with core political speech; it explicitly acknowledged that some (suitably defined) category of fighting words may be banned altogether. Moreover through its examples, it repeatedly affirmed the centrality of anti-government political expression. [\[FN133\]](#) Similarly, even though Justice White insisted at times that "fighting words" and other categories of speech are entirely unprotected, [\[FN134\]](#) the minority - no less than the majority - was unwilling to allow gross viewpoint-based discrimination even in those categories.

Why, then, all the sturm und drang in R.A.V.? In large part, because, as already noted, the White Four

may simply have more tolerance for minority- protective laws, especially when no "innocent whites" are made to pay the price, but only those who engage in "evil \*148 and worthless" [\[FN135\]](#) harassment of racial outgroups. Yet if this is so, the debate is misframed: the real issues here are Reconstruction Amendment issues, which were not openly defined and engaged because the case was packaged as a "First Amendment" case. [\[FN136\]](#)

The caustic debate was misframed in other respects, with the various opinions at times sliding past each other and sliding over some of the big issues posed by the case. And this misframing - combined with subtle differences in focus - may indeed account for some of the remaining disagreement among the Justices. The White Four's opinion tended to focus on the particular alleged facts before the Court. The Scalia Five's opinion, by contrast, focused on the words of the ordinance as applied to the category of fighting words, properly defined. This difference led to two much larger differences in perspective that again implicate attitudes about racial minorities. First, Justice White seemed to see R.A.V. as a case about race; Justice Scalia, by contrast, saw the case as equally implicating concerns about religion and gender. Again and again, Justice Scalia used examples involving those topics. [\[FN137\]](#) Second, Justice White appeared to assume the case was about protecting vulnerable social groups (for example, blacks) from dominant social groups (for example, whites). Thus, Justice White spoke of protecting "groups that have long been the targets of discrimination." [\[FN138\]](#) Nowhere did he openly address the possibility that the St. Paul ordinance might apply against a black-power group hurling racial epithets at whites - "Cracker!" - or radical feminists proclaiming that "all men are scum." Justice Scalia, on the other hand, used language and examples that suggest he would read the ordinance to apply symmetrically - against blacks as well as whites, women as well as men. [\[FN139\]](#)

Was the ordinance symmetric or asymmetric? Its formal words "on the basis of" [\[FN140\]](#) suggest symmetry, but its explicit examples - burning crosses and swastikas [\[FN141\]](#) - suggest special concern with white \*149 power (or more generally, abuse of power by historically dominant social forces). Would the ordinance have been more or less constitutionally troubling if symmetric? These are the most vexing issues underlying R.A.V., yet they were not sharply identified by the Court, much less analyzed. And they are not purely First Amendment issues, but Reconstruction Amendment issues as well.

A couple of examples may help illustrate and clarify my claims about misframing. For starters, consider a key exchange between Justice Scalia and Justice White. First, Justice Scalia:

St. Paul has not singled out an especially offensive mode of expression - it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. [\[FN142\]](#)

Here is Justice White's direct response to this passage, with internal quotations referring to earlier passages of Justice Scalia's opinion and bracketed material inserted by Justice White in an effort to turn Justice Scalia's own words against him:

"[T]he reasons why [fighting words] are outside the First Amendment ... have special force when applied to [groups that have historically been subjected to discrimination]."

... A prohibition on fighting words ... is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence, a message that is at its ugliest when directed against groups

that have long been the targets of discrimination. [\[FN143\]](#)

If Justice Scalia was indeed referring to the alleged facts of R.A.V.'s "mode of expression," his claim seems utterly incomprehensible and other-worldly. How could he think that burning a cross on the yard of a black family in the dead of night is not horribly "threatening (as opposed to merely obnoxious)"? If this passage were indeed referring to the narrow facts before him, how could it be squared with his opening concession that these alleged facts might well have supported prosecution under a "terroristic threat" law? [\[FN144\]](#) The answer, of course, is that Justice Scalia was not speaking here about Robert A. Viktora and the family he terrorized, but about all expression swept within the ordinance, as glossed. That is why he immediately followed up his "merely obnoxious" remark with a paraphrase of the words of the ordinance itself, invoking religious and gender, as well as racial, intolerance.

**\*150** Justice White, by contrast, seemed to be thinking more about the alleged incident before him, which led him to focus more on race, and in particular, on racial insults spewed at blacks and other historic "targets of discrimination" [\[FN145\]](#) rather than on racial epithets hurled by racial minorities against whites.

A second example of the Justices apparently sharply disagreeing, but actually sliding past each other, occurred in the debate between Justice Scalia and Justice Stevens over the proper boxing analogy to apply to the ordinance. Recall that Justice Scalia claimed the rules were rigged: "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" [\[FN146\]](#) In response, Justice Stevens argued that the ordinance was "evenhanded" because it prohibited "a Muslim from hoisting a sign claiming that all Catholics were misbegotten or a Catholic from hoisting a similar sign attacking Muslims." [\[FN147\]](#)

Once again, Justice Scalia invoked a nonracial example and then turned to the language of the ordinance itself. Yet unlike Justice White in the passage we have just noted, Justice Stevens was willing to explicitly engage nonracial hypotheticals [\[FN148\]](#) and to discuss the symmetry question. Yet in the end, he too danced around it, for the example he chose involved two traditional religious minorities: Catholics and Muslims. But what about prosecution of, say, Jehovah's Witnesses for vitriolic attacks on mainstream Protestantism? And if the ordinance did indeed apply to that situation, maybe some of those who might applaud the ordinance as applied to Robert A. Viktora would start to get nervous. Consider, for example, Justice Blackmun's short separate opinion explicitly discussing the need to protect "minorities" from "racial threats" and "race-based fighting words." [\[FN149\]](#) Was Justice Blackmun clearly aware that the Scalia Five and Justice Stevens seemed to read the ordinance far more broadly - for example, as allowing St. Paul to punish an African-American who denounces "the white devil" but not a white who calls another white (or even a black) a "bastard"?

The issues here are achingly complicated: Should racial hate speech be dealt with in the same way as religious and gender-based hate **\*151** speech? [\[FN150\]](#) Within any of these categories, should the law provide for formal symmetry, or for minority-only protection? These complexities cannot be adequately dealt with without openly coming to grips with the Thirteenth and Fourteenth Amendments.

## II. THE CASE OF THE RECONSTRUCTION AMENDMENTS

### A. Missing the Fourteenth Amendment

How might the Justices have profitably integrated the Reconstruction Amendments into their opinions in *R.A.V.*? Begin with Justice Scalia. Ironically, the Court's most dedicated textualist failed to even make mention of the constitutional words that were, strictly speaking, at issue in the case. For every textualist should know that the First Amendment's text explicitly restrains only Congress, [\[FN151\]](#) but the plain words of the Fourteenth Amendment do govern action by the states (and, derivatively, cities such as St. Paul). [\[FN152\]](#) The Reconstruction Congress expressly designed the Fourteenth Amendment to make applicable against states various personal rights, freedoms, privileges and immunities declared in the original Bill of Rights - most definitely including freedom of speech and of the press. [\[FN153\]](#) Indeed, a careful textualist might note how the First Amendment's phrasing - "Congress shall make no law ... abridging" [\[FN154\]](#) - was carefully echoed \*152 by the Privileges or Immunities Clause of the Fourteenth - " n o state shall make ... any law which shall abridge." [\[FN155\]](#)

In light of the general acceptance of the incorporation doctrine, (at least when speech and press rights are concerned), my point may seem a mere pedantic quibble. Lawyers, judges, and scholars commonly refer to state and local censorship cases as "First Amendment" cases. *Texas v. Johnson*, for example, was, strictly speaking, a Fourteenth Amendment case involving a state flag protection law; yet every Justice in the case described it as a "First Amendment" case [\[FN156\]](#) - as did I in Part I.

But the Fourteenth Amendment's general invisibility in "First Amendment" discourse has blinded us to the myriad ways in which the Reconstruction experience has colored the way we think about and apply the First Amendment of the Founding. [\[FN157\]](#) The Reconstruction Amendment was more than a global word processing change to the original Bill of Rights, replacing the original ban on the "federal" government with an identical ban on "state or federal" government. As I have explained in more detail elsewhere, [\[FN158\]](#) the original First Amendment reflected, first and foremost, a desire to protect relatively popular speech critical of unpopular government policies - the kind of speech, for example, that the 1798 Sedition Act sought to stifle. The Fourteenth Amendment shifted this center of gravity toward protection of even unpopular, eccentric, "offensive" speech, and of speech critical not simply of government policies, but also of prevailing \*153 social norms. Whereas the paradigm speaker under the First Amendment was someone like John Peter Zenger in colonial New York - a popular publisher who wanted to get to a local jury likely to be sympathetic to his anti-government message - the paradigm speaker under the Fourteenth Amendment was someone more like Harriet Beecher Stowe in the antebellum South - a cultural outsider whose writings challenged head on the social order and general orthodoxy of dominant public opinion. [\[FN159\]](#)

With our eyes fixed on the subtle differences between Founding and Reconstruction visions of free speech, we can now chart the distinct evolution of our First Amendment Tradition. First came the Sedition Act crisis, dramatizing the need to protect popular antigovernment speech - a pure First Amendment paradigm. Next came *New York Times v. Sullivan*, which protected locally unpopular, but nationally acceptable criticism of both government and society. Thus, *Sullivan* was a mixed First and Fourteenth Amendment case, with a dash of *McCulloch v. Maryland* [\[FN160\]](#) thrown in (because a

retrograde state was trying to shut down a national civil rights movement). Then came Johnson, with judges bravely protecting antigovernment speech that was antisocial and unpopular at both the local and national level. No doubt, Gregory Johnson, unlike the popular John Peter Zenger, would not have been content to place his fate in the hands of a jury of ordinary citizens. This, too, implicated both First and Fourteenth Amendment patterns. Finally came R.A.V., in which the speech fit a pure Fourteenth Amendment mold: plainly provocative and outrageous to widely shared cultural norms of proper behavior, but (unlike speech under the Sedition Act, Sullivan, O'Brien, and Johnson) less obviously directed against government policy as such. In attempting to suppress such speech, the St. Paul government may well have been acting not as a self-interested cadre of officials seeking to immunize themselves from criticism and entrench themselves in office (the original First Amendment's primary concern), but as an honest agent of dominant community morality (whose censorial excesses the Fourteenth Amendment was designed to curb). [\[FN161\]](#)

Of course, the alleged cross-burning in R.A.V. was directed against African-Americans, whom the Fourteenth Amendment was specially drafted to protect. But it is precisely at this point that Justice Scalia could and should have stressed his symmetric reading of the St. Paul \*154 ordinance. For as he apparently read it, the ordinance would also have targeted for special punishment certain black-power epithets aimed at whites. Had a similar ordinance been applied against blacks by Southern whites in the 1960s, Justice Scalia might have asked, would not its selective censorship of racial speech have been troubling? [\[FN162\]](#)

If Justice Stevens had responded at this point by stressing that the ordinance was truly "evenhanded," barring "low blows" all around, Justice Scalia might profitably have drawn on the history behind the Fourteenth Amendment to stress the possible danger of ostensibly "evenhanded" bans. (Although generally open to historical arguments, Justice Scalia in R.A.V. made little use of history beyond a throwaway reference to 1791, the date of the First Amendment's ratification.) [\[FN163\]](#) Had Justice Scalia kept his eye on the Fourteenth Amendment, he might have pointed to a famous event in the 1830s that catalyzed the anti-slavery movement - the so-called gag rule in Congress that "evenhandedly" prevented any member from raising the slavery issue. [\[FN164\]](#) In practice of course, the ban worked to disadvantage the anti-slavery critics of the pro-slavery status quo.

Justice Scalia might also have reminded his audience about the importance of a vigorous conception of free speech to the black-led civil rights movement of the 1960s. For example, the landmark "First Amendment" case of the modern era, *New York Times v. Sullivan* was, on its facts, a case protecting vigorous criticism by blacks of widespread ideas and social practices [\[FN165\]](#)- and so were many other of the key "First Amendment" cases of the era, as Harry Kalven reminds us in his book, *The Negro and the First Amendment*. [\[FN166\]](#)

Had Justice Scalia presented these Fourteenth Amendment arguments, he would have added considerable strength to an already strong rhetorical performance. The opinion of the Court might have picked up additional votes - including perhaps that of Justice Blackmun, whose separate opinion suggests that he may not have been fully aware of the ordinance's threat to minorities if construed symmetrically. [\[FN167\]](#) But even more important, the Court's opinion would \*155 have helped African-Americans and other minorities look beyond the alleged facts of R.A.V. to understand that the

ordinance posed a threat to their freedom as well. They too - indeed, they especially, Justice Scalia might have said - should be wary of government censorship, and all the more so when that censorship is selective.

### B. Missing the Thirteenth Amendment

For Justices White and Stevens, the key Reconstruction Amendment to have emphasized was not the Fourteenth, but the Thirteenth. The Thirteenth Amendment's abolition of slavery and involuntary servitude speaks directly to private, as well as governmental, misconduct; indeed, it authorizes governmental regulation in order to abolish all of the vestiges, "badges[,] and incidents" of the slavery system. [\[FN168\]](#) The White Four could well have argued that the burning cross erected by R.A.V. was such a badge.

Although the Thirteenth Amendment's second section explicitly empowers only Congress to enforce its anti-slavery vision, [\[FN169\]](#) states are not powerless to act. Without Section 2, Congress might have lacked the specific enumerated power to eliminate the vestiges of slavery, but states generally need no such specific enumeration before they can act. Rather, state lawmakers typically may support the Constitution's mandates using their general police power under their state constitution, and in keeping with a specific invitation in Article VI's Supremacy Clause and Supremacy Oath. [\[FN170\]](#)

Might not the kind of harassment alleged in R.A.V. be deemed an obvious legacy of slavery - the Klan rising again to terrorize free blacks? Consider the following evocative sentence from Justice Stevens's opinion: "The cross- burning in this case - directed as it was to a single African-American family trapped in their home - was nothing more than a crude form of physical intimidation." [\[FN171\]](#) If cast as a First Amendment argument, this imagery suggests why the speech at issue should not have been protected - it threatened violence and involved an unwilling private audience, unable to avoid an unwanted message, thereby violating the autonomy principle. Furthermore, it was not directed in any way at a larger political audience as part of \*156 a legitimate exercise of political persuasion [\[FN172\]](#) and thereby fails the Meiklejohn-popular sovereignty test. [\[FN173\]](#) The incident was, in short, a classic example of the fighting words category of unprotected expression.

But the First Amendment packaging fails to explain why race-based fighting words directed at African-Americans should be treated differently from other fighting words. Consider how Stevens's evocative sentence takes on a new color if placed in a Thirteenth Amendment frame. The threat of white racist violence against blacks calls to mind an especially vivid set of historical images - slavery - and the otherwise stale First Amendment metaphor of a "captive audience" suddenly springs to life, poetic and ominous. Now we have a focused constitutional response to questions about why race might be different, and why a burning cross - or the word "nigger" - might be different. [\[FN174\]](#) These, Justice Stevens might have argued, are badges - symbols - of servitude, and the Constitution allows legislatures to treat them differently from other kinds of speech. [\[FN175\]](#)

Two important qualifications are in order. First, Section 1 of the Thirteenth Amendment is not logically tied to race; it protects persons of all races against slavery and involuntary servitude. [\[FN176\]](#)

However, the Supreme Court has long recognized - both before the Thirteenth Amendment in the infamous Dred Scott case [\[FN177\]](#) and thereafter [\[FN178\]](#) - the important connections between slavery and race in America. And from the Civil Rights Act of 1866 to the present, Congress has treated race-based oppression as a unique badge and incident of slavery that may be specially targeted and punished. The Act of 1866 - the \*157 precursor of section 1982 - is especially significant here, as it was purposely drafted pursuant to the Thirteenth Amendment, and yet it prohibited race-based misconduct even in formerly free states (such as Minnesota). [\[FN179\]](#)

Second, the argument sketched out thus far in no way authorizes states to betray the basic principles of the Fourteenth Amendment - including its protection of free speech - simply by purporting to enforce the Thirteenth. [\[FN180\]](#) Laws that regulate only fighting words, properly defined, may present no realistic threat to the hard core of free speech. But perhaps the Thirteenth Amendment might allow word regulation beyond the fighting words category. For example, the Court has upheld legislation under the Thirteenth Amendment that bars, among other things, the use of words such as "For Whites Only" on a residential "For Sale" sign. [\[FN181\]](#) As noted earlier, Justice Scalia seemed to allow for such restrictions if the words are "swept up incidentally within the reach of a statute directed at conduct rather than speech," such as the private racial discrimination in housing prohibited by section 1982, which Justice Scalia cited on this point. [\[FN182\]](#) \*158 But if mere refusal to deal with another on the basis of race can constitute a badge of servitude, surely the intentional racial harassment of blacks can constitute a badge of servitude as well. Under this theory, the intentional trapping of a captive audience of blacks, in order to subject them to face-to-face degradation and dehumanization on the basis of their race, might be proscribed as "incidental" to a general statute designed to eliminate all "badges and incidents" of the legacy of slavery. Intentional trapping - temporary involuntary servitude, a sliver of slavery - is arguably more like conduct than like speech, akin to (and arguably much worse than) refusal to deal on the basis of race. [\[FN183\]](#)

Of course, any incidental regulation of words imposed by these anti-slavery laws would be quite narrow. Consistent with the hard core of the First and Fourteenth Amendments, white supremacists, for example, would still be free to publicly urge the legislature to repeal such hate-speech laws and to use ugly, offensive, racist language in the course of their urging. Indeed, had the St. Paul ordinance explicitly stated that the city would not punish racist speakers engaged in offensive but peaceful public discourse, and moreover would fully protect such racist speakers from any possible violence by private hecklers, the Scalia Five would have had less reason to suspect \*159 that "official suppression of ideas [was] afoot." [\[FN184\]](#) In effect, St. Paul would have made clear that it was trying to ban only certain conduct rather than offensive words and ideas.

Had the Justices focused on the Reconstruction Amendments, they would have been forced to think more clearly about whether gender-based and religion-based hate speech warranted similar treatment to race-based hate speech and whether, within each category, symmetry or asymmetry should obtain. On the first issue, they would have had to consider that American slavery was originally rooted in religious discrimination - only non-Christians were enslaved - and that like blacks, women have suffered deeply entrenched and systematic status-based subordination based on physical traits fixed at birth. On the other hand, they could have noted that by the time of the Thirteenth Amendment's adoption, American slavery had lost its connection to discrimination against non-Christians [\[FN185\]](#) and that, thus far, the

Court and Congress have both linked slavery only to race, not to gender or religion. Section 1982, for example, prohibits only race-based residential discrimination.

On the symmetry issue, the Justices would have had to deal squarely with a question they slid past all too quickly: could the ordinance be applied against racial minorities? If so, why were the anti-Scalia Justices so unconcerned, and why did Justice White's and Justice Blackmun's opinions use language focused only on racial hate speech directed at - rather than spoken by - racial minorities? If, on the other hand, Justices White, Blackmun, and O'Connor were willing to uphold an ordinance they read as asymmetric, that too required explanation. Perhaps they might have emphasized that this form of "affirmative action" for racial minorities did not threaten any "innocent whites" and possibly would not involve courts in the tricky task of administering rules based on the percentages of racial blood in a person's veins. [\[FN186\]](#) In other affirmative action contexts, the government must decide who counts as sufficiently "black," for example, to qualify for race-based benefits. Under the St. Paul ordinance, however, perhaps prosecution might well lie even if the trapped family was not black, as long as R.A.V. thought they were, or even if a light-skinned mulatto sought to denigrate a darker Jamaican as "black scum." In any event, the Thirteenth Amendment approach raises an interesting possibility not easily visible through a conventional First **\*160** Amendment lens: openly asymmetric regulation of racial hate speech may be less, rather than more, constitutionally troubling.

There is, of course, no guarantee that the Scalia Five would have embraced the Thirteenth Amendment approach had it been vigorously pressed in R.A.V. But the Court, one hopes, would at least have been obliged to speak with much greater clarity than it did about the differences it saw between the St. Paul ordinance and section 1982. In the process, it might have clarified exactly how far legislation under the Thirteenth Amendment can go without running afoul of freedom of speech under the First and Fourteenth Amendments.

In any event, my purpose here has not been to resolve definitively the issues raised by R.A.V., but to show how more careful attention to Reconstruction might have enabled all the Justices in R.A.V. to write sharper and more persuasive opinions. [\[FN187\]](#)

#### CONCLUSION: THE CASE OF THE MISSING JUSTICE

For the first time in a quarter century, Thurgood Marshall was not present in the conference room last Term. The hole left by his retirement will long be felt, but perhaps in no case was Justice Marshall's **\*161** absence more palpable than in R.A.V. No doubt, Justice Marshall would have applauded the Justices' general reaffirmation of *Texas v. Johnson*. He would also, no doubt, have reminded the Justices about the centrality of the Reconstruction Amendments. [\[FN188\]](#) Perhaps he would have stressed the Fourteenth Amendment's vigorous protection of even unpopular and offensive speech; or perhaps he would have instead emphasized the legitimacy of government regulation under the Thirteenth Amendment to cleanse America of the badges and incidents of slavery, such as burning crosses in the yards of black families in the dead of night. As we have seen, the lessons of Reconstruction can be interpreted in different ways. [\[FN189\]](#)

But, Justice Marshall would no doubt have insisted, these lessons must be pondered by the Justices, and communicated to the people.

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[FN1] [112 S. Ct. 2538 \(1992\)](#).

[FN2] [491 U.S. 397 \(1989\)](#).

[FN3] See [id. at 421-35](#) (Rehnquist, C.J., dissenting).

[FN4] [Id. at 421](#) (Kennedy, J., concurring).

[FN5] See Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at [18 U.S.C. § 700 \(Supp. II 1990\)](#)).

[FN6] See [United States v. Eichman, 496 U.S. 310, 312-19 \(1990\)](#).

[FN7] See [id. at 323-24](#) (Stevens, J., dissenting).

[FN8] See 136 CONG. REC. H4087-88 (daily ed. June 22, 1990).

[FN9] See 136 CONG. REC. S8736-37 (daily ed. June 26, 1990).

[FN10] In addition to the signal sounded by the Eichman dissenters' refusal to acquiesce to Johnson in 1990, the Court declared in 1991 that cases "decided by the narrowest of margins, over spirited dissents challenging [their] basic underpinnings" were especially ripe for reversal. [Payne v. Tennessee, 111 S. Ct. 2597, 2611 \(1991\)](#).

[FN11] [403 U.S. 602 \(1971\)](#). In *Lemon*, the Court set out a three-part test for Establishment Clause violations. See *id.* at 611-25. In [Lee v. Weisman, 112 S. Ct. 2649 \(1992\)](#), the Court declined to reconsider *Lemon*, but left its future status uncertain. See [id. at 2654-55](#).

[FN12] [410 U.S. 113 \(1973\)](#). In *Roe*, the Court recognized a constitutional right to an abortion in various circumstances. See [id. at 152-66](#). In [Planned Parenthood v. Casey, 112 S. Ct. 2791 \(1992\)](#), the Court revisited *Roe* and modified its trimester framework, but preserved what the Court called *Roe*'s "central holding" on the constitutionally protected status of abortion. See [id. at 2812](#). The close vote, the sharp dissents, and the political salience of the issue, however, all suggest that *Casey* by no means ended the debate over *Roe*.

[FN13] This, of course, echoes Alexander Meiklejohn's celebrated and celebratory reaction to [New York Times Co. v. Sullivan, 376 U.S. 254 \(1964\)](#). See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125.

[FN14] Throughout this Comment, I shall use harsh and at times ugly language. I do so not to shock or to desensitize, but to discuss openly and honestly real-life issues about the boundaries of free speech.

[FN15] [R.A.V., 112 S. Ct. at 2557](#) (White, J., concurring in the judgment).

[FN16] [R.A.V., 112 S. Ct. at 2541](#).

[FN17] See [id. at 2541 n.1](#) (citing [Minn. Stat. §§ 609.563, 609.595, 609.713\(1\) \(1987 & Supp. 1992\)](#)).

[FN18] See Don Terry, *Rights Advocates Uncertain About Ruling's Impact*, N.Y. TIMES, June 23, 1992, at A16.

[FN19] SAINT PAUL, MINN. LEGIS. CODE § 292.02 (1990).

[FN20] In re [R.A.V., 464 N.W.2d 507, 510 \(Minn. 1991\)](#), rev'd, [112 S. Ct. 2538 \(1992\)](#).

[FN21] [315 U.S. 568 \(1942\)](#).

[FN22] See [In re R.A.V., 464 N.W.2d at 510-11](#).

[FN23] See [R.A.V., 112 S. Ct. at 2542](#). No Supreme Court case in the last half-century has upheld a

conviction on the basis of Chaplinsky's formulation; a root intuition behind the fighting words doctrine is that the First Amendment does not forbid the punishment of face-to-face insults meant to and likely to provoke fisticuffs.

[\[FN24\]](#) [Id. at 2543-44.](#)

[\[FN25\]](#) See [id. at 2543.](#)

[\[FN26\]](#) [Id. at 2544.](#)

[\[FN27\]](#) [Id. at 2543.](#)

[\[FN28\]](#) [Id. at 2545.](#)

[\[FN29\]](#) See [id. at 2547-49.](#)

[\[FN30\]](#) [Id. at 2547.](#)

[\[FN31\]](#) [Id. at 2548.](#)

[\[FN32\]](#) See [id. at 2438-49.](#)

[\[FN33\]](#) [Id. at 2547.](#)

[\[FN34\]](#) [Id. at 2546.](#)

[\[FN35\]](#) [Id.](#)

[\[FN36\]](#) See [id. \(citing 42 U.S.C. § 1982 \(1988\)\).](#)

[FN37] *Id.* at 2560 (White, J., concurring in the judgment). Along the way, the White Four at various points labelled the Court's opinion "untried," "[in]judicious," "transparently wrong," "misguided," "ad hoc," "radical," "confus[ing]," "inexplicable," "arid," "doctrinaire" and "mischievous at best." *Id.* at 2551, 2555, 2556, 2557, 2554, 2560.

[FN38] *Id.* at 2551. In a footnote, Justice White overlaid his hand by claiming that the Court "lacks jurisdiction to decide the case on the majority rationale," even though the questions on which certiorari were granted explicitly invoked the First Amendment and highlighted the "content-based" nature of the St. Paul ordinance, in contradistinction to "content-neutral laws" that might pass muster. *Id.* at 2550 n.1 (quoting Petition for Certiorari at i, *R.A.V.* (No. 90-7675)).

[FN39] See *id.* at 2558-60.

[FN40] See *id.* at 2559. In effect, Justice White read the Minnesota gloss as including not only insults likely to provoke a fistfight, but also words that "mere[ly]" cause "hurt feelings." *Id.*

[FN41] See *id.* at 2558-60. These special standing rules make up much of the so-called "overbreadth" doctrine. For a good general discussion, see Richard H. Fallon, Jr., [Making Sense of Overbreadth](#), 100 *YALE L.J.* 853 (1991).

[FN42] See [R.A.V.](#), 112 *S. Ct.* at 2552-53 (White, J., concurring in the judgment).

[FN43] *Id.* at 2555.

[FN44] *Id.* at 2552.

[FN45] Compare Justice Scalia's comments, see [112 S. Ct. at 2543-44](#), with Justice White's, see [id. at 2552-53](#) (White, J., concurring in the judgment).

[FN46] *Id.* at 2555 (White, J., concurring in the judgment). Although Justice White claimed that the basis for this limitation is not the First Amendment but the Equal Protection Clause, see [id. at 2555-56, 2556 n.9](#), Justice Scalia retorted that equal protection rational basis review would have bite here only because First Amendment principles render certain government purposes illegitimate, and therefore incapable of being invoked to support the government's policy, see [R.A.V.](#), 112 *S. Ct.* at 2543 n.4. This debate seems largely semantic. Unlike the issues we shall examine in Part II, there is no practical

difference between a First Amendment and a Fourteenth Amendment framing of this question. See, e.g., Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. CHI. L. REV. 20 (1975). Indeed, even in the absence of both texts, the government's discriminatory policy might be seen as violating implicit structural postulates of popular sovereignty and agency theory. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 1-21, 35-36 (Greenwood Press 1979) (1960).

[FN47] [R.A.V., 112 S. Ct. at 2558](#) (White, J., concurring in the judgment) (quoting [R.A.V., 112 S. Ct. at 2547](#)).

[FN48] [Id. at 2556-57](#).

[FN49] See [id. at 2557-58](#).

[FN50] See [id. at 2570](#) (Stevens, J., concurring in the judgment) ("Contrary to the suggestion of the majority, the St. Paul ordinance does not regulate expression based on viewpoint.").

[FN51] [Id. at 2571](#).

[FN52] See [id. at 2561-71](#).

[FN53] See [id. at 2569-70](#).

[FN54] [Id. at 2560-61](#) (Blackmun, J., concurring in the judgment).

[FN55] If not for overbreadth, the White Four would have been dissenters.

[FN56] The only other case featuring the same 5-4 breakdown was a low visibility bankruptcy case involving a technical jurisdiction issue, in which Justice Thomas wrote for the Court, and Justices Stevens and O'Connor (the latter joined by Justices White and Blackmun) wrote quiet concurrences in the judgment that totaled four paragraphs. See [Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 \(1992\)](#).

[FN57] See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988).

[FN58] On the similarity of voting line ups, see section I.B.2, below.

[FN59] I say "much," rather than "all," because Johnson tended to confirm the traditional image of government as censor and as a threat to free speech, yet devoted less attention to the affirmative role government may - indeed, must - play in protecting and promoting freedom of speech. The Amendment of course prohibits government "abridgement" of free speech, but not government promotion of free speech. See MEIKLEJOHN, *supra* note 46, at 19-20. Moreover, true freedom of speech often requires government action - for example, to protect speakers from hostile crowds, and to create public spaces where true freedom of speech can thrive (including, but not limited to, legislatures, town meetings, juries, and public squares). For a good discussion, see Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

[FN60] [376 U.S. 254 \(1964\)](#).

[FN61] [391 U.S. 367 \(1968\)](#).

[FN62] I have placed the word "desecrate" in quotes for a reason. Although my analysis focuses on the speech and press clause implications of flag burning, I also believe flag-burning laws raise serious Establishment Clause concerns. To speak of flag "desecration," as did many laws, is to blur the sacred and the profane, the spiritual and the secular. For the ultimate good of both church and state, government must not be allowed to drape itself in religious imagery. The word "desecrate" is a red flag that a dangerous establishment of religion is afoot. Beyond this word, we must note the near-worshipful attitude toward the flag shared by many backers of flag laws. To many of them, flag desecration is a kind of blasphemy; but, as Professor Kalven has noted, the hard core of the First Amendment prohibits anti-heresy and anti-blasphemy laws. See KALVEN, *supra* note 57, at 7-8. But cf. [Texas v. Johnson, 491 U.S. 397, 429 \(1989\)](#) (Rehnquist, C.J., dissenting) (speaking without irony or self-consciousness of the "mystical reverence" that "millions and millions of Americans" hold for the flag).

[FN63] [U.S. CONST. amend. I](#).

[FN64] The Supreme Court has long recognized that nonverbal expression is protected by the First Amendment. See, e.g., [West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-34 \(1943\)](#) (refusing to salute the U.S. flag); [Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505-06 \(1969\)](#)

(wearing a black armband); [Stromberg v. California, 283 U.S. 359, 369 \(1931\)](#) (displaying a red flag). See generally Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 *UCLA L. REV.* 29 (1973) (surveying the Court's treatment of symbolic speech and arguing that symbolic speech should be given the same First Amendment status as verbal speech).

[FN65] Of course, I do not claim that anything that could be said to "speak" to us - say, the Grand Canyon - qualifies for First Amendment protection. Rather, I am focusing here only on symbols purposefully used by humans to communicate. Thus, if someone ignorant of sign language happens to make a hand gesture corresponding to a word or thought in sign language, the gesture lacks First Amendment significance - not because the gesture is not oral, but rather because (unlike an identical gesture made by a signer) it is not purposeful human communication. Cf. [Johnson, 491 U.S. at 403 n.3](#) (distinguishing between purposeful expression and other human gestures).

[FN66] Any effort to try to play divide-and-conquer between freedom of press and freedom of speech would be as perverse as claiming that noncapital defendants today may be tried over and over, because they are in jeopardy of neither "life" nor "limb" (that is, dismemberment). See [U.S. CONST. amend. V.](#)

[FN67] Even defenders of Johnson at times seemed to fall prey to this confusion. In an otherwise careful defense of Johnson, Dean Geoffrey Stone came close to equating congressional power to protect bald eagles with a power to protect the flag. See Geoffrey R. Stone, [Flag Burning and the Constitution, 75 IOWA L. REV. 111, 120-21 \(1989\)](#). But a real eagle is more than a pure symbol; it is a physical creature that may be protected for all sorts of reasons. The missing link in Dean Stone's argument is as follows: Does Stone believe Congress could make it a crime to make a symbol of the eagle - perhaps even an eagle flag - and then burn the symbol? I would say obviously not; and if, indeed, Dean Stone believes otherwise, he has not offered any reasons.

[FN68] For a nice discussion of this point, see Frank Michelman, [Saving Old Glory: On Constitutional Iconography, 42 STAN. L. REV. 1337, 1346-47 \(1990\)](#).

[FN69] [Johnson, 491 U.S. at 438](#) (Stevens, J., dissenting).

[FN70] [Id. at 433-34](#) (Rehnquist, C.J., dissenting).

[FN71] See [id. at 432](#). When it suited his purposes, however, the Chief Justice elsewhere in his opinion properly equated words and symbols. See *infra* note 91.

[FN72] [Johnson, 491 U.S. at 404-05](#). Johnson broke no new ground here - one need only recall earlier landmark First Amendment cases involving flags and armbands. See cases cited supra note 64.

[FN73] [R.A.V., 112 S. Ct. at 2542](#) (citations omitted).

[FN74] [Id. at 2548](#).

[FN75] [Id. at 2559](#) (White, J., concurring in the judgment).

[FN76] [Id. at 2553 n.4](#). Justice Stevens did not join the portion of Justice White's opinion in which this footnote appears.

[FN77] [Id. at 2568](#) (Stevens, J., concurring in the judgment) (quoting [Texas v. Johnson, 491 U.S. 397, 406 \(1989\)](#)).

[FN78] [Johnson, 491 U.S. at 406](#). The Johnson Court here followed the approach laid out in [United States v. O'Brien, 391 U.S. 367 \(1968\)](#). See infra pp. 137-39.

[FN79] [Johnson, 491 U.S. at 416](#).

[FN80] [R.A.V., 112 S. Ct. at 2569](#) (Stevens, J., concurring in the judgment) (quoting [Johnson, 491 U.S. at 406](#)) (alteration in the original).

[FN81] [Johnson, 491 U.S. at 432](#) (Rehnquist, C.J., dissenting).

[FN82] For a brief account of this dramatic episode, see HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW* 93 (1982).

[FN83] See [Johnson, 491 U.S. at 407](#) (citing [United States v. O'Brien, 391 U.S. 367 \(1968\)](#)).

[FN84] See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-6, at 824-25 (2d ed. 1988).

[FN85] [O'Brien, 391 U.S. at 374, 379.](#)

[FN86] 50 U.S.C. app. § 462(b)(3) (1988).

[FN87] See John Hart Ely, [Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis](#), 88 HARV. L. REV. 1482, 1496-1508 (1975).

[FN88] [R.A.V., 112 S. Ct. at 2544-45.](#) Justice Scalia's discussion of flag burning included approving citations to Johnson and O'Brien.

[FN89] [Id. at 2562](#) (Stevens, J., concurring in the judgment).

[FN90] For further discussion of the need for judicial scrutiny to flush out illegitimate censorial purpose, see my discussion below of Principle Four.

[FN91] Because government often tries to suppress the ideological symbol by regulating "property," a specific implication of Principle Two is as follows: government may not manipulate "property" rules to suppress disfavored messages. Property rules, like all law, must square with the First Amendment. Thus, in [New York Times Co. v. Sullivan, 376 U.S. 254 \(1964\)](#), the Court invalidated an effort to vest government officials with a reputational "property" right that effectively immunized them from legitimate criticism. See [id. at 283](#). Note, however, that the particular line drawn by Sullivan anticipated O'Brien: the Court refused to recognize a First Amendment right to engage in intentional factual deception - the functional analogue of O'Brien's anti-fraud, anti-false identification rationale - but fully protected expression of opinion and political viewpoint.

The Johnson majority held true to Sullivan by refusing to allow the government to vest itself with a "property" right in the flag in order to immunize its policy from criticism. Chief Justice Rehnquist, writing in dissent in Johnson, tried to break faith with Sullivan by manipulating "property" jargon and arguing that the government might "obtain a limited property right in" the flag symbol. [Texas v. Johnson, 491 U.S. 397, 429 \(1989\)](#) (Rehnquist, C.J., dissenting) (quoting [San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 532 \(1987\)](#)). Note that the Chief Justice here properly equated words and symbols! See *id.* (adding in brackets "[or symbol]" to a quotation referring to "word"); *supra* p. 135 and note 71. Even putting Sullivan to one side, it is hard to make any sense of the Chief Justice's attempted property gimmick. Assume the flag is indeed government "property." So is a park. It is basic hornbook law that government may not open a park only to pro-government demonstrators while banning its use by anti-government groups. Yet such discrimination was exactly what lay at the core of the flag laws - they authorized citizens to "use" the government "property" of the flag in pro-government ways (waving, saluting, respectfully burning, etc.)

but not in anti-government ways (heaping contempt upon, disrespectfully burning, and so on).

Even more embarrassing for the Chief Justice, the property case he invoked here was off point and, when closely examined, in fact undermined his position. In the so-called "gay Olympics" case, the Court upheld the granting of a trademark in the word "[Olympic](#)" to the [United States Olympic Committee](#). See [San Francisco, 483 U.S. at 528](#). This property right would indeed prevent unauthorized groups from "counterfeiting" and "deceptively" using the word or logo - that is, commercially using Olympic symbols in any way that might possibly mislead consumers into believing that the symbols were connected with the official Olympics. But this Sullivan-O'Brien-like concern with factual misrepresentation and deception was limited. And so too were concerns about fair trade and commercial reputation. Nothing in the gay Olympics case prevented citizens from using the word "Olympic" or the official logo in noncommercial contexts where trademark, counterfeiting, misrepresentation, and fair trade concerns are wholly absent. For example, the Court's opinion itself, the lawyers' briefs, and any effort to repeal the congressional statute must be free to use the word "Olympic." And for that matter, the sentences I have just written are obviously protected, even though they too use the word. Most decisively for the Johnson case, citizens are free to buy official Olympic logos and burn them as a political protest of some Olympic policy - say, the Olympics' South Africa rules. In R.A.V. the Justices paid little explicit attention to "property" concepts - but implicitly all nine rejected the property-as-trump gambit of the Johnson dissenters. Not a single Justice, for example, argued that because R.A.V.'s symbolic expression took place on another's private property, the First Amendment therefore disappeared.

[FN92] See [R.A.V., 112 S. Ct. at 2541 n.1](#) (citing [Minn. Stat. § 609.713\(1\) \(1987\)](#)).

[FN93] Others have commented on the equivalence of these two communications. See [id. at 2569 n.8](#) (Stevens, J., concurring in the judgment) (quoting Appendix to Brief for Petitioner at C-6, R.A.V. (No. 90-7675)); Charles R. Lawrence III, [If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 471-72](#).

[FN94] See, e.g., Thomas Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 213-24 (1972). Scanlon has since modified his position. See T.M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U. PITT. L. REV. 519, 532-34 (1979).

[FN95] [Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 \(1991\)](#).

[FN96] See MEIKLEJOHN, *supra* note 46; Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245.

[FN97] [376 U.S. 254 \(1964\)](#).

[FN98] [491 U.S. 397 \(1989\)](#).

[FN99] [Sullivan, 376 U.S. at 270, 282](#) (citation omitted).

[FN100] [Johnson, 491 U.S. at 411](#).

[FN101] [R.A.V., 112 S. Ct. at 2553](#) (White, J., concurring in the judgment).

[FN102] [Id. at 2553 n.4](#).

[FN103] [Id.](#) (emphasis added).

[FN104] [Id.](#) at 2554.

[FN105] [Id.](#) at 2563-64 (Stevens, J., concurring in the judgment); see also [id.](#) at 2567 (stating that First Amendment protection is "at its zenith" for "expression of editorial opinion on matters of public importance").

[FN106] See [id.](#) at 2554, 2555 n.8 (White, J., concurring in the judgment) (accusing the majority of placing fighting words "on at least equal constitutional footing with political discourse"); [id.](#) at 2564-65 (Stevens, J., concurring in the judgment) (making a similar accusation).

[FN107] See [R.A.V., 112 S. Ct. at 2543-44](#) (giving examples involving speech "critical of the government," voicing "criticism of the city government," and in "opposition to the city government").

[FN108] [Texas v. Johnson, 491 U.S. 397, 414 \(1989\)](#).

[FN109] [R.A.V., 112 S. Ct. at 2568](#) (Stevens, J., concurring in the judgment) (quoting [Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 \(1983\)](#) (Brennan, J., dissenting)).

[FN110] [R.A.V., 112 S. Ct. at 2545](#).

[FN111] [Id. at 2558](#) (White, J., concurring in the judgment).

[FN112] For a more thorough discussion, see Akhil Reed Amar, [The Bill of Rights as a Constitution](#), 100 YALE L.J. 1131, 1149-50, 1150 n.88 (1991).

[FN113] The statute in O'Brien raised similar concerns, of course. But as we saw above at p. 138, that statute had an arguable saving grace that flag desecration laws plainly lack.

[FN114] Of course, it might be said that the Confederate flag need not imply intolerable disrespect or un-Americanism - it is part of the American tradition, a symbol of the "rebel" in each of us. But then, from one perspective, so is flag burning. For a more skeptical view of the meaning of Confederate flags, see James Forman, Jr., Note, [Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols](#), 101 YALE L.J. 505 (1991). For the record, I share Forman's skepticism.

[FN115] "[T]he First Amendment protects offensive speech ...." [R.A.V.](#), 112 S. Ct. at 2560 n.13 (White, J., concurring in the judgment) (citing [Texas v. Johnson](#), 491 U.S. 397, 414 (1989)); see also [Rosenfeld v. New Jersey](#), 408 U.S. 901, 901-02 (1972) (vacating and remanding a conviction based on the use of the words "mother fucking" at a public-school board meeting).

[FN116] [R.A.V.](#), 112 S. Ct. at 2547 (emphasis added).

[FN117] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (first emphasis added).

[FN118] [Texas v. Johnson](#), 491 U.S. 397, 422, 435 (1989) (Rehnquist, C.J., dissenting) (arguing that the flag occupies a "unique position" and is not "just another symbol"); [id. at 436](#) (Stevens, J., dissenting) (contending that the question of flag desecration is "unique"; its "intangible dimension" makes other cases involving symbols "not necessarily controlling").

[FN119] [Johnson](#), 491 U.S. at 414, 417-18.

[FN120] [Id. at 417](#).

[FN121] For a very similar analysis, see Michelman, cited above in note 68, at 1343-44.

[FN122] See Michelman, *supra* note 68, at 1344.

[FN123] Arguments like: words are different from symbols; destruction of symbols is akin to destruction of real property; property trumps democratic discourse; and no witch hunt or viewpoint suppression was afoot. See *supra* section I.A.

[FN124] See [R.A.V., 112 S. Ct. at 2549-50.](#)

[FN125] See [id. at 2556](#) (White, J., concurring in the judgment); [id. at 2565](#) (Stevens, J., concurring in the judgment); [id. at 2560-61](#) (Blackmun, J., concurring in the judgment); see also [id. at 2553 n.3](#) (White, J., concurring in the judgment) (attacking the "assortment of exceptions" proposed by the Court to qualify its general formulations).

[FN126] [Texas v. Johnson, 491 U.S. 397, 417 \(1989\).](#)

[FN127] There are only two differences: First, Justices Souter and Thomas were in the R.A.V. majority, "replacing" their predecessors, Justices Brennan and Marshall, who were in the Johnson majority - a welcome and, one hopes, auspicious First Amendment development. Justice Souter's votes and opinions last Term evince an especially strong commitment to First Amendment freedoms. See [International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2715-27 \(1992\)](#) (Souter, J., concurring in part and dissenting in part); [Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 \(1992\)](#); [Burson v. Freeman, 112 S. Ct. 1846 \(1992\)](#); [Norman v. Reed, 112 S. Ct. 698 \(1992\)](#). Second, the Chief Justice and Justice Blackmun have traded places. Even before R.A.V., the Chief Justice may have estopped himself from repudiating Johnson in his opinion for the Court in [Dawson v. Delaware, 112 S. Ct. 1093 \(1992\)](#), in which he pointedly relied on Johnson to uphold the First Amendment rights of a member of a white supremacy prison gang. See [id. at 1098](#).

The similarity between the Johnson and R.A.V. line ups and the uniqueness of the R.A.V. breakdown should give pause to those who might be tempted to see the case as merely a political triumph of "conservatives" over "liberals." Yet there may be something to this intuition, if more precisely reformulated. See *infra* pp. 147-48.

[FN128] This acceptance stands in marked contrast to the 1990 Eichman case, discussed above at p. 124, in which three of the four members of the R.A.V. minority (Justices White, Stevens, and O'Connor) pointedly refused to accept Johnson as a settled precedent.

[FN129] [R.A.V., 112 S. Ct. at 2543.](#)

[FN130] See, e.g., [Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3002 \(1990\)](#) (upholding a race-conscious affirmative action plan in an opinion joined by Justices White, Blackmun, and Stevens).

[FN131] [R.A.V., 112 S. Ct. at 2557](#) (White, J., concurring in the judgment).

[FN132] [Id. at 2560-61](#) (Blackmun, J., concurring in the judgment).

[FN133] See [R.A.V., 112 S. Ct. at 2544-45](#); supra note 107 and accompanying text.

[FN134] See [R.A.V., 112 S. Ct. at 2552-53](#) (White, J., concurring in the judgment).

[FN135] [Id. at 2553.](#)

[FN136] Recall here Justice White's claim that the Court was bound by the parties' narrow framing of the issues in the case. See supra note 38 and accompanying text.

[FN137] See [R.A.V., 112 S. Ct. at 2546](#) (employing the examples of gender roles in advertising and sex discrimination in employment); [id. at 2548](#) (discussing the example of religion-based invective). Justice White's only explicit discussion of a nonracial issue came in response to Justice Scalia's sex discrimination discussion. See [id. at 2557-58](#) (White, J., concurring in the judgment).

[FN138] [Id. at 2557](#) (White, J., concurring in the judgment).

[FN139] See [R.A.V., 112 S. Ct. at 2547](#) ("[O]dious racial epithets, for example[,] would be prohibited to proponents of all views."); [id. at 2546](#) (presenting a hypothetical involving the disparaging portrayal of men). The only hints of asymmetry in Justice Scalia's opinion occur in passages quoting or paraphrasing St. Paul's brief. See [id. at 2548-49.](#)

[FN140] ST. PAUL, MINN. LEGIS. CODE §§ 292.01-.03 (1990).

[FN141] See *id.*

[FN142] [R.A.V., 112 S. Ct. at 2549.](#)

[FN143] [Id. at 2556-57](#) (White, J., concurring in the judgment) (citation omitted) (alterations in the original).

[FN144] See [R.A.V., 112 S. Ct. at 2541 n.1.](#)

[FN145] [Id. at 2557](#) (White, J., concurring in the judgment).

[FN146] [R.A.V., 112 S. Ct. at 2548.](#)

[FN147] [Id. at 2571](#) (Stevens, J., concurring in the judgment).

[FN148] Although generally tracking Justice Scalia in noting gender and religion as well as race, see [id. at 2565, 2570-71](#), Justice Stevens, like Justices White and Blackmun, seemed especially concerned about race. See [id. at 2562 n.1](#) (discussing a "race riot"); [id. at 2570 n.9](#) (moving from a quotation of "race, color, creed, religion [and] gender" language of the ordinance to a specific discussion of "race" and "race-based" threats and "the recent social unrest in the Nation's cities" (emphasis added)).

[FN149] [Id. at 2561](#) (Blackmun, J., concurring in the judgment) (emphasis added).

[FN150] It is often easier to change one's religion than to change one's race. To attack someone on the basis of his religion is usually to attack what he believes; to attack him on the basis of his race is often to attack who he is. And some religions, born in schism, are in large part defined by a rejection of another religion. To be an adherent of religion A is almost necessarily to be anti-religion B, in a way that is less true for races A and B. What's more, some religious speech, even if seemingly vicious and angry, may be rooted in sincere effort to convert and save those whom one believes to be damned. Perhaps these factors counsel greater tolerance of religious venom than racial venom, especially in light of the fact that the Free Exercise Clause may add more protection to religious speech than that furnished by the Free Speech and Free Press Clauses standing alone.

Of course, if different standards applied to religious and racial venom, difficult characterization issues would arise. Many anti-Semitic remarks, for example, might be seen as expressing ethnic hatred of the Jewish people, including those persons who might describe themselves as Jews by birth, regardless of

their personal religious beliefs. For additional discussion of whether gender-based and religion-based hate speech should be treated similarly to racial hate speech, see the thoughtful essay by Toni M. Massaro, [Equality and Freedom of Expression: The Hate Speech Dilemma](#), 32 WM. & MARY L. REV. 211, 244-45, 255-56 (1991).

[FN151] See [U.S. CONST. amend. I](#).

[FN152] See [U.S. CONST. amend. XIV](#). For a discussion of how some antebellum lawyers could nevertheless interpret the text of the First Amendment as declaratory of principles binding states, see Akhil Reed Amar, [The Bill of Rights and the Fourteenth Amendment](#), 101 YALE L.J. 1193, 1203-17, 1273-74 (1992). And for a very brief discussion of other theories invalidating state censorship prior to the Fourteenth Amendment, see *id.* at 1214-15.

[FN153] See Amar, *supra* note 152, at 1218-38, 1272-82.

[FN154] [U.S. CONST. amend. I](#) (emphasis added).

[FN155] [U.S. CONST. amend. XIV, § 1](#) (emphasis added). To be sure, it is embarrassing for the textualist to acknowledge that the Supreme Court's correct decision to "incorporate" the First and other Amendments against states has been incorrectly based on the Due Process Clause of the Fourteenth Amendment rather than its Privileges or Immunities Clause, and that the incorporation process did not begin in earnest until the 1920s.

[FN156] See [Texas v. Johnson](#), 491 U.S. 397, 403 (1989); *id.* at 429 (Rehnquist, C.J., dissenting); *id.* at 436 (Stevens, J., dissenting).

[FN157] Indeed, the very vigor with which the Supreme Court now enforces the First Amendment - and much of the rest of the Bill of Rights - against Congress is largely due to the incorporation of the Bill of Rights against states. Early critics of incorporation feared it would tempt judges to water down the Bill's commands; but in fact the result has generally been the opposite. The Supreme Court has built up "First Amendment" principles in case after case involving state law and has then been able to draw upon those principles in the relatively few cases that do indeed involve federal action. For example, the first Supreme Court invalidation of a federal law on First Amendment grounds did not occur until 1965 in [Lamont v. Postmaster General](#), 381 U.S. 301 (1965) - forty years after the Court first began to develop a coherent "First Amendment" case law based on state government censorship, case law on which Lamont's holding explicitly rests. See *id.* at 306. Or to take an example even closer to home, *Texas v. Johnson* enabled the Court to articulate "First Amendment" principles that could then be applied against

a federal flag burning statute the following year. See [United States v. Eichman, 496 U.S. 310, 315 \(1990\)](#).

I shall explore this theme in greater detail in my forthcoming book, tentatively entitled, *The Creation and Reconstruction of the Bill of Rights*.

[FN158] See Amar, *supra* note 112, at 1147-52.

[FN159] See Amar, *supra* note 152, at 1272-84.

[FN160] [17 U.S. \(4 Wheat\) 316 \(1819\)](#).

[FN161] The distinction sketched out here - between government self-dealing and majority tyranny - builds on James Madison's Federalist No. 51, and is developed in greater detail in Amar, cited above in note 112, at 1132-33, 1137- 52. In *R.A.V.*, Justice Scalia's language shifts imperceptibly from examples involving government self-dealing to an anti-orthodoxy test that protects minorities from majority intolerance. See [R.A.V., 112 S. Ct. at 2543-45](#).

[FN162] For a forceful argument that racial and other minorities are disproportionately likely to be targets of prosecution under formally symmetric hate speech ordinances, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, [1990 DUKE L.J. 484, 512, 520, 555-58](#).

[FN163] See [R.A.V., 112 S. Ct. at 2542](#).

[FN164] For historical background on the gag rule, see HYMAN & WIECEK, cited above in note 82, at 118-19; and Stephen A. Higginson, Note, [A Short History of the Right to Petition Government for the Redress of Grievances, 96 YALE L.J. 142, 158-66 \(1986\)](#).

[FN165] See [New York Times Co. v. Sullivan, 376 U.S. 254, 256-58 \(1964\)](#). For a more complete discussion of this point, see Amar, cited above in note 152, at 1277-81.

[FN166] HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

[FN167] For an example of symmetry in operation, see [State v. Mitchell, 485 N.W.2d 807 \(Wis. 1992\)](#), in which the court struck down a hate-crime penalty enhancer that was used against a black man who

assaulted a white man. See [id. at 809](#).

[FN168] The [Civil Rights Cases, 109 U.S. 3, 35-36 \(1883\)](#) (Harlan, J., dissenting).

[FN169] "Congress shall have power to enforce this article by appropriate legislation." [U.S. CONST. amend. XIII, § 2](#).

[FN170] State power is subject, of course, both to legitimate congressional pre-emption and the affirmative restrictions imposed on states by provisions like Article I, § 10, and § 1 of the Fourteenth Amendment.

[FN171] [R.A.V., 112 S. Ct. at 2569](#) (Stevens, J., concurring in the judgment).

[FN172] This assumes, of course, that Justice Stevens was correct in his factual assertion that the cross-burning was directed only at the trapped family.

[FN173] See MEIKLEJOHN, *supra* note 46.

[FN174] "'The term 'nigger' ... hark[s] back to slavery days.'" Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 158 (1982) (quoting [Bradshaw v. Swagerty, 563 P.2d 511, 514 \(Kan. Ct. App. 1977\)](#)); *id.* at 174 (arguing that "[w]ords such as 'nigger' ... are badges of degradation").

[FN175] If taken at face value, the suggestive phrase "badge of servitude" seems naturally to encompass words like "nigger" and symbols like burning crosses. More historical research, however, is needed to trace the usage of this key phrase among abolitionists, freedmen, and Reconstruction Republicans. Perhaps the phrase had some narrow and precise meaning wholly irrelevant to private racist oppression conducted via words and symbols.

[FN176] I have emphasized this theme elsewhere. See Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, [105 HARV. L. REV. 1359, 1359-60, 1365-66, 1368 & n.30](#). But cf. *id.* at 1368 n.30 (noting explicitly the special relevance of race in analyzing the "'badges and incidents' of slavery" that may be legislatively proscribed beyond the self-executing core of § 1 of the Thirteenth Amendment (quoting The [Civil Rights Cases, 109 U.S. 3, 35-36 \(1883\)](#) (Harlan, J., dissenting))).

[FN177] [Dred Scott v. Sandford](#), 60 U.S. (19 How.) 393 (1857).

[FN178] See, e.g., [Jones v. Alfred H. Mayer Co.](#), 392 U.S. 409, 437-44 (1968) (holding that private race-based discrimination may be prohibited as a "'badge[] and incident[]" of slavery" (quoting [The Civil Rights Cases](#), 109 U.S. at 35-36 (Harlan, J., dissenting))).

[FN179] See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866). The relevant texts of the Act of [1866 and of § 1982](#) are as follows: The Act of 1866 states that "citizens of every race and color ... shall have the same right, in every State and Territory in the United States ... to inherit, purchase, lease, sell, hold, and convey real and personal property ... as is enjoyed by white citizens." Id. [Section 1982](#) states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [42 U.S.C. § 1982 \(1988\)](#).

[FN180] The argument does suggest, however, that doctrinal rules implementing the Fourteenth Amendment's basic principles must be sensitively crafted in light of Thirteenth Amendment principles. Neither Amendment "trumps" the other; rather they must be synthesized into a coherent doctrinal whole.

[FN181] See [Jones](#), 392 U.S. at 437-44. As Jones reminds us, the key constitutional provision is [§ 2](#) of the Thirteenth Amendment, which focuses on legislative implementation of an anti-slavery ethos. For a more recent reminder, see [United States v. Lee](#), 935 F.2d 952 (8th Cir.), vacated in part, reh'g en banc granted in part, 1991 U.S. App. LEXIS 19740 (Aug. 14, 1991), in which the court upheld as constitutional under the First Amendment an act passed as "an exercise of the power of Congress to enforce the Thirteenth Amendment by and through legislation." [Id. at 955](#).

The anti-hate-speech academic literature has instead tended to stress the Equal Protection Clause of the Fourteenth Amendment. But cf. Richard Delgado, [Campus Antiracism Rules: Constitutional Narratives in Collision](#), 85 NW. U. L. REV. 343, 346, 381 n.321, 384 (1991) (discussing both the Thirteenth and Fourteenth Amendments). Although obviously relevant when public universities are concerned - and much of the hate speech debate has been fought out on that ground - the Equal Protection Clause creates monumental state action hurdles that a Thirteenth Amendment approach avoids. The Thirteenth Amendment has an additional advantage for those who favor an asymmetric approach to hate speech. Whereas the abstract language of equality can easily be assimilated into doctrine stressing formal symmetry, the Thirteenth Amendment differs in subtle ways. Its evocative words conjure up vivid images of asymmetric social, political, and economic power - images of masters and slaves, images more congenial to openly asymmetric attempts to right past imbalances. See *infra* pp. 159-60.

[FN182] See [R.A.V.](#), 112 S. Ct. at 2546. Indeed, the facts of R.A.V. seem close to the core of [§ 1982](#)'s concerns: the cross burning occurred less than three months after the targeted black family had moved

into a predominantly white neighborhood. See Terry, *supra* note 18, at A16.

[FN183] The premise of the analysis here - that mere refusal to deal on the basis of race can legitimately be treated as a "badge" of servitude, see *supra* note 178 - can be questioned. See, e.g., EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 70-78 (1990). The Court, however, is unlikely to reverse [Jones v. Alfred Mayer Co., 392 U.S. 409 \(1968\)](#), which embraces this premise. In any event, the kind of intentional racial harassment at issue in R.A.V. seems much closer to the core of the slave system. That this relic of slavery occurs through words and symbols is not the end of the inquiry: extortion also occurs through words. The word "nigger" hurled face-to-face at a captive target is usually not meant to persuade - it is often meant to dominate and degrade. Arguably it is a flaunting of power - "I can do this and get away with it" - as were many verbal epithets uttered by masters to degrade antebellum slaves. Black victims of such epithets may lack symmetric power - for there may be no analogous badges of servitude against whites, no words weighted with the history and stigma associated with slave degradation. And by hypothesis, there is no place for the target to escape or avert her eyes - where was the black family in R.A.V. to go? "Intentional trapping," as I am using the term, occurs precisely when the degradation is unwanted and unavoidable.

On captivity, see [Frisby v. Schultz, 487 U.S. 474 \(1988\)](#), which states that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485. On harassment, see [Boos v. Barry, 485 U.S. 312 \(1988\)](#), which comments favorably on a law that "only prohibits activity undertaken to 'intimidate, coerce, threaten, or harass.'" *Id.* at 326. On unwanted insults, see Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, [42 RUTGERS L. REV. 287 \(1990\)](#), which notes that "[r]emarks whose dominant object is to hurt and humiliate, not to assert facts or values, have very limited expressive value.... [P]enalties are proper when ... someone has initiated contact with a person just to harass him or her ...." *Id.* at 298.

[FN184] [R.A.V., 112 S. Ct. at 2547](#). Various statements of St. Paul officials apparently worried the Court. See [id.](#) at 2548-49.

[FN185] The connection lapsed in part because, early on in American slavery, the master class proved unwilling to emancipate slaves who converted to Christianity. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION* 16-17, 19, 156 (1956).

[FN186] See Massaro, *supra* note 150, at 242 (discussing the problems raised by making criminal or civil liability "hinge on the race of the speaker and the victim").

[FN187] How might St. Paul have drafted a sharper and more defensible ordinance? Here are a few tentative suggestions:

1. State explicitly that the ordinance is designed to implement the Thirteenth Amendment by eliminating various badges and incidents of slavery and caste-based subordination.

2. Limit the ordinance to intentional harassment of a captive and unwilling audience that either: (A) threatens unlawful violence directed at the captive, or (B) tries to affix a badge of slavery on the captive. A "captive" audience in this context connotes one who cannot easily avert her eyes or ears to avoid the harassing message targeted at her.

3. Define "badge of slavery": (A) narrowly to include only racial subordination, or (B) more broadly to include gender subordination as well.

(A) is easier to fit into standard Thirteenth Amendment doctrine; but (B) may broaden the political coalition necessary to secure the ordinance's passage. If (A), the ordinance may define "badge of slavery" to include words, pictures, symbols, and the like, targeted at captive members of historic racial outgroups, such as African-Americans, designed to degrade and dehumanize them, or suggest their untouchability, on the basis of their group membership. If (B), the ordinance would need to be broader, encompassing badges designed to degrade, dehumanize, and subjugate based on the captive's membership from birth in an historically subordinated racial or gender group that harasser seeks to convert into an untouchable and degraded caste. The ordinance should specify that a history of legally imposed disabilities shall be highly probative of the existence of an "historic racial outgroup" under (A) or "an historically subordinated racial or gender group" under (B).

4. Make explicit that if a harasser is mistaken about the captive's actual racial or gender identity, this mistake of fact shall constitute no defense. This helps solve the problem noted above at p. 159.

5. Make clear that speech that does not involve an unwilling captive audience, especially if part of political discourse, is absolutely protected against both public censors and private hecklers threatening violence towards speakers, and that government will intervene to protect offensive speech against private intimidation.

[FN188] This was a leading theme of Justice Marshall's widely noted speech on the 1987 Bicentennial of the un-Reconstructed Constitution. See Thurgood Marshall, [Reflections on the Bicentennial of the United States Constitution](#), 101 HARV. L. REV. 1 (1987).

No doubt the Justice would have used his extraordinary storytelling powers to teach his lesson. For an elegant and moving account of Marshall as storyteller, see Sandra Day O'Connor, [Thurgood Marshall: The Influence of A Raconteur](#), 44 STAN. L. REV. 1217 (1992).

The power and passion of storytelling were largely absent from the R.A.V. opinions. Beyond a couple of sympathetic sentences from Justices Blackmun and Stevens, no one told the tale of Russ and Laura Jones, the black couple who had moved with their children to East St. Paul to escape the drugs and crime of the inner city. See Terry, *supra* note 18, at A16. Perhaps the failure was due to the awkward procedural posture of the case, in which no lower court had yet "found" the "facts." But also absent from R.A.V. (except for a stray sentence or two) was the larger tale of slavery and the Klan, of the pain and death linked to burning crosses. The passion of the Johnson dissenters - who brought to life the story of the flag and the genuine pain felt by many patriots watching it dishonored - was largely absent from R.A.V. Why?

[FN189] My hesitation to put words in Justice Marshall's mouth may well reflect my own lingering uncertainty about exactly where to draw the line between the strong antisubordination ethic of the Thirteenth Amendment and the broad freedom for eccentric expression embraced by the Fourteenth.

For one concrete effort to draw such a line, see my proposed ordinance at note 187 above.

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