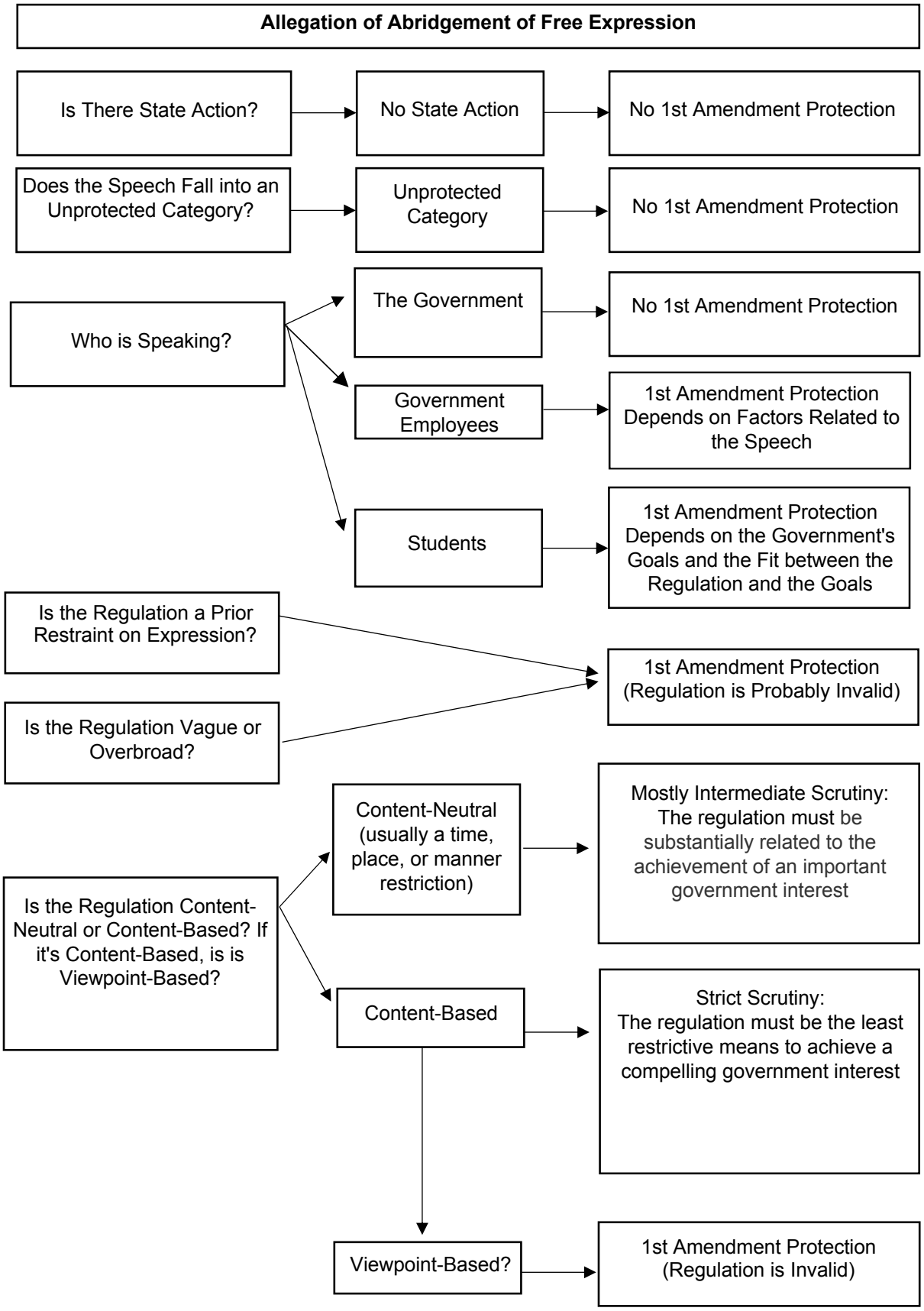
Readings for Tools 2:
Free Expression in the Supreme Court

1 Overview of Free Expression Doctrine

(Please see the next page. Our discussion will follow from the questions on this diagram).


Allegation of Abridgement of Free Expression
Is There State Action?
No State Action
No 1st Amendment Protection
Does the Speech Fall into an Unprotected Category?
Unprotected Category
No 1st Amendment Protection
Who is Speaking?
The Government
No 1st Amendment Protection
Government Employees
1st Amendment Protection Depends on Factors Related to the Speech
Students
1st Amendment Protection Depends on the Government's Goals and the Fit between the Regulation and the Goals
Is the Regulation a Prior Restraint on Expression?
Is the Regulation Vague or Overbroad?
1st Amendment Protection (Regulation is Probably Invalid)
Is the Regulation Content-Neutral or Content-Based? If it's Content-Based, is is Viewpoint-Based?
Content-Neutral (usually a time, place, or manner restriction)
Mostly Intermediate Scrutiny: The regulation must be substantially related to the achievement of an important government interest
Content-Based
Strict Scrutiny: The regulation must be the least restrictive means to achieve a compelling government interest
Viewpoint-Based?
1st Amendment Protection (Regulation is Invalid)

2 Allegation of Abridgment of Free Expression: What is Speech?

We'll cover basic human communication, expressive conduct, associating with others, and the right not to speak (compelled speech). For the right not to speak, please read the narrative and excerpt below.

2.1 The Right Not to Speak (Compelled Speech)

The most common First Amendment speech case alleges that the government has unconstitutionally prohibited, regulated, or punished expression—such as imposing criminal penalties for burning a flag or forcing a club to "associate" with particular people. But the government may also attempt to regulate expression in the opposite way—by *requiring* us to speak or write. For example, we may be ordered to appear as witnesses before courts, grand juries, or legislative investigating committees. We may be required to take oaths when we become citizens, provide court testimony, or assume public office. Americans generally consider these regulations to be reasonable requirements relevant to legitimate government functions. But what if individuals do not want to comply with a regulation that requires the expression of ideas with which they disagree? Other than the Fifth Amendment's protection against compelled self-incrimination, is there any restraint on the government's authority to *compel* expression? To put it another way, does the First Amendment's guarantee of freedom of speech carry with it the freedom *not* to speak?

To begin to develop answers, consider the 1940 case of *Minersville School District v. Gobitis.* The upheld flag salute regulations against claims that the school system was violating the children's right to free exercise of religion. Just three years later, in *West Virginia State Board of Education v. Barnette,* the Court again considered a challenge to the constitutionality of the compulsory flag salute laws brought by Jehovah's Witnesses.

By this time, however, conditions had changed. First, public opinion, so feverishly patriotic at the beginning of World War II, had calmed somewhat following a series of important American military victories. As a consequence, public pressure on the

government to impose mandatory expressions of patriotism had moderated. Second, the Court had undergone some personnel changes that strengthened its civil libertarian wing. Third, the *Gobitis* decision had been roundly criticized in legal circles. These circumstances encouraged the Witnesses to be more optimistic about their chances of winning.

One additional, equally crucial factor distinguished *Barnette* from *Gobitis*. Lawyers for the Witnesses decided to base the attack primarily on the freedom of speech rather than on religious liberty. As a consequence, the case clearly addresses the right not to speak.

West Virginia State Board of Education v. Barnette

319 U.S. 624 (1943)

http://caselaw.findlaw.com/us-supreme-court/319/624.html

Vote: 6 (Black, Douglas, Jackson, Murphy, Rutledge, Stone)

3 (Frankfurter, Reed, Roberts)

OPINION OF THE COURT: *Jackson*

CONCURRING OPINIONS: *Black and Douglas* (joint), *Murphy*

DISSENTING OPINION: *Frankfurter*

FACTS:

Following the *Gobitis* decision, the West Virginia legislature amended its laws to require that all public schools teach courses to increase students' knowledge of the American system of government and to foster patriotism. In support of this policy, the state board of education required that the American flag be saluted and the Pledge of Allegiance recited each day. Students who refused to participate could be charged with insubordination and expelled. Not attending school because of such an expulsion was grounds for a child to be declared delinquent. Parents of delinquent children were subject to fines and jail penalties of up to thirty days. In some cases, officials threatened noncomplying students with reform school.

The Jehovah's Witnesses challenged these regulations in the name of the Barnette family, church members who had been harassed by the school system for failure to participate in the flag salute ritual. One of the Barnette children had, in fact, been expelled.

Despite the Supreme Court's decision in *Gobitis*, a three-judge district court sympathized with the Barnette family's plight. According to well-respected circuit court judge John J. Parker: "The salute to the United States' flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it is petty tyranny unworthy of the spirit of the Republic, and forbidden, we think, by the United States Constitution." After the decision, the West Virginia School Board appealed to the U.S. Supreme Court.

MR. JUSTICE JACKSON DELIVERED THE OPINION OF THE COURT.

Here . . . we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their following to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the

meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg v. California* [1931]. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . [H]ere the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . .

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious

beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power. . . .

. . . [At] the very heart of the *Gobitis* opinion [is the reasoning] that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence [the Court] reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the

Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversity that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Affirmed.

MR. JUSTICE FRANKFURTER, DISSENTING.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. [*Editor's Note:* Justice Frankfurter was Jewish.] Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. . . . [I]t would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

In striking down the West Virginia compulsory flag salute law, the Court ruled that the individual has at least a qualified right to be free of government coercion to express views he or she disavows. This decision does not go so far as to hold that an individual's First Amendment right can be used to avoid obligations such as testifying in a court, but it precludes certain forms of compelled expression.

3 Is the Government Regulating Speech?

No readings.

4 Does the Speech Fall into an Unprotected Category?

We'll discuss incitement of (1) incitement of illegal activity, (2) true threats, (3) hostile audience/fighting words, (4) captive audience, and (5) discriminatory harassment.

4.1 Incitement of Illegal Activity

In *Brandenburg v. Ohio* (1969), the justices articulated the Court's current standard for judging speech that advocates illegal behavior.

Brandenburg v. Ohio

395 U.S. 444 (1969)

https://caselaw.findlaw.com/us-supreme-court/395/444.html

Oral arguments are available at https://www.oyez.org/cases/1968/492.

Vote: 8 (Black, Brennan, Douglas, Harland, Marshall, Stewart, Warren, White) 0

PER CURIAM OPINION

CONCURRING OPINIONS: *Black, Douglas*

FACTS:

Clarence Brandenburg, the leader of an Ohio affiliate of the Ku Klux Klan, sought to obtain publicity for the group's goals by inviting a television reporter and camera crew to attend a rally held on a farm, just outside of Cincinnati. Local and national television stations later aired some of the footage from the rally, which showed at least a dozen hooded Klansmen gathered around a burning cross. Some were carrying firearms. Brandenburg delivered a speech to the group in which he said, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have

to be some revengeance taken." He also said, "Personally I believe the [n-word] should be returned to Africa, the Jew returned to Israel." Based on these films, Ohio authorities arrested Brandenburg for violating Ohio's criminal syndicalism law, which was passed in 1919 to prevent the spread of unpatriotic views. The Ohio act prohibited the advocacy of unlawful means of political reform. After his conviction was upheld by the state supreme court, Brandenburg appealed to the U.S. Supreme Court, arguing that the First Amendment protected his expression.Note that the justices issued a per curiam opinion but, apparently, it did not start out that way. Justice Abe Fortas wrote the original draft. The justices changed it to a per curiam, with some revisions by Justice William J. Brennan Jr., because Fortas had resigned from the Court before *Brandenburg* was issued.

PER CURIAM

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." . . .

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California* (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to

incite or produce such action. As we said in *Noto v. United States* (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

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

Reversed.

Note that the test the Court adopted in *Brandenburg* has two important elements, both of which must be satisfied in order to punish speech that advocates the "use of force or of a law violation": the advocacy must be "directed to inciting or producing imminent lawless action" and it is "likely to incite or produce such action."

The *Brandenburg* approach seems to offer a great deal of protection under the First Amendment—making it harder for the government to suppress unpopular ideas. In *Brandenburg,* the Court declared that not even a probable harm—a "danger" of "substantive evil"—was enough; the harm would actually have to occur (or be at the point of occurring). But room for interpretation exists nonetheless. For example, would the Court have reached a different decision had Brandenburg added the word *NOW* to his speech, as in: "it's possible that there might have to be some revengeance NOW." Would that be advocacy aimed at producing *imminent* lawless action?

4.2 True Threats

No readings.

4.3 Hostile Audience/Fighting Words

4.3.1 Hostile Audience

No readings for hostile audience.

4.3.2 Fighting Words

The fighting words doctrine tends to relate to direct personal insults—speech that is so inflammatory that it provokes a violent response from the listener. To the Court, as you will see in *Chaplinsky v. New Hampshire* (1942), such expression is not really speech at all. It does not involve a genuine discussion of ideas; it is instead a kind of verbal assault on another person that inflicts an injury. Do you find this logic persuasive? Also consider the Court's definition of fighting words. Does it strike a reasonable balance between protecting too much and too little speech?

Chaplinsky v. New Hampshire

315 U.S. 568 (1942)

http://caselaw.findlaw.com/us-supreme-court/315/568.html

Vote: 9 (Black, Byrnes, Douglas, Frankfurter, Jackson, Murphy, Reed, Roberts, Stone)

0

OPINION OF THE COURT: *Murphy*

FACTS:

On April 6, 1940, Jehovah's Witnesses member Walter Chaplinsky was selling religious pamphlets and literature, including *Watchtower* and *Consolation,* on a public street in New Hampshire. While he was announcing the sale of his pamphlets, a crowd of about fifty people began to gather. Several took offense at Chaplinsky's comments about organized religion and "racketeer" priests and complained to the city marshal. The marshal warned Chaplinsky that the people were getting into an ugly mood, but Chaplinsky continued to express his religious views and distribute his literature. After one person tried to attack Chaplinsky, the marshal and three of his men intervened and forcibly began to take Chaplinsky to city hall. When a very agitated Chaplinsky demanded to know why they had arrested him and not those in the crowd, one of the officers replied, "Shut up, you damn bastard," and Chaplinsky in turn called the officer a "damned fascist" and "a God damned racketeer." For those words, the state charged him with breaking a law prohibiting the use of "any offensive, derisive, or annoying word to any other person who is lawfully in the street." Chaplinsky was convicted and received a fine. He appealed.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes

of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. . . .

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

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . .

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

Affirmed.

Written by the usually very liberal Justice Murphy, the majority opinion affirmed Chaplinsky's conviction, holding the government may prohibit fighting words, defined as words "which by their very utterance inflict injury or tend to incite an immediate breach of peace." Although this definition of "fighting words" may seem clear, the word "injury" could be interpreted to include not just physical injury but also emotional or psychological harm. If so, the fighting words doctrine, commentators suggest, could be used to suppress all kinds of speech. The mere expression of unpopular or offensive ideas, even if they do not provoke an immediate violent reaction, could be restricted under such a broad definition of injury.

Perhaps not so surprisingly, then, the Court revisited fighting words doctrine in *Cohen v. California* (1971). How did the justices clarify *Chaplinsky*'s definition?

Cohen v. California

403 U.S. 15 (1971)

http://caselaw.findlaw.com/us-supreme-court/403/15.html

Oral arguments are available at https://www.oyez.org/cases/1970/299.

Vote: 5 (Brennan, Douglas, Harlan, Marshall, Stewart)

4 (Black, Blackmun, Burger, White)

OPINION OF THE COURT: *Harlan*

DISSENTING OPINION: *Blackmun*

FACTS:

In April 1968, at the height of the protests against the Vietnam War, Paul Robert Cohen visited some friends in Los Angeles, his hometown. While they were discussing their opposition to the war, someone scrawled on Cohen's jacket the words "Fuck the Draft" and "Stop the War." The following morning, Cohen wore his jacket in the corridors of a Los Angeles County courthouse where men, women, and children were present, knowing it bore these messages.

Although Cohen took off the jacket before entering the courtroom, a police sergeant had observed it in the corridor. The officer asked the judge to cite Cohen for contempt of court. The judge refused, but the officer arrested Cohen, charging him with "willfully and unlawfully and maliciously disturbing the peace and quiet by engaging in tumultuous and offensive conduct."

Given the nature of Cohen's alleged offense, this case could have ended where it started, in a California trial court. No violence occurred, nor were large groups of people or spectators involved. But that was not to be. By the time of Cohen's trial in September, his cause had attracted the attention of the American Civil Liberties Union (ACLU). Its Southern California affiliate decided that Cohen's case presented a significant issue—that the message on his jacket represented a form of protected expression—and it offered to finance Cohen's case.

Affirming Cohen's municipal court conviction, the California Court of Appeal found that it was "reasonably foreseeable that such conduct might cause others to rise up to commit a violent act." The California Supreme Court declined to review that decision, but Cohen's ACLU lawyers successfully petitioned the U.S. Supreme Court to consider the First Amendment issues at stake.

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State

sought to punish is the fact of communication. . . . Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First . . . Amendment never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place . . . this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the

Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Feiner v. New York* (1951); *Terminiello v. Chicago* (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority

would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression." We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There

may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. . . .

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First . . . Amendment, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

4.4 Captive Audience

(see *Cohen v. California* above)

4.5 Discriminatory Harassment

(no readings)

5 Who is Speaking?

We'll consider the Government, Government Employees, Students.

5.1 The Government

(no readings)

5.2 Government Employees

(no readings)

5.3 Students

Considerable controversy has arisen over freedom of speech in the public schools. Do the schools constitute a special setting that permits an elevated degree of speech regulation? Do pre-college students have the same expression rights as adult

speakers? The debate over these questions began with *Tinker v. Des Moines Independent Community School District* in 1969.

Tinker v. Des Moines Independent Community School District

393 U.S. 503 (1969)

http://caselaw.findlaw.com/us-supreme-court/393/503.html

Oral arguments are available at https://www.oyez.org/cases/1968/21.

Vote: 7 (Brennan, Douglas, Fortas, Marshall, Stewart, Warren, White)

2 (Black, Harlan)

OPINION OF THE COURT: *Fortas*

CONCURRING OPINIONS: *Stewart, White*

DISSENTING OPINIONS: *Black, Harlan*

FACTS:

In December 1965 a group of adults and secondary school students in Des Moines, Iowa, devised two strategies to demonstrate their opposition to the Vietnam War: they would fast on December 16 and New Year's Day and would wear black armbands every day in between. Principals of the students' schools learned of the plan and feared the demonstration would be disruptive. As a consequence, they announced that students wearing the armbands to school would be suspended. Of the eighteen thousand children in the school district, all but five complied with the policy. Among those five were John Tinker, Mary Beth Tinker, and Christopher Eckhardt, whose parents allowed them to wear black armbands to school. The three students had a history of participating in other civil rights and antiwar protests. All three were suspended. ACLU attorneys represented the students in their appeal to the Supreme Court.

MR. JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska* (1923), this Court held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent

In *West Virginia State Board of Education v. Barnette*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. . . .

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students

made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises. . . .

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. . . .

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

Reversed and remanded.

Justice Abe Fortas's majority opinion is a strong endorsement of constitutional protection for expression that takes place in the classroom. Teachers and students, he declared, do not shed their constitutional rights at the schoolhouse gate. As long as the speech does not disrupt the educational process, government has no authority to proscribe it.

6 Is the Regulation a Prior Restraint on Expression?

P*rior restraint* occurs when the government reviews material to determine whether its publication/expression will be permitted. As a form of government censorship, prior restraint is antithetical to a free press/free expression. As Justice Lewis F. Powell Jr. explained, "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." In other words, the government may punish activity that violates legitimate civil or criminal laws, but such government sanctions may take place only *after* publication/expression, not before.

The principle that prior restraint runs contrary to the Constitution was established in the formative case *Near v. Minnesota* (1931). The justices took a strong stance against censorship, but does their decision imply that the government may never block the publication of material it considers inappropriate or harmful? Are there exceptions to the constitutional prohibition against prior restraint? Consider these questions as you read Chief Justice Charles Evans Hughes's opinion in *Near*.

(Note to students: The material that follows focuses on freedom of the press but it also applies to speech.)

Near v. Minnesota

283 U.S. 697 (1931)

http://caselaw.findlaw.com/us-supreme-court/283/697.html

Vote: 5 (Brandeis, Holmes, Hughes, Roberts, Stone)

4 (Butler, McReynolds, Sutherland, Van Devanter)

OPINION OF THE COURT: *Hughes*

DISSENTING OPINION: *Butler*

FACTS:

A 1925 Minnesota law provided for "the abatement, as a public nuisance, of a 'malicious, scandalous, and defamatory newspaper, magazine, or other periodical.'" In the fall of 1927, Floyd B. Nelson, a county attorney, asked a state judge to issue a restraining order banning publication of the *Saturday Press*. In the attorney's view, the newspaper, partly owned by Jay Near, was the epitome of a malicious, scandalous, and defamatory publication. The *Saturday Press* committed itself to exposing corruption, bribery, gambling, and prostitution in Minneapolis, which Near often connected to Jews. The paper attacked specific city officials for being in league with gangsters and chided the established press for refusing to uncover the

corruption. Near's racist, anti-Semitic attitudes colored these attacks. In one issue, Near wrote:

> I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters. . . . It is Jew, Jew, Jew, as long as one cares to comb over the records. I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

Based on the paper's past record, a judge issued a temporary restraining order prohibiting the sale of printed and future editions. Believing that this action violated his rights, Near contacted the American Civil Liberties Union (ACLU), which agreed to take his case. He grew uncomfortable with the organization, however, and instead obtained assistance from the publisher of the *Chicago Tribune*. Together, they challenged the Minnesota law as a violation of the First Amendment freedom of press guarantee, arguing that the law was tantamount to censorship.

MR. CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

[The Minnesota] statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. . . .

. . . The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous

and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. . . .

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." . . .

The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." No one would

question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. . . . These limitations are not applicable here. . . .

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remains open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. . . .

. . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege. . . .

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court . . . and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. . . .

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the

constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . . As was said in *New Yorker Staats-Zeitung v. Nolan,* "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and, if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action . . . , to be an infringement of the liberty of the press. . . .

Judgment reversed.

Chief Justice Hughes's opinion appears to take a definitive position against prior censorship. He wrote, "The statute not only seeks to suppress the offending newspaper . . . but to put the publisher under an effective censorship." But he acknowledged that the protection against "previous restraint is not absolutely unlimited." There may be exceptional circumstances—Hughes cited the protection of vital national security interests as one example—under which government restraint is necessary.

7 Is the Regulation Vague or Overbroad?

(no readings)

8 Is the Regulation Content-Neutral or Content-Based? (If Content-Based is it Viewpoint-Based?)

(no readings)

9 Case Study: Hate Speech

R.A.V. v. City of St. Paul

505 U.S. 377 (1992)

Vote: 9-0

OPINION OF THE COURT: *Scalia*

FACTS:

The city of St. Paul alleged that between 1:00 A.M. and 3:00 A.M. on June 21, 1990, Robert A. Viktora, a seventeen-year-old high school dropout, and several other teenagers "assembled a crudely made cross by taping together broken chair legs" and then burned the cross inside the fenced backyard of a black family that lived across the street from Viktora. (Because Viktora was a minor his full name was not used in the official court reports.) St. Paul could have prosecuted him under several criminal laws—for example, arson, which carries a maximum penalty of five years in prison and a $10,000 fine. Instead, it charged him with violating two laws, including the St. Paul Bias-Motivated Crime Ordinance. This law stated:.

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

Before Viktora's trial, his lawyer asked the judge to dismiss the charge, arguing that the ordinance violated the First Amendment because it was "substantially overbroad and impermissibly content-based." The trial court judge granted the motion, and the city appealed to the Minnesota Supreme Court.

The state supreme court reversed the trial court's decision, holding that the ordinance did not violate freedom of expression guarantees contained in the First Amendment. The court found that the ordinance prohibits conduct equivalent to "fighting words," unprotected expression under the First Amendment. It also ruled

that the ordinance was not impermissibly content based because it was "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."

JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of *Chaplinsky* [*v. New Hampshire,* (1942)]. . . . Assuming, *arguendo,* that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses. . . .

. . . Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example&mdah;would seemingly be

usable *ad libitum* [as one wishes] in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. 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.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content- specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content. . . .

. . . [T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. 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. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone

be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty. . . .

Finally, St. Paul . . . defend[s] the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest." . . . The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

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

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

It is so ordered.

JUSTICE WHITE, WITH WHOM JUSTICE BLACKMUN, JUSTICE O'CONNOR, AND JUSTICE STEVENS JOIN CONCURRING IN THE JUDGMENT.

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

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. . . .

. . [T]his Court has long held certain discrete categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts "fire" in a crowded theater may not claim the protection of the First Amendment. *Schenck v. United States* (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. *New York v. Ferber* (1982); *Miller v. California* (1973); *Roth v. United States*(1957). And the Court has observed that, "[l]eaving aside the special considerations when public officials [and public figures] are the target, a libelous publication is not protected by the Constitution." *Ferber*.

All of these categories are content-based. But the Court has held that the First Amendment does not apply to them, because their expressive content is worthless or of de minimis value to society. . . .

. . . Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: "Such a simplistic, all-or-nothing- at-all approach to First Amendment protection is at odds with common sense, and with our jurisprudence as well." It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.

. . . Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace. . . .

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

Furthermore, the Court obscures the line between speech that could be regulated freely on the basis of content (i.e., the narrow categories of expression falling outside the First Amendment) and that which could be regulated on the basis of content only upon a showing of a compelling state interest (i.e., all remaining expression). By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category. . . .

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