R.A.V. v. ST. PAUL

SUPREME COURT OF THE UNITED STATES
505 U.S. 377
June 22, 1992
[9 - 0]

Please take some degree of hope in knowing that this is the most intellectually challenging case we are likely going to see. Nevertheless, it is an important case – one that you need in your arsenal of knowledge!

OPINION: Justice Scalia...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.

Please refer to the next few sentences and understand that these actions were clearly in violation of **other** laws. Apparently, the City chose to limit their prosecution to **new** laws they wanted to take for a "test drive." Also, did anyone notice? This is a **unanimous** decision!

Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent City of St. Paul chose to charge petitioner (then a juvenile) was the **St. Paul Bias-Motivated Crime Ordinance** which provides:

"Whoever places on public or private property a symbol, object, appellation,

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

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was **substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment**.

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*[1]. Petitioner...urge[s] us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as "substantially overbroad." We find it unnecessary to consider this issue. Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that **the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses**.

The First Amendment generally prevents government from proscribing speech (*Cantwell v. Connecticut*[2]) or even expressive conduct (*Texas v. Johnson*[3]) because of disapproval of the ideas expressed. **Content-based regulations are presumptively invalid**. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a **few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."** *Chaplinsky.* We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See *Roth v. United States*[4] (**obscenity**); *Beauharnais v. Illinois* (**defamation**); *Chaplinsky v. New Hampshire* (**fighting words**). Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech" or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is

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[1]Case 1A-S-8 on this website.

[2]Case 1A-R-3 on this website.

[3]Case 1A-S-37 on this website.

[4]Case 1A-S-10 on this website.

the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. **THUS, THE GOVERNMENT MAY PROSCRIBE LIBEL; BUT IT MAY NOT MAKE THE FURTHER CONTENT DISCRIMINATION OF PROSCRIBING ONLY LIBEL CRITICAL OF THE GOVERNMENT.**

These issues can be very difficult to grasp. Hang on and we will get through this as best we can.

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate them freely." That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that "fighting words" have at most a "*de minimis*" expressive content or that their content is *in all respects* "worthless and undeserving of constitutional protection;" **sometimes they are quite expressive indeed**. We have not said that they constitute "*no* part of the expression of ideas," but only that they constitute "no *essential* part of any exposition of ideas." *Chaplinsky*.

Justice Stevens seeks to avoid the point by dismissing the notion of obscene anti-government speech as "fantastical," apparently believing that any reference to politics prevents a finding of obscenity. Unfortunately for the purveyors of obscenity, that is obviously false. A shockingly hardcore pornographic movie that contains a model sporting a political tattoo can be found, "*taken as a whole*, to lack serious literary, artistic, political, or scientific value." *Miller v. California*. [5] Anyway, it is easy enough to come up with other illustrations of a content-based restriction upon "unprotected speech" that is obviously invalid: the anti-government libel illustration mentioned earlier, for one. And of course the concept of racist fighting words is, unfortunately, anything but a "highly speculative hypothetical."

The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that **nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses** -- so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. Similarly, we have upheld reasonable "time, place, or manner" restrictions, but **only if they are "justified without reference to the content of the regulated speech."** And just as the

[5] Case 1A-S-22 on this website.

power to proscribe particular speech on the basis of a non-content element (*e. g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e. g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "non-speech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech"; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: **THE GOVERNMENT MAY NOT REGULATE USE BASED ON HOSTILITY -- OR FAVORITISM -- TOWARDS THE UNDERLYING MESSAGE EXPRESSED.**

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be "underinclusive" -- a First Amendment "absolutism" whereby "within a particular 'proscribable' category of expression,...a government must either proscribe *all* speech or no speech at all." That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "under-inclusive," it would not discriminate on the basis of content. See *Sable Communications,* upholding obscene *telephone* communications laws.

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

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. **To illustrate:**

Is it me? Yes, please, please provide an illustration.

A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience -- i. e.*, that which involves the most lascivious displays of sexual activity. But it may not

prohibit, for example, only that obscenity which includes offensive *political* messages. And the Federal Government can criminalize only those threats of violence that are directed against the President since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President (*Watts v. United States*[6] - upholding the facial validity of §871 because of the "overwhelming interest in protecting the safety of the Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.") But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice Stevens), a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "*justified* without reference to the content of the...speech." A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

I know this is tough for most of us (or, maybe, just me). But, it is an important case on this topic and we just cannot avoid it because it is difficult. Hang in there!

These bases for distinction refute the proposition that the selectivity of the restriction is "even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

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[6]Case 1A-S-15 on this website.

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "**on the basis of race, color, creed, religion or gender**." **DISPLAYS CONTAINING ABUSIVE INVECTIVE, NO MATTER HOW VICIOUS OR SEVERE, ARE PERMISSIBLE UNLESS THEY ARE ADDRESSED TO ONE OF THE SPECIFIED DISFAVORED TOPICS. THOSE WHO WISH TO USE "FIGHTING WORDS" IN CONNECTION WITH OTHER IDEAS--TO EXPRESS HOSTILITY, FOR EXAMPLE, ON THE BASIS OF POLITICAL AFFILIATION, UNION MEMBERSHIP, OR HOMOSEXUALITY -- ARE NOT COVERED. THE FIRST AMENDMENT DOES NOT PERMIT ST. PAUL TO IMPOSE SPECIAL PROHIBITIONS ON THOSE SPEAKERS WHO EXPRESS VIEWS ON DISFAVORED SUBJECTS.**

Perhaps that helps. Are you still with Justice Scalia?

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 -- would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." **St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.**

My, my, Justice Scalia is truly putting us all to the test. Trivia Alert! The **Marquis of Queensberry Rules** are a code of popularly accepted rules in the sport of boxing. They were named so because the Marquis of Queensberry publicly endorsed the code.

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 "it 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.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice Stevens suggests that this "fundamentally misreads" the ordinance. It is directed, he claims, not to speech of a particular content, but to particular "injuries" that are "qualitatively different" from other injuries. **This is wordplay**. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes...that the ordinance applies only to "racial, religious, or gender-specific symbols" such as "a burning cross, Nazi swastika or other instrumentality of like import." Indeed, St. Paul argued in the Juvenile Court that "the burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate."

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. 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.**

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the "secondary effects" of the speech. According to St. Paul, the ordinance is intended, "not to impact on the right of free expression of the accused," but rather to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against." Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry,* "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." "The emotive impact of speech on its audience is not a 'secondary effect.'"

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

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 existence of adequate content-neutral alternatives thus "undercuts significantly" any defense of such a statute, casting considerable doubt on the government's protestations that "the asserted justification is in fact an accurate description of the purpose and effect of the law." **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. Judgment reversed.

CONCURRENCE: Justice White...[Not provided.]

CONCURRENCE: Justice Blackmun...[Not provided.]

CONCURRENCE: Justice Stevens...[Not provided.]