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Hating Hate Speech: Why Current First Amendment Doctrine Does Not Condemn a Careful Ban

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Hating Hate Speech: Why Current First Amendment
Doctrine Does Not Condemn a Careful Ban

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SAN FRANCISCO

Hating Hate Speech: Why Current First Amendment Doctrine Does Not Condemn a Careful Ban

by RORY K. LITTLE*

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* Joseph W. Cotchett Professor of Law, U.C. Hastings College of the Law. Great thanks to my colleague Professor Setsuo Miyazawa for inviting the remarks on which this Essay is based at the “Hate Speech Laws in Japan in Comparative Perspectives” Symposium held at Hastings in San Francisco on September 22, 2017. Professor Miyazawa both conceived of and organized this wonderful Symposium. Thanks also to the editors of the *Hastings Constitutional Law Quarterly* for their work on the Symposium and valuable editing assistance. Thanks finally for helpful discussions with Matt Coles, Zachary Price, and Reuel Schiller, and legal research assistance from Eve A. Zelinger, UC Hastings ‘19. Errors and misconceptions remain mine.

Introduction

The goal of this Essay is to suggest that the First Amendment (as opposed to strong policy views) does not necessarily condemn a narrowly drawn and carefully administered statute that would ban racial and religious “hate speech.” Many scholars apparently believe the contrary.¹ But a careful parsing of *Virginia v. Black*—a hate speech precedent that critics often misinterpret, discount, or ignore²—demonstrates otherwise. Of course, part of the trick is definitional: To survive Constitutional “strict scrutiny,” any such statute would have to be based narrowly on intent to intimidate, and be carefully administered by prosecutors and courts.

A brief version of this Essay was delivered at a comparative constitutional law symposium held at UC Hastings College of the Law in San Francisco in September 2017. The keynote speaker, Professor Craig Martin of Washburn University in Canada, brought to light a fact that is often ignored in United States hate speech debates: For a quarter century, the United States has been a signatory party to a multinational treaty called the *International Convention for the Elimination of All Forms of Racial Discrimination*.³ As Professor Martin notes,⁴ Article IV of that treaty requires all “State Parties” to, *inter alia*, “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred”⁵ When the United States signed this Convention in 1994, it added a standard proviso (“nothing . . . shall be deemed to require . . . legislation . . . incompatible with the provisions of the Constitution . . .”), and the Senate similarly reserved when it ratified the treaty.⁶ Of course, the Supremacy

1. See, e.g., ERWIN CHERMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS, 82–83 (2017); Michael Dorf, *Hate Speech and Private Disassociation*, DORF ON LAW (Aug. 28, 2017), <http://www.dorfonlaw.org/2017/08/hate-speech-and-private-disassociation.html> (“the constitutionality . . . is unclear, given that as construed by the Supreme Court, the First Amendment protects hate speech”); Eugene Volokh, *No, Gov. Dean, There Is No ‘Hate Speech’ Exception to the First Amendment*, WASH. POST, Apr. 21, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/21/no-gov-dean-there-is-no-hate-speech-exception-to-the-first-amendment>. In the 1980s there was a spate of articles advocating restrictions on hate speech. See CHERMERINSKY & GILLMAN. But since the U.S. Supreme Court decided *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), scholars have generally adopted the unconstitutional view.

2. E.g., CHERMERINSKY & GILLMAN, *supra* note 1; Dorf, *supra*, note 1; Volokh, *supra* note 1.

3. International Convention for the Elimination of All Forms of Racial Discrimination, art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD] (87 other nations have signed this treaty, and 179 nations are “parties” to it).

4. Craig Martin, *Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada*, 45 HASTINGS CONST. L.Q. 455 (2018).

5. ICERD, *supra* note 3, art. IV.

6. ICERD, *supra* note 3.

Clause requires no less. Nevertheless, it is clear that the United States has agreed in this treaty to take actions that might well include a ban on racialized hate speech, if the actions can be accomplished constitutionally.

Compliance with our international treaty obligations is important,⁷ just as is compliance with our Constitution. To the extent that both sources of legal obligation can be lawfully accommodated, they should be.

This Essay proceeds in four parts: a draft statute for critics to shoot at and a discussion of background contextual factors; a demonstration that despite the textual absolutism, First Amendment freedoms have never been absolute; a demonstration that precedent does not condemn a narrow ban on hate speech; and some explanatory notes regarding the draft statute I present.

I. A Draft Hate Speech Statute and Its Contemporary Context

Below, I present some brief background context for this Essay. In addition, law essays that remain safely theoretical, without proposing concrete solutions for critics to shoot at, seem timid and often ineffectual to me. As such, I offer the following statutory language as a starting point—it is repeated later in this essay with some explanatory notes:⁸

A. A Draft Hate Speech Statute

Hate Speech Prohibited:

(a) It shall be unlawful to make any speech at a public gathering or on public media that asserts or is clearly premised on the racial or religious inferiority or hatred of a minority group and is intended to intimidate or injure any individual or members of the targeted group.

(b) An *intent to intimidate* is defined as an intent to create in the targeted individual or group a fear of bodily harm or violence. *Intent to injure* shall include intent to cause others imminently to injure the target(s), as well as intent to cause demonstrable nontrivial harm to a target's physical or psychological wellbeing. The requisite intent shall include willful blindness to reasonably known harms caused by such speech.

7. Indeed, some might argue it is obligatory. See *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (treaties create obligations but may not be binding federal law absent implementing legislation). See Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

8. See *infra* notes 16–17.

B. Background Context

Professor Craig Martin's lead article for this symposium succinctly presents comparative perspectives on "hate speech" statutes from three nation's perspectives: Japan, Canada, and the United States.⁹ Martin usefully opens our eyes to the fact that in 1994, the United States became a signatory to the *International Convention on the Elimination of All Forms of Racial Discrimination* ("ICRED").¹⁰ Safe to say, many Americans are still unfamiliar with this Convention, despite its Senate ratification a quarter of a century ago. If nothing else, this symposium will help spread the word about this valuable worldwide initiative to condemn discrimination and hatred based on race.

As Martin also notes, Japan is "not alone" in confronting pressing contemporary issues of "hate speech" within a national and legal culture that strongly protects freedom of speech. The United States is currently embroiled in similar controversies. The events in Charlottesville, Virginia, of August 2017 are but one data point in a flood of current moments placing the condemnation of hate speech in tension with First Amendment values.¹¹ At the same time, racial equality and nondiscrimination principles are constitutionally enshrined in the Fourteenth Amendment to the U.S. Constitution, an amendment which was itself the product of a battle for racial freedom.¹² We share with Japan and many other nations a common enterprise in seeking, as Martin puts it, "the right balance" between "freedom of expression" and "equality" rights.¹³

My modest goal in this Essay is to inquire whether a carefully defined and administered statute prohibiting racial "hate speech" can be written in harmony with the First Amendment. I attempt to do this without value-laden policy judgments about freedom of speech or racial nondiscrimination. Some First Amendment scholars would surely answer my inquiry "No!" The "absolutist" view, that our Constitution's First Amendment must tolerate

9. Martin, *supra* note 4.

10. See ICRED, *supra* note 3.

11. See Alyxandra N. Vernon, *Letting the Devil Speak: Proposals to Protect the Integrity of the First Amendment While Maintaining Public Safety at Demonstrations* (unpublished student note) (detailing the Charlottesville events); Maggie Astor et al., *A Guide to the Charlottesville Aftermath*, N.Y. TIMES, Aug. 13, 2017, <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html> ("violence erupted" at and after a "white nationalist rally," including the death of one protestor and thirty-four wounded); Benjamin Wallace Wells, *Battle Scars: How Virginia's Past Spurred a Racial Reckoning*, NEW YORKER, Dec. 4, 2017, at 32–37.

12. "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV; see, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

13. Martin, *supra* note 4, at 481.

even the most hateful racist views, has a respectful, albeit relatively recent, pedigree.¹⁴ Indeed, that view has been voiced even as America witnessed vitriolic white supremacist and Nazi-inspired ethnic attacks and violence in Charlottesville in August 2017.¹⁵ I use the word “attacks” advisedly—it was hateful speech and unrestrained freedom of expression that generated the massive and hostile public gatherings in Charlottesville, and a young woman was killed as a direct result.¹⁶ This recent episode, as much as any other, demonstrates the power that vitriolic hate speech can have. Indeed, as noted immediately below, many today view such speech itself as a direct attack on the psyche of minority individuals and groups.

C. The Harms Caused by Hate Speech¹⁷

The injurious effects of racial and religious hate speech¹⁸ have been well explained and documented elsewhere; this Essay does not pretend to rehearse them here.¹⁹ Briefly, hate speech has injurious repercussions well beyond the immediate effect of the words themselves, that is, more than tangible violence that may be immediately engendered. Indeed, violence stemming from hate speech and the detrimental psychological effects that may follow, are intertwined. As one expert researcher writes, “when hate is

14. See generally Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L.J. (forthcoming 2018); ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE* (2007).

15. See sources cited *supra* note 11.

16. Wells, *supra* note 11, at 36. Indeed, a lawsuit has been filed seeking damages for the hateful protests in Charlottesville. See Complaint, *Sines v. Kessler*, No. 3:17-CV-00072-NKM (W.D. Va. Oct. 11, 2017).

17. With apologies for my simplistic overview as opposed to the thoughtful and exhaustive treatment of this topic in JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012). The harms caused by racialized hate speech have also been well laid out by other scholars such as Mari Matsuda, Richard Delgado, and Patricia Williams. See CHEMERINSKY & GILLMAN, *supra* note 1, at 84 (citing sources). For example, “[t]he experience of being called ‘nigger,’ ‘spic,’ ‘Jap,’ or ‘kike’ is like receiving a slap in the face. The injury is instantaneous.” Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 483. See also WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari Matsuda et al. eds. 1993).

18. This Essay and the ICERD focus on racial hate speech. But the injurious effects of Nazi hate speech against Jews leading to World War II, considered in light of the current American resurgence of anti-Muslim speech, also supports (without more, I think) the extension of the ideas in this Essay to religion.

19. See sources cited *supra* note 17.

physically in your brain, then you think hate and feel hate, you are moved to act to carry out what you physically, in your neural system, think and feel.”²⁰

Beyond physical violence, individuals and communities are affected by the injurious and lasting psychological impacts of hate speech. Hate speech can cause its targets to turn to self-harm or suicide, as well as damage their confidence and self-esteem.²¹ Moreover, the harmful mental health repercussions of hate speech are not temporary. As Dr. George Lakoff has recently written, hate speech “changes the brains of those hated for the worse, creating toxic stress, fear and distrust This internal harm can be even more severe than an attack with a fist.”²²

Finally, the harms to minority-group targets living within the larger community ought not be ignored:

When a society is defaced with anti-Semitic signage, burning crosses and defamatory racial leaflets, [a societal] assurance of security “evaporates. A vigilant police force and the Justice Department may still keep people from being attacked or excluded,” but the objects of hate speech are deprived of the assurance that the society regards them as people of equal dignity.²³

Having in mind the idea that hate speech can indeed cause injury, both physical and psychological, to communities as well as to individual targets, the events in Charlottesville and the contemporary resurgence of “white supremacy” and other racial hate speech in the United States, provides a crucible in which to examine the absolutist First Amendment view.

II. Freedom of Speech Has Never Been Absolute Under the First Amendment

A discussion of our Supreme Court’s First Amendment precedents is much like Judge Leventhal’s description of using legislative history: Looking

20. George Lakoff, *Why Hate Speech Is Not Free Speech* (Sept. 8, 2017), <https://georgelakoff.com/2017/09/08/why-hate-speech-is-not-free-speech/>. Dr. Lakoff is a retired Distinguished Professor of Cognitive Science and Linguistics at the University of California at Berkeley.

21. See, e.g., Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL., PUB. POL’Y, & L. 81, 84 (2009) (“Suicide rates for ethnic immigrant groups in the United States are significantly predicated by the degree of negativity of hate speech directed toward them.”).

22. Lakoff, *supra* note 20.

23. Michael W. McConnell, *You Can’t Say That: Review of ‘The Harm in Hate Speech’ by Jeremy Waldron*, N.Y. TIMES, June 24, 2012, <http://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html>. See WALDRON, *supra*, note 17, at 4–5.

over the heads at a crowded party and picking out your friends.²⁴ Which is to say, there are dozens and dozens of First Amendment Supreme Court precedents—it is not difficult to selectively focus on one’s favorites, picking out snatches of phrases that support conclusions running in opposite directions.

Moreover, my experience is that First Amendment evaluation is often driven more by one’s assessment (and one’s preferred hierarchical ranking) of the underlying values that one believes the First Amendment serves, rather than the amendment’s actual text or history.

Apologies if the following account is subject to criticism along both these lines. Here are the friends I see at this First Amendment party.

A. Our Protective First Amendment Doctrine is a Creation of the Twentieth Century and Has Always Recognized Exceptions

The First Amendment to the United States Constitution sure sounds absolute: “Congress shall make *no* law . . . abridging the freedom of speech.”²⁵ But it must be acknowledged that this “plain language” has never been interpreted to be absolute.²⁶ In fact, while some speech-inhibiting statutes have been struck down (all within the last one-hundred years), other statutes that undeniably “abridg[e] the freedom of speech” have been upheld against constitutional challenge ever since the Amendment was adopted in 1790.²⁷

Indeed, as the Supreme Court has noted, at the time of the Constitution’s framing, “[t]he guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance.”²⁸ Instead our Supreme Court, which is accepted in the United States as possessing the constitutional authority to

24. Justice Scalia employed this analogy and attributed it to Judge Harold Leventhal in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). In fact, I heard other judges invoke it when I was a D.C. district court law clerk to Judge Louis F. Oberdorfer in 1982. See, e.g., Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (recounting a conversation with Judge Leventhal).

25. U.S. CONST. amend. I (emphasis added).

26. Or, as Professor Martin puts it, although the language is “apparently unqualified,” the Supreme Court has developed a “complex web of doctrine” to uphold some limits on expression. Martin, *supra* note 4, at 482.

27. Constitutional scholars have long noted that one of the earliest Congresses (the Fifth) enacted the Sedition Act in 1798, which made it a crime to “write, print, utter or publish . . . any false, scandalous, and malicious writing against the government of the United States, with the intent to . . . excite . . . the hatred of the people of the United States . . .” 1 Stat. 596. Enacted by the same Federalists that had founded the Union, and vigorously criticized by other constitutional Framers, that statute was never struck down as unconstitutional but expired by its own terms in 1801. See *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

28. *Roth v. United States*, 354 U.S. 476, 482 (1957).

“say what the law is,”²⁹ has repeatedly defined categories of speech that are unprotected, or only partly protected, from legislative infringement.

Indeed, once “robust” free speech protections began to develop in the mid-twentieth century, the “trick” in First Amendment doctrine—that is, the doctrinal mechanism that is used to avoid First Amendment condemnation of laws that abridge speech—has been to define certain types of expression that we wish to prohibit as being “not speech” within the Amendment’s compass.³⁰ While Professor Martin suggests that freedom of speech should be “balanced” against the dangers of racial hatred, our Supreme Court has more often condemned “balancing” regarding free speech interests. (As Justice Scalia famously noted in other contexts, talented jurists can “balance” their way to almost any conclusion.³¹) Instead, our Court has generally adopted a categorical approach to protecting free speech—an “absolutist” stance of protection—and then developed or discovered categories of expression that are simply announced, *ipse dixit*, to be outside Constitutional protection.

Thus, for example, federal and state governments can undoubtedly make laws that abridge the right to express one’s sexuality, so long as that expression meets some community definition of “obscenity.”³² Obscenity, the Supreme Court held, is simply “not speech” protected by the First Amendment.

Similarly, the Court has defined categories of “commercial speech” which are either unprotected, or partially protected but still subject to restriction—that is, not protected by the same “strict scrutiny” that real speech gets.³³ Does the First Amendment mean “no law,” or just “not very restrictive law”?

Most relevant for the topic at hand perhaps, is the long-recognized “not speech” category that has been labeled “fighting words.” Seventy-five years ago, in *Chaplinsky v. New Hampshire*, the Court described this category as encompassing words whose “very utterance inflict injury *or* tend to incite an

29. *Marbury v. Madison*, 5 U.S. 137, 177 (1927).

30. *See, e.g., Roth*, 354 U.S. at 485 (“obscenity is not within the area of constitutionally protected speech”).

31. *See, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (multipart balancing tests can lead to any result “favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court”); *Bendix Autolite Corp. v. Midwesco Enter.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in the judgment).

32. *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth*, 354 U.S. at 485.

33. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1478 (5th ed. 2017). Indeed, it was only in 1975 that the Supreme Court ruled that some commercial speech received any protection at all. *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975). Previously the Court had held that “the Constitution imposes no restraint on government [prohibition of] . . . purely commercial advertising.” *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).

immediate breach of the peace.”³⁴ I want to put down a marker right now on this phrasing: the “or” has significance, even if some modern commentators tend to ignore it. This *Chaplinsky* test, which is still used by the Supreme Court and others today, is clearly written to encompass two *different* categories of speech: Words that “inherently provoke a violent reaction” or words that injure, “by their very utterance.”³⁵ Some later cases and current scholars tend to emphasize the former category, and ignore the latter.³⁶ But the concept that speech can itself injure, and that such speech may be restricted or even banned, is also accepted, then and now.³⁷ And in considering hate speech prohibitions, it is vitally important. The alternative category of *Chaplinsky*—words that “by their very utterance inflict injury”—cannot be ignored in a fair evaluation of the doctrinal constitutionality of speech-limiting laws.

Related to the category of unprotected “fighting words” is another prohibitable category of expression: “true threats.” The Supreme Court has described this category as reaching “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁸ Importantly for present purposes, this category (which like *Chaplinsky* retains currency today) extends to threatening speech that creates fear in the target even if expressed without intent to *actually* cause harm. Thus, the majority³⁹ in *Virginia v. Black* explained that to fall outside the protection of the First Amendment, “the speaker need not actually intend to carry out the threat. Rather, the prohibition of true threats ‘protects individuals from the

34. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis supplied).

35. See CHERMERINSKY & GILLMAN, *supra* note 1, at 91 (“*Chaplinsky* appears to recognize two situations . . .”) (emphasis supplied); *Chaplinsky*, 315 U.S. at 572.

36. Thus, current scholars often rely instead on a test of First Amendment constitutionality that was pronounced more recently, in *Brandenburg v. Ohio*: “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.” 395 U.S. 444, 447 (1969) (emphasis added). But this test plainly goes only to one of the two categories in the *Chaplinsky* formulation.

37. Rather than *Brandenburg*, one must look to *Virginia v. Black*, 538 U.S. 343 (2003), to find a description, and application, of the second category of speech that can be prohibited: words that “by their very utterance” injure the target of the speech.

38. *Watts v. United States*, 394 U.S. 705, 708 (1969).

39. I sometimes use “majority” rather than “the Court” to draw attention to the fact that in many significant First Amendment decisions, whether upholding or condemning expression-abridging laws, the Justices have not been unanimous; instead, reasonable minds on the Court have differed.

fear of violence' and 'from the *disruption that fear engenders*.'"⁴⁰ Again, these statements by the Supreme Court cannot fairly be ignored or wished away. *Black* holds that the First Amendment permits expression-limiting laws that protect against "fear" and "disruption."⁴¹ Any doctrinal evaluation of any hate speech prohibition must confront these precedents and persuade constitutional scholars why they ought not apply.

In sum, as the Supreme Court recognized in its most recent "hate speech" decision, "[t]he protections afforded by the First Amendment . . . are not absolute."⁴² Instead, "we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."⁴³ (Also of interest is that in both *Black* and *R.A.V.*, the Court endorsed a "balancing," rather than categorical, view. Citing two prior decisions, the five-Justice *Black* majority wrote that, "[t]he First Amendment permits 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."⁴⁴)

B. Countervailing Values Disfavoring the Prohibition of Racial and Religious Hate Speech

Against this doctrinal background, it is certainly true that certain moments—many moments—in our nation's history have tested our commitment to First Amendment values: *inter alia*, the Sedition Acts; the Civil War; World War I-era antidraft, antilabor, and red scare episodes; anti-communism moments such as 1950s McCarthyism; the civil rights struggle in the 1950s-70s; and anti-Vietnam war protests. The 2017 resurgence of publically advanced anti-Muslim and white-supremacy viewpoints is another such moment.⁴⁵

40. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (emphases added) (quoting *R.A.V. v. City of St Paul, Minnesota*, 505 U.S. 377, 388 (1992) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969))).

41. *Black*, 538 U.S. at 359–60.

42. *Id.* at 358.

43. *Id.*

44. *Id.* at 343 (quoting *R.A.V.*, 505 U.S. at 382).

45. See, e.g., Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with Nazi-Era Salute*, N.Y. TIMES, Nov. 20, 2016, <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html>; Maria Perez, *KKK Leader David Duke Tweets 'Thank God For Trump! That's Why We Love Him!'*, NEWSWEEK, Nov. 29, 2017, <http://www.newsweek.com/kkk-leader-david-duke-tweets-thank-god-trump-thats-why-we-love-him-726023>; Simran Jeet Singh & Hansdeep Singh, *The Rise of Hate Crimes Can Be Tied Directly to Hateful Speech*, DAILY BEAST, Sept. 6, 2012, <https://www.thedailybeast.com/the-rise-of-hate-crimes-can-be-tied-directly-to-hateful-speech>.

Certainly, the often-expressed fear of “slippery slopes,” when giving the government power to suppress speech, is a real and valid one. Indeed, my anecdotal experience in preparing and delivering this Essay is that a liberal condemnation of any type of hate-speech statute ultimately depends not on doctrine (which as shown above is mixed) but on a fear of slippery slopes (and the inevitable discretion that statutes provide for slipping) that is well-grounded in our history. That is, even if some precedents might support a narrowly drawn hate speech prohibition, critics oppose it out of fear of maladministration. The objection goes something like this: “Government has proven repeatedly over time that it can never be trusted to enforce speech prohibitions fairly and narrowly, but will instead use them to advance its own agenda and interfere with those opposed to its agenda.”⁴⁶ Indeed, examples of powerful actors using anti-expression laws for malign purposes are not difficult to find.⁴⁷ What would be the consequences of a statute prohibiting hate speech? Nothing but bad, in the long run, say critics. I agree with this concern. I think it is vitally important as a normative matter to ask, what slippery slopes would such a law likely lead to, as well as judge to which it would not?

For these reasons, any part of a legal structure founded on a prohibition of hate speech, even if narrowly drawn, should be devoted to ensuring steady and careful administration of the law once adopted. That is to say, potential and actual misuse of a law by prosecutors and courts must be part of the constitutional evaluation of any statute.⁴⁸ Broad grants of discretion in statutory language should be avoided, and the subsequent exercise of executive branch discretion should be carefully monitored and judicially checked. Slopes become slippery when statutory language is imprecise or when judicial oversight is too light-handed. I cannot stress enough that even if a hate speech statute were narrowly drawn to survive doctrinal attack, executive branch misuse of such a statute, beyond the circumstances and motivations of its enactment, should provide constitutional ground to strike it down.

46. Conversations with Professor Matt Coles, U.C. Hastings College of the Law, and a former Deputy National Director of the ACLU (Fall 2017). I greatly value Matt Coles’ real-world litigation experiences in this area, and his strongly held views certainly give me pause.

47. See e.g., CHEMERINSKY & GILLMAN, *supra* note 1, at 106 (arguing that anti-hate-speech codes at universities “are often used to punish the speech of people who were not their intended [protected] targets . . . [M]embers of minority groups themselves—the very people whom the law is intended to protect—are likely targets of punishment”). To this point, however, my draft statute would apply only to the targeting of minority groups, see *infra* p. 601 and note 128.

48. Thus, for example, the Court has made the opportunity for prosecutorial misuse of discretion part of its constitutional “vagueness” analysis for criminal statutes. See, e.g., *Chicago v. Morales*, 527 U.S. 41, 73 (1999).

Further normative assessment, however, is beyond the limited scope of this Essay. I certainly share the misgivings of slippery slopes and government misuse, particularly in the First Amendment arena. It is not difficult to point to dark episodes in our country's history where hysteria has overcome constitutional reason and First Amendment principles were discounted or ignored in the face of perceived exigency. But to be fair, no dispositive answers to questions like these can be found in constitutional text, originalist (or subsequent) American history, or Supreme Court precedent. In the end, all we can do is suggest extremes that we agree are constitutionally in or out of bounds, and then examine proposed statutory language to see whether we think it should stand or fall. My only goal here is to rebut the claim that current constitutional doctrine necessarily condemns a careful hate-speech statute. I think it clear that it does not.

III. First Amendment Precedents Do Not Condemn a Narrow Hate Speech Prohibition

The case that is key to a current analysis of any hate speech prohibition statute is *Virginia v. Black*, which although almost fifteen years old is still the Supreme Court's latest word on the topic.⁴⁹ But before analyzing *Black*, a few earlier cases deserve mention. A brief survey shows what I think is an almost unbroken line of authority that can support banning hate speech that injures, or is intended to injure, or engenders realistic fear of harmful injury in its targets.

A. A Brief History of Relevant First Amendment Precedents

To repeat, the current robust (or "absolutist") vision of First Amendment speech freedoms is entirely a creature of the twentieth century.⁵⁰ Constitutional law casebooks today tend to begin with discussion of cases around the time of WWI, with merely a wave at any prior history.

But there is some prior history—and it is not supportive of the robust, absolutist view that has been accepted by many since the 1960s. First, as noted above, the Fifth Congress, comprised of at least some of our constitutional "founding fathers,"⁵¹ enacted the Sedition Act of 1798,

49. See *infra* note 96 (discussing why the decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017) is inapposite to the hate speech debate).

50. See, e.g., David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1213 (1983); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 516, 519 (1981); LEONARD LEVY, *LEGACY OF SUPPRESSION* 2–3 (1960); ZECHARIAH CHAFFEE JR., *FREE SPEECH IN THE UNITED STATES* (1941).

51. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983) (noting the "clashing views" of the constitutional Framers regarding the Sedition Acts). In

making it a crime to “write, print, utter or publish . . . any false, scandalous, and malicious writing against the government of the United States, with the intent to . . . excite . . . the hatred of the people of the United States”⁵² Although the constitutionality of this federal statute was hotly debated, many persons were convicted under it and served prison time. And the law was permitted to expire in 1802, rather than ever declared unconstitutional.⁵³

What then followed, in terms of First Amendment jurisprudence, was in the words of one commentator a “lamentabl[e] . . . century of silence,” at least from the U.S. Supreme Court.⁵⁴ Speech-protective precedents from the nineteenth century are never cited, if they exist. For example, application of the common law of defamation against speech and the press was broadly accepted when the First Amendment was written—the field was not accorded strong constitutional protections until the landmark 1960 decision in *New York Times v. Sullivan*.⁵⁵

1. Early to Mid-Twentieth-Century Precedents

Indeed, even early in the twentieth century, the Court *upheld* the constitutionality of a new Sedition Act, that of 1918. In *Abrams v. United States*,⁵⁶ the Court affirmed the conviction of persons (Russian immigrants) for circulating leaflets that were critical of sending American troops to Eastern Europe after the Russian revolution. While it is often Justice

fact, as Jud Campbell has noted in a recent comprehensive review, “the meanings of speech . . . freedoms at the Founding remain remarkably hazy.” Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246, 249 (2017).

52. 1 Stat. 596. See Geoffrey R. Stone, *The Story of the Sedition Act of 1798: ‘The Reign of Witches’*, in *FIRST AMENDMENT STORIES* 13–38 (Richard W. Garnett & Andrew Koppelman eds., 2012).

53. Perhaps this point is anachronistic, since the principle of judicial review of federal statutes for their constitutionality was not announced by the Supreme Court until a year later in *Marbury v. Madison*, 5 U.S. 137 (1803). Still, Congressional enactment of the Sedition Act, and its signing by then-President (and constitutional Founder) John Adams, as well as its acceptance by most states, suggests that a significant number of contemporary First Amendment framers and supporters saw no irreconcilable conflict. Indeed, the debate regarding the Act was more political than legal (Thomas Jefferson and others arguing that it violated States’ rights under the Tenth Amendment), as part of the hotly-contested Presidential election of 1800. Nevertheless, by 1964 the Court was undoubtedly correct in stating that constitutional concerns regarding the Sedition Act “ha[ve] carried the day in the court of history.” *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964). That twentieth century doctrinal statement does not, however, detract from whatever the Framers’ original understanding may have been.

54. WAYNE BATCHIS, *THE RIGHT’S FIRST AMENDMENT* 11 (2016).

55. *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* (2017).

56. *Abrams v. United States*, 250 U.S. 616 (1919).

Holmes's dissent in *Abrams* that scholars like to quote,⁵⁷ the conviction for publishing dangerous ideas persists as a never-overruled First Amendment precedent. The Court applied a "clear and present danger" test, relying on Holmes's famous *dictum*, written just months before, that of course "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater."⁵⁸ I will mention this *dictum* again below—because it is clearly based on the protection of others from harms created by the speech itself, not an imminent (indeed, not any) violation of law.

In point of fact, the First Amendment was not held applicable to state laws at all until 1925 (via the Due Process Clause of the Fourteenth Amendment).⁵⁹ It is no overstatement to note that the doctrine of First Amendment protections for unpopular speech is recently developed and is based more on strongly held modern views and policies than on the Amendment's plain language or original intent.

Again, in 1942 in *Chaplinsky v. New Hampshire*, the Supreme Court acknowledged in a unanimous opinion that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem."⁶⁰ Among these categories, the Court noted, were "insulting or 'fighting' words—*those which by their very utterance inflict injury* or tend to incite an immediate breach of the peace."⁶¹ To repeat, the "or" in this of-quoted definition plays an important function. Insulting words—those "which by their very utterance inflict injury"—are viewed as different from—but in some cases just as unprotected as—words that lead to imminent law-breaking. *Both* categories were uncontroversially viewed, in the 9-0 *Chaplinsky* decision, as unprotected by First Amendment principles.⁶²

Then in 1952, the Court specifically upheld what was clearly a "hate speech" criminal statute, against constitutional attack. This case is largely forgotten today or, as Professor Martin notes, dismissed as "no longer good

57. *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 991–92 (3d ed. 2006). See Andrew Cohen, *The Most Powerful Dissent in American History*, ATLANTIC, Aug. 10, 2013, <https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/>.

58. *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes, J., for a unanimous Court, *upholding* a conviction for the circulation of a leaflet opposing the WWI draft).

59. *Gitlow v. New York*, 268 U.S. 652 (1925).

60. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

61. *Chaplinsky*, 315 U.S. at 572 (emphasis supplied).

62. The decision in *Chaplinsky* was unanimous, and written by the liberal Justice Frank Murphy, 315 U.S. at 768, 774.

law.”⁶³ Joseph Beauharnais was the president of the White Circle League in Chicago. He circulated a leaflet urging “[o]ne million self-respecting white people in Chicago to unite,” and decrying “the white race being mongrelized by the negro,” and he urged the government to “halt the further encroachment . . . of white people . . . by the Negro.”⁶⁴ The leaflet was a stark example of pure racial hatred. Beauharnais was tried under a state statute prohibiting the publication of any “lithograph” that “exposes the citizens of any race, color, creed or religion to contempt, derision or obloquy or which is productive of breach of the peace.”⁶⁵ (Again, note as in *Chaplinsky* the “or” here, separating hateful speech from speech that produces violations of law.) Beauharnais’s conviction was, like *Chaplinsky*’s and *Abram*’s, affirmed.

Justice Frankfurter’s opinion for the Court in *Beauharnais* reminded readers of “the tragic experiences of the last three decades From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951” (both events, I would wager, forgotten to most 2017 memories⁶⁶), there had been “exacerbated tension between races, often flaring into violence and destruction.”⁶⁷ Today, we need look back only to Charlottesville in August 2017 to accept that this important governmental interest has not abated. Justice Frankfurter wrote, and we might well agree, that it would be to “deny experience” to say that the State was without good reason to seek to condemn “malicious defamation of racial and religious groups, made in public places and . . . calculated to have a powerful emotional impact ‘There are limits to the exercise of the liberties [of speech and of the press].’”⁶⁸

The *Beauharnais* Court acknowledged that a hate-speech statute like Illinois’ might not solve the problems of race relations, and even “might itself raise new problems.”⁶⁹ But this “is the paradox of reform. It is the

63. Martin, *supra* note 4, at 484. Somewhat less strongly, Dean Chemerinsky notes that *Beauharnais* “never has been overruled” and says that it “is the strongest authority for the government to regulate racist speech.” He then suggests only that “for many reasons it is questionable whether *Beauharnais* is still good law.” CHEMERINSKY, *supra* note 57, at 1012. See also BATCHIS, *supra* note 54, at 78 (“largely discredited” reasoning).

64. *Beauharnais v. Illinois*, 343 U.S. 250, 252, 276 (1952) (emphasis supplied).

65. *Id.* at 251.

66. See H.M. EDWARDS, “NO, N-O-E, NO:” THE CICERO RIOT STORY (2011); JOHN GLANVILLE GILL, TIDE WITHOUT TURNING: ELIJAH P. LOVEJOY AND FREEDOM OF THE PRESS (1958). The 1837 murder of newspaper editor Lovejoy was sustained in prominence when it was mentioned by candidate Abraham Lincoln in his famed “Lyceum Address” in 1838. See *Abraham Lincoln’s Lyceum Address*, ABRAHAM LINCOLN ONLINE, (2017), <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>.

67. *Beauharnais*, 343 U.S. at 258.

68. *Id.* at 261 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

69. *Id.* at 262.

price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues.”⁷⁰ The Court then endorsed “group protection on behalf of the individual”—in other words, permissibly banning hateful speech of racial groups due to the harms that could befall individual members of the target group.⁷¹ “[A] man’s job and his educational opportunities and the dignity accorded him may depend . . . on the reputation of the racial and religious group to which he . . . belongs.”⁷²

2. *The 1960s: Brandenburg Narrows the Doctrine*

The 1960s however, saw a change in First Amendment doctrine—driven of course by huge changes centered around now-distant cultural moments of widespread speech advocating criminal resistance to government, by civil rights activists, Black Panthers, and anti-Vietnam War protestors alike. In 1969, the Supreme Court struck down an Ohio “criminal syndicalism” statute used to convict a Ku Klux Klan leader who had advocated “unlawful methods of terrorism” in a speech at a cross-burning rally.⁷³ The Court unanimously concluded that Brandenburg was guilty only of “mere advocacy,” rather than “incitement to imminent lawless action.”⁷⁴ Announcing a new formulation of First Amendment doctrine, the *Brandenburg* Court ruled that “[a] statute which fails to draw this distinction

70. *Beauharnais*, 343 U.S. at 262.

71. *Id.*

72. *Id.* at 263. The Court went on to also reject a constitutional vagueness challenge; it is that portion of the opinion which is most easily assailed today, as the statute at issue seems quite vague. Justices Black, Reed, Douglas, and Jackson dissented from the *Beauharnais* ruling in separate opinions, although two of the four appeared to agree that some hate speech may be banned. *Beauharnais*, 343 U.S. at 267, 277, 284, 287. Justice Douglas agreed with the majority that “conduct directed at a race or group” like that of “Hitler and his Nazis” could “be made an indictable offense”—but “the peril of [such] speech must be clear and present, *leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.*” *Id.* at 284. Justice Jackson similarly agreed “that a State has power to bring classes ‘of any race, color, creed, or religion’ within the protection of its libel laws.” *Id.* at 299. His objection was based on the absence of procedural safeguards, not the First Amendment.

73. *Brandenburg v. Ohio*, 395 U.S. 444, 445–446 (1969), was issued as a *per curiam* opinion, but as Professor Bernard Schwartz later discovered, that was not because it was simple. The first draft had been authored by Justice Abe Fortas, and endorsed the “clear and present danger” test from *Schenck v. United States*. But Fortas resigned from the Court in some disrepute before his opinion could issue; Justice Brennan then revised Fortas’s draft, eliminating the “clear and present danger” test, and the opinion was issued *per curiam*. See Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 237 (1994).

74. *Brandenburg*, 395 U.S. at 449.

impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.”⁷⁵

As Professor Schwartz notes, the *Brandenburg* test “replaced” prior formulations.⁷⁶ Indeed, *Brandenburg* has become the “canon” in contemporary constitutional texts.⁷⁷ However, it ignores the alternative ground affirmed in *Chaplinsky*: words which “by their very utterance inflict injury.”

3. *R.A.V. and Virginia v. Black*

And now we come to the two “modern” cross-burning cases: *R.A.V. v. City of St. Paul* and, a decade later, *Virginia v. Black*.⁷⁸ It seems fair to say that these two decisions are in some tension with each other.⁷⁹ But neither decision clearly condemns a narrow hate-speech prohibition. Indeed, I contend that *Virginia v. Black* clearly would support one.

In *R.A.V.*, teenagers burned a “crudely made cross” in the front yard “of a black family that lived across the street.”⁸⁰ They were prosecuted under a city ordinance that prohibited “symbol[s]” that “arouse anger, alarm, or resentment in others on the basis of race.” The Minnesota Supreme Court ruled that the law survived strict scrutiny because it was “narrowly-tailored” to further a “compelling governmental interest.”⁸¹ But a 5-4 majority of the U.S. Supreme Court struck down the ordinance as being impermissibly

75. *Brandenburg*, 395 U.S. at 448. The *Brandenburg* Court overruled the Court’s prior decision in *Whitney v. California*, 274 U.S. 357 (1927), which had upheld California’s similar criminal syndicalism law. *Brandenburg*, 395 U.S. at 447, 449.

76. Schwartz, *supra* note 73, at 236, 237–238.

77. CHEMERINSKY, *supra* note 33, at 1373 (“the key case”); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1075 (7th ed. 2013) (“the Court has adhered to *Brandenburg*). *But see*, LEE BOLLINGER & GEOFFREY R. STONE, EPILOGUE TO ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 312 (2001) (asking “whether the *Brandenburg* era will turn out to be just one era among many, in which the freedom of speech varies widely”).

78. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). One might also add *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), to the list of cases that are doctrinally supportive of a carefully drawn hate speech prohibition. But in the interests of time and space, I omit further discussion because *Mitchell* is more an equal protection decision than a free speech decision. In *Mitchell*, the Court upheld a state statute that allowed more severe sentences for crimes committed with a hostile racial motive, than for the same crimes without such a motive. *Mitchell*, 508 U.S. at 485, 489. The Court distinguished the case from *R.A.V.* as involving “conduct” not expression. *Mitchell*, 508 U.S. at 487. But the Court also used the harm-based theory later endorsed in *Virginia v. Black*, noting that “bias-inspired conduct is thought to *inflict greater individual and societal harm*” than the same conduct without the bias. *Mitchell*, 508 U.S. at 488 (emphasis added).

79. Thus, the author of the Court’s opinion in *R.A.V.*, Justice Scalia, dissented in part in *Virginia v. Black* and indeed explained that he would have gone further toward *upholding* the statute in *Black*.

80. *R.A.V.*, 505 U.S. at 379–383.

81. *In re Welfare of R.A.*, 464 N.W. 2d 507, 510 (Minn. 1991).

“content-based.”⁸² That is, the *R.A.V.* statute selected race speech from other types of “angering” speech and then denied it protection. Still, in the course of outlining this new doctrinal tool, the Court affirmed that its precedents support a “limited categorical approach” to the First Amendment, and found no need to modify the *Chaplinsky* test for fighting words. Indeed, the Court cited *Beauharnais*, as well as obscenity decisions, as recognizing “traditional limitations” on free speech.⁸³ Indeed, Justice Scalia explained that “these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*”⁸⁴

But then, in order to explain “the exclusion of ‘fighting words’ from the . . . First Amendment” while yet distinguishing the statute at issue in *R.A.V.*, Justice Scalia delivered one of the more confusing statements of his often Delphic *oeuvre*: “[F]or purposes of th[e First] Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication.”⁸⁵ I think it is fair to say that in the quarter century since *R.A.V.*, no one understands what, precisely, this aphorism means. Other than this: some words, “despite their verbal character,” are simply “nonspeech” that the First Amendment does not protect. Where is the textualist in this?

Continuing in this mysterious vein, Justice Scalia went on to explain that “when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable,” then content-based speech discrimination is permitted.⁸⁶ This appeared to be a newly developed explanation for distinguishing past speech-limiting precedents,

82. *R.A.V.*, 505 U.S. at 393. Four other Justices concurred in the result only, *see id.* at 397.

83. Interestingly, Justice Scalia described *Beauharnais* as a “defamation” case, without further explanation, and then noted only that “our decisions since the 1960s have narrowed the . . . defamation” exception. *R.A.V.*, 505 U.S. at 383. This is an artful dodge that the Justice often employed: Noting a case that is apparently contrary to current doctrine and then merely noting the current doctrine without approving it.

84. *R.A.V.*, 505 U.S. at 383 (emphasis in the original).

85. *Id.* at 386.

86. This was offered as a “bas[i]s for distinction” of the *R.A.V.* holding from prior “fighting words” precedents that had affirmed convictions. *R.A.V.*, 505 U.S. at 390. “There may be other such bases as well,” and Justice Scalia offered a few, such as “secondary effects,” and criminal laws that “incidentally” punish speech (e.g. treason). *Id.* at 389–90. Interestingly, at this point Justice Scalia also endorsed a new concept—“sexually derogatory ‘fighting words’”—as a way of explaining why federal sex discrimination laws can prohibit them. *Id.* Why *racially*-derogatory fighting words—that is, “hate speech”—would not also fit within this concept—or whether in fact they might—was not addressed, even though *that* question was the precise focus of the *R.A.V.* inquiry. *Id.*

not a rephrasing of previously seen doctrinal principles.⁸⁷ Again, no one since has since been quite certain what Justice Scalia meant.⁸⁸ (Thus Justice Scalia's mesmerizing genius with language sometimes clouded the precise judgment of his colleagues, who on occasion would just silently join his semantically adept opinions in doctrinally difficult cases.)

Most significantly for current purposes, Justice Scalia's opinion for the Court stated that when there is "no realistic possibility that official suppression of ideas is afoot," then "the regulation of 'fighting words' . . . may address some offensive instances" even if it might be described as "content discrimination."⁸⁹ He clearly (if footnotedly) noted that the "presumptive invalidity" of content discrimination "does not mean invariable invalidity."⁹⁰ But cross-burning, he concluded without additional explanation, simply did not fit into this "general exception."⁹¹

Whether its result was right or wrong, *R.A.V.* is significant for my purposes because the Court fully acknowledged that the interests underlying enactment of the St. Paul hate-speech statute were "compelling."⁹² "Ensuring the basic human rights of members of groups that have been historically subjected to discrimination, including the right of such group members to live in peace where they wish" (that is, without cross-burnings on their front lawn) is an interest that can survive strict scrutiny.⁹³ Such

87. The other four Justices in *R.A.V.* concurred only in the judgment (three writing separately), viewing the statute as "overbroad" but otherwise writing that perhaps a prohibition of race-based hate speech *could* be constitutional. Justice White characterized Justice Scalia's analysis as a "nonexhaustive list of ad hoc exceptions" designed to "confine . . . its decision to the facts of this case." *R.A.V.*, 505 U.S. at 407. Justice Blackmun separately characterized the Scalia opinion as "an aberration . . . where the Court manipulated doctrine." *Id.* at 415. He wrote that "the people of St. Paul" should not be "prevent[ed] . . . from specifically punishing the race-based fighting words that so prejudice their community." *Id.* at 416. Justice Stevens wrote separately to similarly approve the statute, noting that "threatening someone because of her race or religious beliefs may cause particularly severe trauma or [there's that persistent 'or' again] touch off a riot," and opining that "there are legitimate, reasonable and neutral justifications for such special rules." *Id.* at 416. Justice O'Connor silently joined Justice White's short jurisdictional concurrence in the result, *see infra* note 88.

88. In an additional brief concurrence in the *R.A.V.* judgment joined by all four concurring Justices, Justice White called Justice Scalia's rationale a "novel theory" that had not been argued below or presented in the arguments to the Supreme Court. *R.A.V.*, 505 U.S. at 397. Meanwhile, Justice Scalia dismissed Justice Stevens' dissenting view as "wordplay"—as if his own opinion (or indeed the entire enterprise of legal analysis) were something else. *Id.* at 392.

89. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

90. *Id.* at 390 n.6.

91. *Id.* at 393.

92. *Id.* at 395.

93. *Id.* at 395.

expressive conduct is “reprehensible.”⁹⁴ But because the City could have enacted a constitutional ordinance (really?) prohibiting speech that “arouses anger, alarm, or resentment in others” *without* reference to content-based groups—that is, not restricted to race—an ordinance that was so limited fell under the First Amendment. The irony of this rationale, of course, is that it turns the concept of a “narrowly-tailored” statute on its head. The problem in *R.A.V.*, apparently, was that the law was too narrow—but a less-specific statute banning all “fighting words” of any kind would survive? As Justice Blackmun wrote separately, “deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not . . . set[s] law and logic on their heads.”⁹⁵

And now, finally,⁹⁶ we come to the Court’s most recent hate-speech decision, *Virginia v. Black*, in which the Court appeared to repudiate some of the ideas in *R.A.V.*, and concluded in no uncertain terms that “a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.”⁹⁷ The Court’s decision made explicit what I think has been clear for a century: that the “or” in *Chaplinsky*’s definition of “fighting words” has significance, and that speech that either incites imminent lawbreaking or is intended to harm others “by its very utterance,” may be regulated without constitutional violation.⁹⁸

94. *R.A.V.*, 505 U.S. at 395.

95. *Id.* at 415.

96. Opponents of any hate speech prohibition might also invoke the Court’s recent decision in *Matal v. Tam*, 137 S.Ct. 1744 (2017), which struck down on First Amendment grounds a statute that prohibited the registration of trademarks that “disparage” or “bring . . . into . . . disrepute” any “persons.” But even putting aside that there was no controlling majority opinion, *Matal* seems quite distinguishable, as it broadly banned “ideas that offend” (*Id.* at 1751 (opinion of Alito, J.)), and did not contain the narrowing elements in the draft statute I have proposed. See *infra* p. 599–601.

97. *Virginia v. Black*, 538 U.S. 343, 347 (2003). With respect, Dean Chemerinsky and his coauthor appear to misinterpret or mischaracterize this ruling to the opposite effect, writing in 2017 that in *Black* the Court “conclude[ed] that cross burning generally is protected speech.” CHEMERINSKY & GILLMAN, *supra* note 1, at 96. But the quoted holding of the Court in *Black*—that cross burning is *not* protected speech when there is intent to intimidate (which is the very definition of hate speech)—was plainly shared by six Justices: the four who joined Justice O’Connor’s opinion (538 U.S. at 347), as well as Justice Scalia (the author of *R.A.V.*), joined by Thomas (*id.* at 368, Scalia concurring). Indeed, three Justices wrote separately that they would go even further in not protecting the expression at issue. See *id.* at 368 (Stevens concurring); *id.* at 368 (Scalia, joined by Thomas, concurring in part); *id.* at 388 (Thomas dissenting because he viewed cross burning as conduct, not expression at all, and thus would have allowed its prohibition). Only Justice Souter’s dissenting opinion, joined by Justices Kennedy and Ginsburg, rejected what was perceived to be the majority’s “flexible . . . virulence exception” to the First Amendment. *Id.* at 382.

98. Dean Chemerinsky is one of the few scholars who recognizes that *Chaplinsky* in fact “recognizes *two* situations” in which speech may be regulated: not just when “likely to cause a

In *Black*, three persons had been convicted under a Virginia statute for burning a cross “on the property of another, a highway, or other public place . . . with the intent of intimidating any person or group.”⁹⁹ Black had led a Ku Klux Klan rally where a large cross was burned and visible from the public highway.¹⁰⁰ Elliott and O’Mara, unaffiliated with the Klan, had burned a cross in the yard of Elliott’s next-door African-American neighbor.¹⁰¹ In addition to defining the crime, the Virginia statute provided that “any such burning of a cross shall be prima facie evidence of” the necessary intent.¹⁰² This additional “prima facie evidence” provision led the Court to reverse the convictions.¹⁰³ But the Court made clear that the definition of the crime itself passed First Amendment muster.¹⁰⁴

Justice O’Connor’s opinion for the Court presented a somewhat detailed history of cross burning, noting that “the Klan used cross burnings as a tool of intimidation and a threat of impending violence.”¹⁰⁵ The connection between cross burnings and the Klan’s doctrine of racial and religious hatred “became indelible” and was “inextricably intertwined.”¹⁰⁶ “While a burning cross does not inevitably convey a message of intimidation,” it is often “designed to inspire in the victim a fear of bodily harm.”¹⁰⁷

With this history in mind, the Court noted that while the First Amendment’s protection of “offensive” and “distasteful” ideas is a “bedrock principle,” the constitutional protections “are not absolute.”¹⁰⁸ The Court then recited *Chaplinsky*’s definition of fighting words: “words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹⁰⁹ The *Brandenburg* test is devoted to the second of these alternatives: inciting “imminent lawless action.”¹¹⁰ But the decision in *Virginia v. Black* was plainly

violent response” but also “when it is an insult likely to inflict immediate *emotional harm*.” CHEMERINSKY & GILLMAN, *supra* note 1, at 91 (both emphases added). But he then goes on to misread *Black* as holding that cross-burning falls into neither category, *see supra* note 97.

99. *Black*, 538 U.S. at 348.

100. *Id.* at 348–49.

101. *Id.* at 350.

102. *Black*, 538 U.S. at 348.

103. *Id.* at 367.

104. *Id.* at 363.

105. *Id.* at 354.

106. *Id.* at 353, 354. That the KKK stands for racial and religious hatred ought to require no citation today. If one is needed, see *Ku Klux Klan*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Dec. 24, 2017).

107. *Black*, 538 U.S. at 357.

108. *Id.* at 358.

109. *Id.* at 359 (quoting *Chaplinsky*, 315 U.S. 568, 572 (1942)).

110. *Brandenburg*, 395 U.S. at 447 (1969).

founded on the *first* alternative: “words which by their very utterance inflict injury” or are intended to cause harm to the target.¹¹¹ The “or” in *Chaplinsky* has constitutional, distinguishing, significance.

The *Black* Court also noted that “true threats” may be regulated or banned: “statements where the speaker means to communicate a serious expression of an *intent* to commit an act of unlawful violence to a particular individual *or group of individuals*.”¹¹² The First Amendment rationale of *Black* clearly applies to groups, not just individuals. As importantly, the Court explained that “the speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protects individuals from the fear of violence’ and ‘from the disruption that fear engenders.’”¹¹³ Thus speech that is intended to intimidate may be prohibited under the First Amendment: “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat” based on an “intent of placing the victim in fear of bodily harm or death.”¹¹⁴

The Court clearly rejected the argument that because Virginia’s statute selected cross-burning as one out of perhaps many types of intimidating expression, it must fall under *R.A.V.*’s “content-neutral” rule. No, the court explained: “[j]ust as a State may regulate only that obscenity which is most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”¹¹⁵ Of course, a “sense of anger or hatred” inspired by cross burning in its observers “is not sufficient”—the cross burning must be “intended to intimidate” in the sense discussed.¹¹⁶

Whether viewed as a “fighting words” or a “true threats” case, *Black* affirmed that the expressive act of cross burning may be criminalized when done hatefully. The constitutional bottom line of *Black* seems clear:

111. *Black*, 538 U.S. at 359.

112. *Id.* at 359 (emphasis added). See *supra* text accompanying notes 38-41 (discussion of “true threats” doctrine).

113. *Black*, 538 U.S. at 360.

114. *Id.*

115. *Id.* at 366.

116. *Black*, 538 U.S. at 366. It was for this reason as well as others that Justice O’Connor wrote for a plurality that the convictions must be reversed—the “prima facie evidence” provision of the statute allowed for conviction without proof of the requisite intention to intimidate. *Id.* at 367. Significantly, however, the Court’s opinion left open the possibility that two of the three defendants’ convictions might still stand, or be retried, after Virginia examined its statute and the record in light of the Court’s new analysis. *Id.* at 366–67. In fact, on remand, the Virginia Supreme Court held that the prima facie evidence provision in its statute was severable, the remainder of its cross-burning statute was constitutional as the U.S. Supreme Court had stated, and therefore the remaining defendants’ convictions were affirmed. *Elliot v. Commonwealth*, 267 Va. 464, 476 (2004).

“particularly virulent” intimidating speech may be selected, constitutionally, for a statutory ban.¹¹⁷

IV. A Draft Hate Speech Prohibition: Analysis and Explanations

In light of *Black*, and pulling together the various strands discussed above, there is a strong case that a statute banning some forms of hate speech, coupled with a strong intent standard, could pass First Amendment muster. Five points, at least, seem clear:

1. A statute can be based on an intent in the speaker to create “fear” and “disruption” in the minds and lives of its targets.¹¹⁸
2. A statute may also ban, in addition to imminent law-breaking, words “which by their very utterance inflict injury.”¹¹⁹ Injury—not lawbreaking. Indeed, this point flows directly from Justice Holmes’s famous aphorism in *Abrams* almost exactly one-hundred years ago. Why, exactly, may falsely shouting fire in a crowded theater be prohibited? Clearly, it seems, because it may lead directly to injury of others. This is so whether or not “imminent lawbreaking” is likely. Indeed, because a shout of “fire” stimulates *lawful* speedy exiting, law-breaking per se seems unlikely. Nevertheless, speech that directly causes injury may be regulated or banned.
3. A corollary to point 2 is that empirical evidence is necessary to support the constitutionality of an injury-preventing speech statute. *Virginia v. Black* demonstrates this: The “inextricable” entwinement of cross-burning, violence, and fear was explicated at some length before the “intimidating” link was relied upon.
4. A statute may ban speech targeted at groups, as well as specific individuals.¹²⁰
5. A statute need not address all forms of hate speech, or intimidating speech, but may be restricted to “particularly virulent” intimidating speech.¹²¹

A. A Draft Statute as a Starting Point for a Hate Speech Prohibition

With these premises in mind, what might the language of a constitutionally permissible hate speech statute look like? Importantly, one that might also satisfy the United States’ obligations under Article IV of the ICREd treaty, even with the United States’ constitutional reservation? I’ll

117. *Black*, 538 U.S. at 363.

118. *Id.* at 360.

119. *Id.* at 359 (quoting *Chaplinsky*).

120. *Id.*

121. *Id.* at 363.

take a stab at it here, knowing full well that it is far easier to critique a proposal than to construct a satisfactory one.

Hate Speech Prohibited:

(a) It shall be unlawful to make any speech at a public gathering or on public media that asserts or is clearly premised on the racial or religious inferiority or hatred of a minority group and is intended to intimidate or injure any individual or member of the targeted group.

(b) An *intent to intimidate* shall be defined as an intent to create in the targeted individual or group a fear of bodily harm or violence. *Intent to injure* shall include intent to cause others to imminently injure the target(s) as well as intent to cause demonstrable nontrivial harm to a target's physical or psychological wellbeing. The requisite intent shall include *willful blindness* to reasonably known harms caused by such speech.

B. Explanatory Points

My small doctrinal project done, here are just a few explanatory points:

1. The draft statute is limited to “public gatherings” and “public media.” Private speech is not targeted. But televised speeches or publically distributed podcasts are. Books are not intended to be included within “public media.”¹²² Judicial development and legislative honing would be necessary to more precisely define the scope.

2. “Clearly premised on” will reach hate speech where the hateful racial or religious targeting is semantically masked. “Those people,” “people like them,” etc. As in *Black*, context will be essential to prove a violation.¹²³

3. The draft statute extends beyond race-hatred speech to hate speech based on religion as well. The ICRED Convention mentions only “racial” hatred or superiority. But the history of religion used as a surrogate for racial or ethnic hatred is strong (for example, Nazi hatred of the “Jewish race;” contemporary advocacy of a “Muslim ban”). Sponsors of this statute will have to assemble a more detailed empirical/historical foundation for this.

4. The most important aspect of this draft statute is its premise that hate speech can directly cause harm to individuals and groups. It is far beyond the scope of this Essay to attempt to assemble, or even summarize, all the empirical work that has been done on the harms

122. I recognize this as a large doctrinal hole, which deserves a much fuller explanation. Why is speech different from books? The immediacy of their impact? The ease with which targets can avoid a book?

123. See, *Black*, 538 U.S. at 367 (“contextual factors . . . are necessary to decide whether a particular [expression] is intended to intimidate”).

caused by hate speech.¹²⁴ Moreover, determining how and where the “line” should be drawn between “demonstrable non-trivial harm” to a target’s “psychological wellbeing” (which would be proscribed) and generalized feelings of discomfort, dislike, or insecurity (which would not be) is undoubtedly difficult. Still, intending to cause immediate harm, such as intending to stimulate a crowd to engage in violence (as appears to have happened in Charlottesville), as well as intending to engender lasting psychological injury, would be within the reach of this statute.

5. Furthermore, not just “positive knowledge” but also “willful blindness” is reached by this statute.¹²⁵ If harms likely caused by hate speech are reasonably well-known, it would be no automatic defense to falsely claim “I didn’t know” or “I didn’t mean it.” As with all difficult questions of criminal intent, this would instead be a jury question and would necessarily require assessment of context, as well as strict application of the criminal “proof beyond a reasonable doubt” standard.¹²⁶

6. Finally, the statute targets hate speech that is directed at “minority” groups. This is premised on an assertion that hate-speech directed at racial or religious minorities is a “particularly virulent”¹²⁷ evil that may be targeted as likely to directly cause non-trivial harm. This is premised to some extent on the familiar *Carolene Products* footnote four idea that minority groups may properly receive heightened constitutional protection.¹²⁸ *Virginia v. Black* can be read to permit such under-inclusive speech regulation, despite *R.A.V.*’s suggestions to the contrary. This conclusion is bolstered by the fact that Justice Scalia, author of *R.A.V.*, joined the speech-prohibition conclusions in *Black* without qualification (and in fact, would have gone farther than Justice O’Connor’s opinion).

124. See *supra* notes 17–23; Martin, *supra* note 4; Hiroshi Fukurai & Alice Yang, *The History of Japanese Racism, Japanese American Redress, and the Dangers Associated with Government Regulation of Hate Speech*, 45 HASTINGS CONST. L.Q. 533 (2018); Junko Kotani, *Proceed with Caution: Hate Speech Regulation in Japan*, 45 HASTINGS CONST. L.Q. 603 (2018).

125. See generally *Jewell v. United States*, 532 F.2d 697 (9th Cir. 1976) (*en banc*) and *id.* at 705–706 (Kennedy J. dissenting); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 755 (2011) (“The doctrine of willful blindness is well-established in criminal law.”).

126. Thus, courts have cautioned that the *Jewell* willful blindness instruction should be carefully and infrequently used; and the jury must be informed that if it believes that a defendant actually believed to the contrary, it cannot convict. See, e.g., *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007); *United States v. Hansen*, 791 F.3d 863 (8th Cir. 2015).

127. *Black*, 538 U.S. at 363.

128. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); see David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251 (2010); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

Conclusion

Some popular observers have argued that the unexpected Trump Presidency has given “permission” or “new life” to racialized hate speech in America today. Certainly, the events and fervor surrounding Charlottesville in August 2017 made our September Symposium on “Hate Speech Laws in Japan in Comparative Perspective” a surprisingly timely one. Professor Martin’s keynote article explains the basis for what many First Amendment scholars believe to be true: A statute banning hate speech cannot survive constitutional scrutiny in the United States, despite the U.S.’s obligation in ICRED to the contrary.

This Essay is intended to demonstrate that the constitutional condemnation of a carefully drawn and administered hate speech prohibition is not as clear as some First Amendment defenders assert. *Virginia v. Black* clearly endorses the constitutionality of statutes that would prohibit “particularly virulent” versions of intimidating hate speech intended to, or likely causing, harm. This Essay takes that suggestion, and similar suggestions found in prior First Amendment decisions, to argue that a narrowly drawn and carefully administered statute prohibiting racial and religious hate speech might not be unconstitutional. I do not advocate such a statute, and am fully aware of the slippery slope arguments that American history supports regarding the danger of allowing even a small portion of the camel’s nose into the tent. But constitutional scholars should confront what the precedents actually say, rather than rely on what they believe the “spirit” of the 1960s version of the First Amendment “must” condemn.

Finally, this Essay proposes specific statutory language merely to begin a debate, not to settle it. Surely my proposal is inadequate and can be greatly improved. And the dangers of discretion are real—perhaps such a statute should not be tried at all.

But the dangers and harms caused by virulent race and religion hate speech are also real. They are significant. The United States has joined an international treaty effort that seeks to condemn the evils of race discrimination. We should see where the actual language of precedent, and the consequent debate, leads, rather than circling the wagons of agreement on unconstitutionality without question.

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