TEACHING AMERICAN HISTORY

READING PACKET FOR SEPTEMBER 9TH, 2023 | FIRST AMENDMENT: IS HATE SPEECH PROTECTED UNDER THE CONSTITUTION?

CORE READING 1: SCHENK V. UNITED STATES
SOURCE: https://teachingamericanhistory.org/document/schenck-v-united-states/

INTRODUCTION: Remarkably, Schenck v. United States was the Supreme Court's first major effort to interpret the First Amendment. Prior to this, Congress and state legislators had broad discretion to regulate speech without judicial interference. Charles Schenck was the general secretary of the Socialist Party in Philadelphia. During World War I, he and the other defendants mailed 15,000 leaflets criticizing the draft as a violation of the Thirteenth Amendment's prohibition against "involuntary servitude." A portion of the leaflet read as follows: "A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States." Schenck was convicted by a federal court under the Espionage Act, a federal law passed by Congress and the Wilson administration upon America's entry into World War I. The Espionage Act sought to quell resistance to the draft by making it a crime "to obstruct the recruiting and enlistment service of the United States." Schenck appealed to the Supreme Court, claiming that the act violated his right to free speech under the First Amendment.

Writing for the Court, Justice Oliver Wendell Holmes famously explained that the First Amendment is not absolute. Even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." The case is further noteworthy because it marks the first appearance of Justice Holmes' "clear and present danger" test, which emphasizes context and circumstances of the speech as the decisive factor in determining whether or not it is protected or punishable. According to this test: "The character of every act depends upon the circumstances in which it is done." Because Schenck's speech occurred during wartime, it constituted a clear and present danger to national security. Had he said the same thing during peacetime, the case might have been decided differently. In two companion cases handed down a week later, Frohwerk v. United States*, and* Debs v. United States*, Holmes likewise upheld convictions under the Espionage Act. However, in the subsequent cases of Abrams v. United States and Gitlow v. New York, he dissented, using the clear and present danger test to protect free speech. These later cases would begin the Court's increasing concern with the First Amendment. In the decades that followed, free speech would be elevated to a preferred place in our constitutional scheme.*

JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, by causing and attempting to cause insubordination, etc., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. . . .

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on: "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press,

and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., etc., winding up, "You must do your share to maintain, support, and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point. . . .

. . . We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. . . .

Judgments affirmed.

CORE READING 2: CHAPLINKSKY V. NEW HAMPSHIRE
SOURCE: https://teachingamericanhistory.org/document/chaplinsky-v-new-hampshire/

INTRODUCTION: Walter Chaplinsky was a member of the Jehovah's Witnesses, a religious group involved in several landmark First Amendment decisions, including the compulsory flag salute case of West Virginia v. Barnette (1943). *On a "busy Saturday afternoon," April 6, 1940, Chaplinsky was distributing religious literature on a public street while denouncing organized religion as a "racket." A hostile crowd gathered. After police removed him for his own protection, an angry verbal exchange with authorities ensued. Chaplinsky said to a police officer, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Based on these remarks, Chaplinsky was convicted for violating a New Hampshire state law that punished the use of "offensive, derisive, or annoying" speech.*

Writing for a unanimous Court, Justice Frank Murphy (1890–1949) upheld Chaplinsky's conviction on the basis of the "fighting words" doctrine. According to Murphy, such words "by their very utterance, inflict injury or tend to incite an immediate breach of the peace." Moreover, they play no "essential part of any exposition of ideas" and are of such "slight social value" that they may be permissibly restricted in the greater interest of morality and public decency.

The fighting words doctrine is a rare content-based exception to Court's general rule of content neutrality. Along with libel and obscenity, it constitutes a category of punishable speech outside the First Amendment. The fighting words doctrine also presumes a hierarchy of speech. At the top of this hierarchy, warranting the most protection, is speech that contributes to intellectual and political discourse. At the bottom, is low value speech like fighting words that play no "essential part of any exposition of ideas." Such low value speech may be permissibly restricted in the interest of public order and morality.

While still on the books, the fighting words doctrine has been significantly narrowed through a series of cases that have reiterated protection for offensive, disturbing, and feared speech; see Terminiello v. Chicago (1949), *Cohen v. California, Texas v. Johnson, Snyder v. Phelps, and Matal v. Tam. Some have sought to expand the fighting words doctrine to include hate speech as a new category of punishable expression. As it now stands, there is no separate content-based category of hate speech. Instead, hate speech is punishable depending upon its circumstances and context, as in the case of making a credible threat to someone (see Virginia v. Black).*

JUSTICE MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business or occupation.

The complaint charged that appellant, with force and arms, in a certain public place in said city of Rochester, to-wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat the words following, addressed to the complainant, that is to say, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists," the same being offensive, derisive and annoying words and names." . . .

. . . He was found guilty, and the judgment of conviction was affirmed by the Supreme Court of the state.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled, and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the city marshal, Bowering, that

Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection, the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action" (Lovell v. City of Griffin).

Appellant assails the statute as a violation of all three freedoms—speech, press and worship—but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

"Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument" (Cantwell v. Connecticut). . . .

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." It was further said:

The word "offensive" is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which, by general consent, are "fighting words" when said without a disarming smile. . . . [S]uch words, as ordinary men know, are likely to cause a fight. So are threatening, profane, or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including "classical fighting words," words in current useless "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity, and threats.

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace (Cantwell v. Connecticut; Thornhill v. Alabama). This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law (Fox v. Washington).

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

CORE READING 3: BRANDENBURG V. OHIO
SOURCE: https://teachingamericanhistory.org/document/brandenburg-v-ohio-2/

INTRODUCTION: Clarence Brandenburg was the leader of an Ohio chapter of the Ku Klux Klan, a white supremacist group opposed to the civil rights movement. In the summer of 1964, he invited a Cincinnati reporter to film a membership rally. The televised film captured gun-toting, hooded figures burning a cross. Using racial epithets. Brandenburg stated: "We're not a revengent organization, but if our president, our Congress, our Supreme Court continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken (sic)." Given these remarks and others, Brandenburg was convicted under an Ohio criminal syndicalism law. Upon appeal, the Supreme Court ruled in his favor through a per curiam opinion. "Per curiam," which is Latin for "by the Court," is an unsigned, often short, collective statement. The Court referenced the two precedents of Yates v. United States (1957) *and* Noto v. United States (1961)*, which narrowed the Smith Act (see Dennis v. United States) by distinguishing between "advocacy of ideas" and "advocacy of action."*

Brandenburg may be seen as the culmination and refinement of the Supreme Court's developing jurisprudence on the clear and present danger standard first announced in Schenck v. United States. Distilling earlier precedents into a new formula, the Court articulated the "imminent lawless action" standard. In other words, speech is protected until the very point at which it directly incites and is likely to produce imminent lawless action under the circumstances. Since Brandenburg's conditional language ("might have to be taken") fell short of an immediate call for violence—that is, a direct incitement—it was protected under the First Amendment.

In reversing Brandenburg's conviction, the Supreme Court not only struck down the Ohio criminal syndicalism statute, it also overturned Whitney v. California, given the similarities between the two laws. Brandenburg v. Ohio *remains the controlling precedent in regard to illegal advocacy. Its "imminent lawless action" test sets a highly protective standard for speech right up to the very brink of lawless danger.*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio criminal syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism" (Ohio Rev.Code Ann. § 2923.13). He was fined $1,000 and sentenced to one to ten years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution. . . .

The record shows that . . . the appellant telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The state also introduced into evidence several articles appearing in the films, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed twelve hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the state of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the state of Ohio than does any other organization. We're not a revengent organization, but if our president, our Congress, our Supreme Court continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

The second film showed six hooded figures, one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by twenty states and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio (Whitney v. California, 1927). . . . But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in Noto v. United States (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. Yates v. United States (1957), De Jonge v. Oregon (1937), Stromberg v. California (1931).

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

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

Reversed.

SUPPLEMENTAL READING 1: TEXAS V. JOHNSON

SOURCE: https://teachingamericanhistory.org/document/texas-v-johnson/

INTRODUCTION: Gregory Lee Johnson was the leader of an American Maoist group that protested at the 1984 Republican National Convention in Dallas, Texas, where Ronald Reagan was seeking renomination for president. During the demonstration, someone took down an American flag from a nearby building and handed it to Johnson. At the end of a march, he unfurled the flag, poured kerosene on it, and burned it while the protestors hollered, "America, the red, white, and blue, we spit on you." Johnson was arrested and fined under a Texas state law that punished flag desecration. The law advanced two interests: to protect the flag as a symbol of nationhood, and to prevent a breach of peace. The case made its way to the Texas Court of Appeals, the highest state court, which ultimately ruled in favor of Johnson. Texas then appealed the decision to the Supreme Court.

In a 5–4 decision, written by Justice William J. Brennan (1906–1997), the Court extended the concept of symbolic speech to cover flag burning as an offensive yet protected expression of dissent. Justice Brennan first distinguished the important symbolic speech precedent of United States v. O'Brien (1968)*, which refused to extend First Amendment protection to the burning of a draft card, from Johnson's burning of the flag. Whereas the federal law that prohibited the burning of a draft card was meant to ensure the smooth functioning of armed forces recruitment, Texas' interest in protecting the flag as a symbol of national unity was related to "the suppression of speech," and as a result would be subjected to "the most exacting scrutiny."* Texas v. Johnson *is further noteworthy as a clear example of the Court's "preferred freedoms" standard. Justice Rehnquist's dissent invoked poetry to affirm the patriotic memories and feelings stirred by the flag and the need to honor it as a revered symbol of national unity and public sacrifice. His dissent also contained a poignant reflection about the proper role of the Court in the American constitutional system.*

Congress responded to Texas v. Johnson *by enacting the Flag Protection Act of 1989. However, relying upon the same reasoning used in* Texas v. Johnson*, the Supreme Court struck it down in* United States v. Eichman (1990).

JUSTICE BRENNAN delivered the opinion of the Court. . . .

. . . We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the state's regulation is related to the suppression of free expression. See, e.g., United States v. O'Brien (1968). If the state's regulation is not related to expression, then the less stringent standard we announced in United States v. O'Brien for regulations of noncommunicative conduct controls. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the state's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' " . . . we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" (United States v. O'Brien, 1968; Spence v. Washington, 1974). . . .

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag (Spence v. Washington, 1974); refusing to salute the flag (Barnette v. West Virginia, 1943); and displaying a red flag (Stromberg v. California, 1931), we have held, all may find shelter under the First Amendment. See also Smith v. Goguen (1974) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood" (Smith v. Goguen, 1974). . . .

The state of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct. . . . Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for president. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. . . . In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment. . . .

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the state is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record, and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the state stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning." . . . The only evidence offered by the state at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.

The state's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" (Terminiello v. Chicago, 1949). . . .

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (Brandenburg v. Ohio, 1969). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in Brandenburg. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" (Chaplinsky v. New Hampshire, 1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the federal government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the state's interest in maintaining order is not implicated on these facts. . . .

The state also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In Spence, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The state, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist; that is, that we do not enjoy unity as a nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of O'Brien. We are thus outside of O'Brien's test altogether.

It remains to consider whether the state's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction. . . .

. . . Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the state's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny" (Boos v. Barry, 1988).

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the state emphasizes the "special place"' reserved for the flag in our nation. . . .

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, e.g., Hustler Magazine, Inc. v. Fallwell.

We have not recognized an exception to this principle even where our flag has been involved. . . .

In short, nothing in our precedents suggests that a state may foster its own view of the flag by prohibiting expressive conduct relating to it. . . .

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. . . . We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment. . . .

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Johnson was convicted for engaging in expressive conduct. The state's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the state's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic" (New York Trust Co. v. Eisner, 1921). For more than two hundred years, the American flag has occupied a unique position as the symbol of our nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. . . .

[Justice Rehnquist provided a history of the flag, and included extensive citations or poetry written about it.]

The American flag, then, throughout more than two hundred years of our history, has come to be the visible symbol embodying our nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence, regardless of what

sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the act of Congress, and the laws of forty-eight of the fifty states, which make criminal the public burning of the flag. . . .

. . . As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several states have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, e.g., State v. Loyal (1973).

. . . The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished. . . .

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the members of both Houses of Congress, the members of the forty-eight state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case" (Fletcher v. Peck, 1810). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the armed forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

SUPPLEMENTAL READING 2: VIRGINIA V. BLACK
SOURCE: https://teachingamericanhistory.org/document/virginia-v-black/

INTRODUCTION: Virginia v. Black *considered two different acts of cross burning. The first instance involved Imperial Grand Wizard Barry Black's burning of a cross on private property during a Klan membership rally. The second instance involved two teenagers, Richard Elliott and Jonathan O'Mara, who drove a truck onto their African American neighbor's lawn, planted a cross, and burned it.*

At issue in Virginia v. Black *was a Virginia state law that banned cross burning with "an intent to intimidate a person or group of persons." The same Virginia statute included a provision specifying that "any such burning . . . shall be prima facie evidence of an intent to intimidate a person or group." Prima facie is a Latin phrase loosely translated in English to mean "at first sight." In legal terms, it refers to the instructions given to a jury that their first impression of the facts is correct, until proven otherwise. Thus, under this provision, jurors were correct to infer a malicious "intent to intimidate" whenever a cross was burned, regardless of the circumstances.*

In a previous cross-burning case, R.A.V. v. St. Paul (1992)*, the Court struck down a local ordinance banning hate speech. Writing for the majority in* R.A.V.*, Justice Antonin Scalia (1936–2016) argued that the law engaged in impermissible content and viewpoint discrimination by prohibiting hate speech in the case of some groups while allowing it for others.*

Writing for the majority, in Virginia v. Black*, Justice O'Connor distinguished the* R.A.V.*precedent from the present case. She argued that* R.A.V. *does not prohibit government from banning cross burning in all circumstances. Consistent with this recognition, she applied the "true threats" doctrine of* Watts v. United States *to cross burning. Under this doctrine, "the speaker need not actually intend to carry out the threat." The ban on "true threats" seeks to protect individuals from fear of violence and "the disruption that fear engenders."*

Reviewing the history of cross burning, Justice O'Connor concluded that not all cross burning intends to intimidate and terrorize. Sometimes, it conveys a statement of belief or a symbol of group solidarity. In these latter cases, it constitutes protected expression under the First Amendment. Because the prima facie provision of the Virginia statute failed to distinguish between these different manners of cross burning, it ran afoul of the First Amendment. Thus, the Court overturned the conviction of Barry Black, but returned the case of Elliott and O'Mara to the lower court for further action. In sum, cross burning is protected or punishable depending upon the context. Justice Thomas, the Court's sole African American member, disagreed with Court's interpretation of the historical record. Thomas argued further that the Virginia law should be upheld because it bans only conduct, not expression.

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. We conclude that while a state, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form. . . .

[The Court's opinion here includes a history of cross burning, from its origins in the fourteenth century as a means for Scottish tribes to signal each other to today's Ku Klux Klan.]

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury

or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting (Abrams v. United States, 1919; see also Texas v. Johnson, 1989: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Thus, the First Amendment "ordinarily" denies a state "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence" (Whitney v. California, 1927). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, e.g., R.A.V. v. City of St. Paul; Texas v. Johnson, supra; United States v. O'Brien (1968); Tinker v. Des Moines Independent Community School District (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e. g., Chaplinsky v. New Hampshire (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem"). The 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.' "

Thus, for example, a state may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (Chaplinsky v. New Hampshire; see also R.A.V. v. City of St. Paul, listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment (Cohen v. California, 1971; see also Chaplinsky v. New Hampshire). Furthermore, "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" (Brandenburg v. Ohio, 1969). And the First Amendment also permits a state to ban a "true threat" (Watts v. United States, 1969).

"True threats" encompass 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. See Watts v. United States ("political hyberbole" is not a true threat). The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. [T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. . . .

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. . . . The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise

their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "would create an unacceptable risk of the suppression of ideas" (Members of City Council of Los Angeles v. Taxpayers for Vincent, 1984). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "burning a cross at a political rally would almost certainly be protected expression" (R.A.V. v. St. Paul). Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning."

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. . . . [W]e hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under [the Virginia law].

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see Texas v. Johnson (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our nation's two hundred years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with intent to intimidate," I believe that the majority errs in imputing an expressive component to the activity in question. . . .

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic' " (Texas v. Johnson, 1989).

[Quoting from the majority's opinion on the history of the Klan:]

> "The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States."

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate, those its dislikes, uses the most brutal of methods. . . .

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to Blacks. Because the modern Klan expanded the list of its enemies beyond Blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia that: "A white, conservative, middle class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police."

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence. . . .

It strains credulity to suggest that [the Virginia state] legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests. . . .

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality. . . .

Because I would uphold the validity of this statute, I respectfully dissent.

SUPPLEMENTAL READING 3: SNYDER V. PHELPS
SOURCE: https://teachingamericanhistory.org/document/snyder-v-phelps/

INTRODUCTION: Fred Phelps was the founder and sole pastor of the Westboro Baptist Church. His sect applauds the killing of U.S. soldiers as divine retribution for the sin of homosexuality and for allowing gays in the armed services. To convey their message, the Westboro Baptists picketed more than six hundred funerals over twenty years. Marine Lance Corporal Matthew Snyder was killed in Iraq in 2003 and buried in a Catholic funeral service provided by his father, Albert Snyder, in Westminster, MD. Phelps and six of his relatives picketed the funeral, holding up antigay and anti-Catholic signs. Although he did not witness the picketing during the funeral ceremony, Albert Snyder subsequently viewed it on television. He claimed that the emotional trauma of the spectacle damaged his physical and mental health, a claim corroborated by his physicians. He thus sued for intentional infliction of emotional duress and won more than $10 million in combined punitive and compensatory damages. However, the Fourth Circuit Court reversed the judgment.

Writing for the Supreme Court (the case was decided 8–1), Chief Justice John Roberts (1955–) affirmed the Fourth Circuit's decision in favor of the Westboro Baptists. His opinion turned on the question of whether or not the speech was of a "public or private concern." Justice Alito's dissent argued that on the contrary, the Westboro Baptists "went far beyond commentary of public concerns." Their vilification of gays and Catholics combined with their invasion of Snyder's privacy did not deserve First Amendment protection.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. . . . That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government" (Garrison v. Louisiana, 1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" (Connick v. Myers, 1983).

. . . [W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import (Dun & Bradstreet).

We noted a short time ago, in considering whether public employee speech addressed a matter of public concern, that "the boundaries of the public concern test are not well defined" (San Diego v. Roe, 2004). Although that remains true today, we have articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors. . . .

Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record" (Dun & Bradstreet). As in other First Amendment cases, the court is obligated "to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" (New York Times Company v. Sullivan., 1964). In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our nation,

homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed, unlike the private speech in Dun & Bradstreet, to reach as broad a public audience as possible. And even if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.

Apart from the content of Westboro's signs, Snyder contends that the "context" of the speech—its connection with his son's funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is "fairly characterized as constituting speech on a matter of public concern" (Connick), and the funeral setting does not alter that conclusion.

Snyder argues that the church members in fact mounted a personal attack on Snyder and his family, and then attempted to "immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church." . . . Westboro had been actively engaged in speaking on the subjects addressed in its picketing long before it became aware of Matthew Snyder, and there can be no serious claim that Westboro's picketing did not represent its "honestly believed" views on public issues.

Snyder goes on to argue that Westboro's speech should be afforded less than full First Amendment protection "not only because of the words" but also because the church members exploited the funeral "as a platform to bring their message to a broader audience." There is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views and because of the relation between those sites and its views—in the case of the military funeral—because Westboro believes that God is killing American soldiers as punishment for the nation's sinful policies.

Westboro's choice to convey its views in conjunction with Matthew Snyder's funeral made the expression of those views particularly hurtful to many, especially to Matthew's father. The record makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection" (United States v. Grace, 1983). . . ."[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that " '[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate" (Frisby v. Schultz, 1988). . . .

We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In Frisby, for example, we upheld a ban on such picketing "before or about" a particular residence. In Madsen v. Women's Health Center, Inc. (1994) we approved an injunction requiring a buffer zone between protesters and an abortion clinic entrance. The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some one thousand feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit

the expression of an idea simply because society finds the idea itself offensive or disagreeable" (Texas v. Johnson, 1989). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful" (Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro's picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression" (Hustler v. Falwell). In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]' " expression (Bose Corp., quoting New York Times). Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment" (Boos v. Barry, 1988). What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.

For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside.

Snyder argues that even assuming Westboro's speech is entitled to First Amendment protection generally, the church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral. . . .

As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home (see Rowan v. Post Office Department, 1970), and an ordinance prohibiting picketing "before or about" any individual's residence (Frisby).

Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral service itself. We decline to expand the captive audience doctrine to the circumstances presented here. . . .

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

JUSTICE ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal

attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree.

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic" (New York Times Co. v. Sullivan, 1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. . . .

In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents' well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder's funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly six hundred military funerals. . . .

This strategy works because it is expected that respondents' verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. . . .

In this case, respondents implemented the Westboro Baptist Church's publicity-seeking strategy. Their press release stated that they were going "to picket the funeral of Lance Cpl. Matthew A. Snyder" because "God Almighty killed Lance Cpl. Snyder. He died in shame, not honor—for a fag nation cursed by God. . . . Now in Hell—sine die." This announcement guaranteed that Matthew's funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event. . . .

Even if those who attended the funeral were not alerted in advance about respondents' intentions, the meaning of [the] signs would not have been missed. Since respondents chose to stage their protest at Matthew Snyder's funeral and not at any of the other countless available venues, a reasonable person would have assumed that there was a connection between the messages on the placards and the deceased. Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents' signs—e.g., "God Hates You," "Not Blessed Just Cursed," and "You're Going to Hell"—would have likely been interpreted as referring to God's judgment of the deceased.

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. . . .

After the funeral, the Westboro picketers reaffirmed the meaning of their protest. They posted an online account entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots!" Belying any suggestion that they had simply made general comments about homosexuality, the Catholic Church, and the U.S. military, the "epic" addressed the Snyder family directly: "God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil." . . .

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the U.S. military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the U.S. military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not. . . .

The Court concludes that respondents' speech was protected by the First Amendment for essentially three reasons, but none is sound.

First—and most important—the Court finds that "the overall thrust and dominant theme of [their] demonstration spoke to" broad public issues. As I have attempted to show, this portrayal is quite inaccurate; respondents' attack on Matthew was of central importance. But in any event, I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents' attack on Matthew Snyder and his family should be treated differently. . . .

Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. I therefore respectfully dissent.