



1992

Recent Developments: R.A.V. v. City of St. Paul: City Ordinance Banning Cross Burnings and Other Symbols of Hate Speech Violates the First Amendment

Kim Germaine Judd

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>

 Part of the [Law Commons](#)

Recommended Citation

Judd, Kim Germaine (1992) "Recent Developments: R.A.V. v. City of St. Paul: City Ordinance Banning Cross Burnings and Other Symbols of Hate Speech Violates the First Amendment," *University of Baltimore Law Forum*: Vol. 23 : No. 1 , Article 6.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol23/iss1/6>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

Legislature's intent that a driver need not be told of all possible consequences between refusing and failing a chemical test for alcohol. In addition, by finding that the word "sanctions" does not encompass mere possibilities, the court has refused to recognize additional procedural safeguards for persons who decline to take chemical alcohol concentration tests. By deciding that an officer is not required to advise a driver of potential eligibility for modification of suspension or restrictive license if a driver takes the chemical alcohol test, the court has implied that a person who refuses to take the test must be prepared to face the consequences.

- Ellen Marth

R.A.V. v. City of St. Paul: CITY ORDINANCE BANNING CROSS BURNINGS AND OTHER SYMBOLS OF HATE SPEECH VIOLATES THE FIRST AMENDMENT.

In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), the United States Supreme Court ruled that a city ordinance banning cross burnings and other hate crimes violated the First Amendment to the United States Constitution because it discriminated on the basis of speech content and was not reasonably necessary to achieve the compelling interest of protecting groups that have historically been the victims of discrimination. While the Court unanimously agreed that the law was facially invalid, it was divided over the proper analysis of the ordinance under the First Amendment. The Court's decision resulted in a clash of interpretations, with a four member concurrence charging the majority with abandoning long established First Amendment principles.

In 1990, the petitioner, a white teenager, burned a cross on the front lawn of a black family that had recently moved into the city of St. Paul, Minnesota. The petitioner was charged with violating a local hate crime law that prohibited the display of a symbol

which aroused anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender. The ordinance specifically cited cross burning and swastika displays as acts punishable under its mandate.

The trial court dismissed the charges on the grounds that the law was substantially overbroad and impermissibly content-based. The Supreme Court of Minnesota rejected the overbreadth claim and upheld the ordinance because the statute limited its reach to "fighting words" and was narrowly tailored to serve a compelling governmental interest. The petitioner challenged the constitutionality of the statute, arguing that it infringed upon his First Amendment right to free speech. The Supreme Court granted certiorari to consider whether the ordinance discriminated impermissibly on the basis of content, and, if so, whether such discrimination was reasonably necessary to achieve the state's compelling interest in protecting those who have historically been the targets of discrimination.

Justice Scalia, writing for the Court, began his analysis by acknowledging that limited categories of speech - such as obscenity, defamation and fighting words - had been proscribed on the basis of content because their low social value was outweighed by a higher social interest. *R.A.V.*, 112 S. Ct. at 2543 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). In this case, however, the majority rejected the view that "fighting words," defined as insults which are likely to provoke the listener to react violently, were entirely without constitutional protection. *R.A.V.*, 112 S. Ct. at 2541. The Court determined that the government could proscribe "fighting words" in general because of the activity they provoked, but it could not proscribe specific sub-categories of fighting words because of the ideas they expressed or the classes they targeted. *Id.* at 2544. Thus, the majority found that the St. Paul ordinance was content discriminatory because it imposed spe-

cial prohibitions on those who expressed views on the disfavored subjects of race, color, creed, religion or gender, while at the same time permitting equally abusive messages which did not address those topics. *R.A.V.*, 112 S. Ct. at 2547. In addition, the Court reasoned that because there were content-neutral alternatives available, such as prosecuting the conduct under an arson statute, the city's compelling interest in protecting minority groups from victimization did not justify the law's discrimination. *Id.* at 2550.

The Court next outlined the two exceptions to content-based discrimination. The first exception occurs when the purpose of the distinction is content-neutral. *Id.* at 2545. As an illustration, the Court noted that a state could prohibit obscenity generally, but it could not prohibit obscenity that only included offensive political messages. *Id.* at 2546. Similarly, the Court noted that burning a flag in violation of an arson statute was punishable, but it had been held content-discriminatory to punish flag burning in violation of a law against dishonoring the flag. *Id.* at 2544 (citing *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989)). "Fighting words," according to the Court, were unprotected because "their content embodie[d] an intolerable mode of expression." *R.A.V.*, 112 S. Ct. at 2549. Justice Scalia's analysis suggested that cross burning was not "especially offensive" as it did not communicate ideas in a "threatening (as opposed to a merely obnoxious) manner." *Id.*

The Court then addressed the second exception which would permit content-based discrimination: where the regulation was aimed at the secondary effects of the speech without reference to the content of the speech. *Id.* (citing *Renton v. Playtime Theaters Inc.*, 475 U.S. 41, 48 (1986)). The City of St. Paul cited this second exception as the basis for the discrimination in its ordinance, arguing that the St. Paul ordinance was not intended to stifle freedom of expression, but rather was

to protect against the victimization of people who were particularly vulnerable to discrimination. *R.A.V.*, 112 S. Ct. at 2549. The Court, reasoning that the “emotive impact of speech on its audience is not a secondary effect, found that the St. Paul ordinance was not directed to secondary effects because it handicapped “specific categories” of speech. *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

In a concurring opinion, Justice White argued that the case should have been decided by finding the ordinance fatally overbroad. *Id.* at 2550. As written, the ordinance could prevent modes of expression that had offensive content but were not themselves threatening or harmful. For this reason, Justice White charged the majority with renouncing the traditional use of strict scrutiny review as a tool of First Amendment analysis. Under a strict scrutiny analysis, restrictions on speech are justified where the statute is narrowly tailored and necessary for the achievement of a compelling interest. The St. Paul ordinance, according to Justice White, could have survived a strict scrutiny review if it was more narrowly drafted. He faulted the majority for effecting an underinclusive standard which suggested that the statute should have banned a wider category of speech than was necessary to achieve the city’s interest. This perceived departure from strict scrutiny analysis was criticized in light of the recent Supreme Court decision *Burson v. Freeman*, 112 S. Ct. 1846 (1992), in which the participating members of the present Court agreed that a strict scrutiny standard is applicable to a case involving a First Amendment challenge to a content-based statute. *R.A.V.*, 112 S. Ct. at 2551.

The concurrence also argued that the majority violated Court precedent by not categorically including fighting words among constitutionally prohibited speech. *Id.* at 2552-53. Justice White recognized that fighting words made up no “essential part of any exposition of ideas” and were wholly un-

protected by the First Amendment because they were “directed at individuals to provoke violence or to inflict injury.” *Id.* at 2553 (quoting *Chaplinsky*, 315 U.S. at 572).

In a separate concurring opinion, Justice Stevens noted his frustration with the majority’s attitude towards the dangers of hate speech. *R.A.V.*, 112 S. Ct. at 2570. In a footnote referring to the Los Angeles riots, he wrote, “one need look no further than the recent social unrest in the nation’s cities to see that race-based threats may cause more harm to society . . . than other threats.” *Id.* at 2570 n.9.

The Supreme Court’s ruling that banning cross burnings and swastika displays on the basis of content violates the First Amendment is significant because most states have enacted some form of hate speech legislation that will be invalidated by this decision. *R.A.V. v. St. Paul* will probably stand as one of the most far-reaching interpretations of the First Amendment. Although the bottom line was balanced, the analysis was insensitive. The majority’s seeming perception of hate speech as no more than a societal nuisance is offensive to the many Americans whose lives were threatened by the very actions which the majority characterizes as merely “obnoxious.” To many, the sight of a burning cross on the front lawn or a swastika display on the temple wall exceeds mere speech and proposes a direct threat of physical violence. Moreover, the Court’s fractured consensus on First Amendment analysis, as applied to hate speech, will likely leave many lawyers bewildered over how to litigate hate crimes, and will leave many legislators perplexed about how to formulate a hate crime statute.

- Kim Germaine Judd

Lucas v. South Carolina Coastal Council: LANDOWNER COMPENSATION REQUIRED WHERE PROPERTY REGULATIONS DEPRIVE ALL ECONOMICALLY BENEFICIAL USE OF LAND UNLESS REGULATIONS ARE INHERENT IN TITLE.

The United States Supreme Court’s most recent inverse condemnation decision, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), introduced a new approach to determine whether a property owner has suffered a regulatory taking requiring the payment of just compensation. The Court developed a test which inquires into the underlying principles of the state’s property and nuisance law. The new test considers whether the challenged regulations merely make explicit restrictions on the property’s use that were inherent in the title to the property itself. If so, then no compensation is required under the Fifth and Fourteenth Amendments, even if the regulation deprives the owner of all economically beneficial use of the land.

In 1986, David Lucas purchased two residential lots on the Isle of Palms, a barrier island located east of Charleston, South Carolina. Just as neighboring landowners had done on their land, Lucas intended to build single-family homes on his \$975,000 parcels. His plans, however, were thwarted by the South Carolina Legislature in 1988 with the passage of the Beachfront Management Act. S.C. Code Ann. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1991) (“the Act”). The Act established a baseline connecting the furthest-inland points of erosion during the last forty years and prohibited the construction of “occupiable improvements” seaward of the baseline. Because the baseline fell inland of Lucas’s lots and his proposed homes constituted “occupiable improvements,” Lucas was prohibited from building on his land.

Lucas challenged the Act in the South Carolina Court of Common Pleas, arguing that the law’s effect on