The Courts and Political Controversy

POLI 104I

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- 7/6 - obscenity (OB2 – 5b (first half))
- 7/11 - executive power (OB1 – 4a-d)
- 7/13 - election law (OB1 - 8c)
- **7/18 – threats & offensive speech (OB2 – 5b (second half))**
- 7/20 - guns (OB2 365-387 + Bruen)
- 7/25 - privacy (OB2 – 11 + Dobbs)
- 7/27 - review

Constitutional Amendments

- 1st: Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to petition the Government for a redress of grievances.
- 14th: [1868] Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

Reading for 7/18

- threats & offensive speech (OB2 – 5b (second half))
  - Cohen v. California
  - Federal Communications Commission v. Pacifica Foundation
  - Bethel School District No. 403 v. Fraser
  - R.A.V. v. City of St. Paul, Minnesota
  - Wisconsin v. Mitchell
  - Virginia v. Black
  - Brown v. Entertainment Merchants Association (optional)

Threats and Offensive Speech

- Common law: Tuberville v. Savage (1669)
- “Savage had made some insulting comments to Tuberville. In response, Tuberville grabbed the handle of his sword and stated, "If it were not assize-time, I would not take such language from you." Savage responded with force, causing Tuberville to lose his eye. Tuberville brought an action for assault, battery, and wounding, to which Savage pleaded provocation, to-wit Tuberville's statement.”
- “The Court considered the language used in the statement and found that Tuberville did not express any intention to do any harm to Savage in the given circumstances. Tuberville's expressed words indicated that he was *not* going to harm Savage because the justices of assize were in town, and his laying his hand on his sword was to be interpreted in conjunction with those words, namely as an indication or description of what he *would have* done were the judges not nearby.”
- “Therefore, Tuberville's conduct was insufficient to put a reasonable person in Savage's situation in apprehension of immediate violence, as it involved neither a subjective intent to do so nor an act reasonably construable as doing so, at least one of which would have been required for Tuberville's action to constitute an assault. As such, Tuberville's conduct constituted neither an attack that would have justified Savage in defending himself nor even provocation sufficient to mitigate Savage's culpability for his response. Thus, Savage's defense was unsuccessful, and Tuberville prevailed in his action.”

Threats and Offensive Speech

- Chaplinsky v. New Hampshire (1942): the “fighting words” doctrine.
- Background: “On a public sidewalk in downtown Rochester, Walter Chaplinsky was distributing literature that supported his beliefs as a Jehovah's Witness and attacked more conventional forms of religion. Chaplinsky called the town marshal "a God-damned racketeer" and "a damned Fascist." He was arrested and convicted under a state law that prohibited intentionally offensive, derisive, or annoying speech to any person who is lawfully in a street or public area. On appeal, Chaplinsky argued that the law violated the First Amendment on the grounds that it was overly vague.”
- Holding: “Writing for a unanimous Court, Justice Frank Murphy upheld Chaplinsky’s conviction. The Court identified certain categorical exceptions to First Amendment protections, including obscenities, certain profane and slanderous speech, and "fighting words." He found that Chaplinsky's insults were “**fighting words**” since they caused a direct harm to their target and could be construed to advocate an immediate breach of the peace. Thus, they lacked the social value of disseminating ideas to the public that lay behind the rights granted by the First Amendment. A state can use its police power, the Court reasoned, to curb their expression in the interests of maintaining order and morality.”

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Background: “A 19-year-old department store worker expressed his opposition to the Vietnam War by wearing a jacket emblazoned with "FUCK THE DRAFT. STOP THE WAR" The young man, Paul Cohen, was charged under a California statute that prohibits "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct." Cohen was found guilty and sentenced to 30 days in jail.
- Question Presented: Did California's statute, prohibiting the display of offensive messages such as "Fuck the Draft," violate freedom of expression as protected by the First Amendment?”
- Majority (Harlan): “…whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.”

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Majority (Harlan): “we deal here with a conviction resting solely upon “speech.””
  - “This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.”
- “This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.”

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Majority (Harlan): “Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest.”
  - [But] “we are often `captives' outside the sanctuary of the home and subject to objectionable speech.””
  - “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that **substantial privacy interests are being invaded in an essentially intolerable manner**. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Majority (Harlan): “The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that **no other approach would comport with the premise of individual dignity and choice upon which our political system rests**. See Whitney v. California, 274 U.S. 357, 375 -377 (1927) (Brandeis, J., concurring).”
- “To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth **necessary side effects** of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Majority (Harlan): "…while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."
- "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results."
- Holding: "…absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."

Threats and Offensive Speech

- Cohen v. California (1971): decided 6-3; reversed.
- Dissent (Blackmun): “Cohen's absurd and immature antic, in my view, was mainly conduct and little speech…well within the sphere of Chaplinsky v. New Hampshire.”

Threats and Offensive Speech

- Hess v. Indiana (1973): limits to Brandenburg, Chaplinsky
- “The case involved an antiwar protest on the campus of Indiana University Bloomington. Between 100 and 150 protesters were in the streets. The sheriff and his deputies then proceeded to clear the streets of the protestors. As the sheriff was passing Gregory Hess, one of the members of the crowd, Hess uttered, "We'll take the street later" or "We'll take the street again." Hess was convicted in Indiana state court of disorderly conduct…”
- “The Supreme Court reversed Hess's conviction because Hess' statement, at worst, "amounted to nothing more than advocacy of illegal action at some indefinite future time." In contrast to such an indefinite future time, the Court emphasized the word imminent in the "imminent lawless action" test of Brandenburg. Because the evidence did not show that Hess' speech was intended and likely to produce "imminent disorder", the state could not punish Hess' speech.”
- “In addition, Hess' speech was not directed at any particular person or group. As a result, "it cannot be said that he was advocating, in the normal sense, any action." For similar reasons, Hess' speech also could not be considered "fighting words" under Chaplinsky v. New Hampshire (1942).”

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Background: “During a mid-afternoon weekly broadcast, a New York radio station aired George Carlin's monologue, "Filthy Words." Carlin spoke of the words that could not be said on the public airwaves. The station warned listeners that the monologue included "sensitive language which might be regarded as offensive to some." The FCC received a complaint from a man who stated that he had heard the broadcast while driving with his young son.” The FCC then issued a declaratory order threatening Pacifica with administrative sanctions for airing the broadcast.
- Question Presented: “Does the First Amendment deny government any power to restrict the public broadcast of indecent language under any circumstances?”
- Majority (Stevens): “This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.”

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Majority (Stevens): “The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance where the "law generally speaks to channeling behavior rather than actually prohibiting it.“”
  - The FCC equated indecent language with obscene language (OB2:519).
- “The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. Roth v. United States, 354 U.S. 476 . But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Majority (Stevens): “If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content - or even to the fact that it satirized contemporary attitudes about four-letter words - First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.”
  - “Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch 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." Chaplinsky v. New Hampshire, 315 U.S., at 572.”

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Majority (Stevens): “Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, e. g., Hess v. Indiana, 414 U.S. 105.”
- “Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, [438 U.S. 726, 747] the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.”
- “It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. Cohen v. California, 403 U.S. 15, 25.

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Majority (Stevens): [revised Q.P.]: “In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.”
  - “the broadcast media have established a uniquely pervasive presence in the lives of all Americans…broadcasting is uniquely accessible to children”
- “The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, 29 and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.”

Threats and Offensive Speech

- Federal Communications Comm. v. Pacifica Foundation (1978): decided 5-4, reversed.
- Dissent (Brennan): [the majority] "misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home… [and] ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many - including the FCC and this Court - might find offensive."
- "Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds."
- "Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them…[this will make] completely unavailable to adults material which may not constitutionally be kept even from children."

Threats and Offensive Speech

- Bethel School District No. 403 v. Fraser (1986): decided 7-2; reversed.
- Background: “At a school assembly of approximately 600 high school students, Fraser made a speech nominating a fellow student for elective office. In his speech, Fraser used what some observers believed was a graphic sexual metaphor to promote the candidacy of his friend. As part of its disciplinary code, Bethel High School enforced a rule prohibiting conduct which "substantially interferes with the educational process . . . including the use of obscene, profane language or gestures." Fraser was suspended from school for two days.”
- Question Presented: “Does the First Amendment prevent a school district from disciplining a high school student for giving a lewd speech at a high school assembly?”
- Holding: “No. The Court found that it was appropriate for the school to prohibit the use of vulgar and offensive language.”

Threats and Offensive Speech

- Bethel School District No. 403 v. Fraser (1986): decided 7-2; reversed.
- Majority (Burger): “A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:
  - "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.“
- “The marked distinction between the political "message" of the armbands in Tinker and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." Id., at 508.”

Threats and Offensive Speech

- Bethel School District No. 403 v. Fraser (1986): decided 7-2; reversed.
- Majority (Burger): “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.“
  - “Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”
  - “Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint.”
- “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.”

Threats and Offensive Speech

- Bethel School District No. 403 v. Fraser (1986): decided 7-2; reversed.
- Concurrence (Brennan): prints the actual text of the speech.
- “in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits.”
- “ school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express.”
- “…the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.”

Threats and Offensive Speech

- Bethel School District No. 403 v. Fraser (1986): decided 7-2; reversed.
- Concurrence (Marshall): “I agree with the principles that JUSTICE BRENNAN sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because in my view the School District failed to demonstrate that respondent's remarks were indeed disruptive.”
- Concurrence (Stevens): what is offensive changes over time; if a school wants to punish a student for speech this should be announced in an official policy to give proper notice, required by the Due Process clause.
  - “the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it.”
- “…because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Background: “Several teenagers allegedly burned a crudely fashioned cross on a black family's lawn. The police charged one of the teens under a local bias-motivated criminal ordinance which prohibits the display of a symbol which "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court dismissed this charge. The state supreme court reversed. R.A.V. appealed to the U.S. Supreme Court.”
  - The Minnesota Supreme Court concluded that the ordinance only applied to conduct “outside First Amendment protection,” so the ordinance as construed only prohibits “fighting words” and speech that threatens “imminent lawless actions.”
- Question Presented: “Is the ordinance overly broad and impermissibly content-based in violation of the First Amendment free speech clause?”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Holding: “Yes. In a 9-to-0 vote, the justices held the ordinance invalid on its face because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." The First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed…Government has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules.”””
- Majority (Scalia): “Content-based regulations are presumptively invalid…From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky, supra, at 572.”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Majority (Scalia): “In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: each is, as Justice Frankfurter recognized, a "mode of speech"…both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment.”
- “As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility - or favoritism - towards the underlying message expressed.”
- “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Majority (Scalia): “Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech," ”
  - “Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”
- “Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional…the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other…are not covered.”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Majority (Scalia): “What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred…”
- “Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.”

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- Concurrence (White): “the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment.”
- “To borrow a phrase: "Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense, and with our jurisprudence as well." Ante, at 384. It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, Ferber, supra, at 763-764, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is, by definition, worthless and undeserving of constitutional protection.”
- Fighting words are not a means of exchanging views…they are directed against individuals to provoke violence or to inflict injury. Chaplinsky, 315 U.S., at 572 . Therefore, a ban on all fighting words or on a subset of the fighting words category…would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace

Threats and Offensive Speech

- R.A.V. v. City of St. Paul, Minnesota (1992): decided 9-0; reversed and remanded.
- “By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category.”
- Concurrence (Stevens): “The allure of absolute principles has skewed the analysis of both the majority and [concurring] opinions.”

Threats and Offensive Speech

- Wisconsin v. Mitchell (1993): decided 9-0; reversed and remanded.
- Background: “On October 7, 1989, Todd Mitchell, a young black man, instigated an attack against a young white boy. He was subsequently convicted of aggravated battery in the Circuit Court for Kenosha County. According to Wisconsin statute, Mitchell's sentence was increased, because the court found that he had selected his victim based on race. Mitchell challenged the constitutionality of the increase in his penalty, but the Wisconsin Court of Appeals rejected his claims. However, the Wisconsin Supreme Court reversed.”
- Question Presented: “Did the increase in Mitchell's sentence based on his bigoted motives violate his First Amendment rights?”
- Holding “the Court concluded that the Wisconsin statute did not violate the right to free speech because the occasion in which an average person's racist comments would be used against him or her in a court of law would arise so rarely that he or she would not feel forced to suppress them” [so no “chilling effect” would occur].

Threats and Offensive Speech

- Wisconsin v. Mitchell (1993): decided 9-0; reversed and remanded.
- Majority (Rehnquist): “although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted beliefs.”
- “we hold that Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him.”

Threats and Offensive Speech

- Wisconsin v. Mitchell (1993): decided 9-0; reversed and remanded.
- Majority (Rehnquist): “Nothing in our decision last Term in R.A.V. compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "`fighting words' that insult, or provoke violence, `on the basis of race, color, creed, religion or gender.’”…
- Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city - i.e., those "that contain . . . messages of `bias-motivated' hatred," we held that it violated the rule against content-based discrimination...But whereas the ordinance struck down in R.A.V. was explicitly directed at expression (i.e., "speech" or "messages", id. at 392, the statute in this case is aimed at conduct unprotected by the First Amendment.

Threats and Offensive Speech

- Wisconsin v. Mitchell (1993): decided 9-0; reversed and remanded.
- Majority (Rehnquist): “Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should, in the future, commit a criminal offense covered by the statute. We find no merit in this contention.”
- “The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that, if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement…This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

Threats and Offensive Speech

- Virginia v. Black (2003):
- Background: “Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating a Virginia statute that makes it a felony "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place," and specifies that "any such burning...shall be prima facie evidence of an intent to intimidate a person or group." At trial, Black objected on First Amendment grounds to a jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred. He was found guilty. O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. In Elliott's trial, the judge did not give an instruction on the statute's prima facie evidence provision. Ultimately, the Virginia Supreme Court held, among other things, that the cross-burning statute is unconstitutional on its face and that the prima facie evidence provision renders the statute overbroad because the probability of prosecution under the statute chills the expression of protected speech.”

Threats and Offensive Speech

- Virginia v. Black (2003):
- Question Presented: “Does the Commonwealth of Virginia's cross-burning statute, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, violate the First Amendment?”
- Holding: “Yes, but in a plurality opinion delivered by Justice Sandra Day O'Connor, the Court held that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, in which four other justices joined, 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, in which three other justices joined.”
- Majority (O’Connor): “…regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate."”

Threats and Offensive Speech

- Virginia v. Black (2003):
- Majority (O'Connor): "…regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate.""
- "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…"*
- "The protections afforded by the First Amendment, however, are not absolute…a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, R. A. V.). 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…"*

Threats and Offensive Speech

- Virginia v. Black (2003):
- Majority (O'Connor): ""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…*R. A. V.*….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."

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- Majority (O'Connor): "The Supreme Court of Virginia ruled that in light of *R. A. V.* v. *City of St. Paul*, *supra*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint."
- "It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner."
- "The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V.* v. *City of St. Paul*, *supra,* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree."

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Threats and Offensive Speech

- Virginia v. Black (2003):
- Majority (O'Connor): "We did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech…. while the holding of *R. A. V.* does not permit a State to ban only obscenity based on "offensive *political* messages," or "only those threats against the President that mention his policy on aid to inner cities," the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at issue ... is proscribable…"
- "Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion…"

Threats and Offensive Speech

- Virginia v. Black (2003):
- Majority (O'Connor): "The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."
- "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."
- "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."

Threats and Offensive Speech

- Virginia v. Black (2003):
- Concurrence (Stevens): ”Cross burning with "an intent to intimidate," Va. Code Ann. §18.2-423 (1996), unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct. With this observation, I join *Justice O'Connor*'s opinion.”
- Dissent (Thomas): “ I believe that the majority errs in imputing an expressive component to the activity in question…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.”

Threats and Offensive Speech

- Virginia v. Black (2003):
- Concurrence (Scalia): “Justice Antonin Scalia dissented from the latter portion of the Court's conclusion to argue that the Court should vacate and remand the judgment of the Virginia Supreme Court with respect to Elliott and O'Mara, so that that court could have an opportunity to construe the cross-burning statute's prima-facie-evidence provision.”
- Dissent (Souter): “Justice David H. Souter, joined by Justices Anthony M. Kennedy and Ruth Bader Ginsburg, concluded that the Virginia statute is unconstitutional and therefore concurred in the Court's judgment insofar as it affirmed the invalidation of Black's conviction.”