COMMENTS

WHAT DOES IT MEAN TO SEE A BLACK CHURCH BURNING?

Understanding the Significance of Constitutionalizing Hate Speech

_Michele M. SimmsParris*

"People who will burn a cross will burn a church"**

The Color of Night***

Somewhere
in the middle of some place,
in the middle or at the fringes of this place —
your space and, yes, my space too —
America
there resonates
in the crackling timbre of heat and hate

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*** Michele M. SimmsParris (1997)
a spate of yellow, blue, orange, and red.
Color.

How tragically appropriate
when we stop to consider, stop to understand,
when we stop.
and realize that somewhere in the final analysis
sound has a smell, sight has a taste
and fire for the purpose of trepidation
ignites more than a conflagration of wood and mortar
but it completes a searing of the soul
not just mine, not just theirs —
not just America.

Somewhere
in the after-dusks of Tennessee and New York
Alabama and Michigan, Georgia, Virginia, Texas and possibly
Maine, there is a color of night that burns bright like a memory
it looks exactly the same each time.
It is a sacrilegious song for a sacrilegious dance
a choreograph of building up
and burning down and building up again for the continuance of

America.

Somewhere
in the truthfulness of our existence
we understand that logic and hate could never be wedded.
we understand that it takes more than words to express the soul
and home is that intangible place built by memory.

But this,
this is not a death for me.
Like the Phoenix ours is a mandate to resurrect from the pyre.
This is the work done and undone to be done better again, the
next time
by shared hands that appreciate that color is always beautiful,
even at night,
even in this place —
America.

I. INTRODUCTION

Racism burns at the core of American society. It singes our cultural fabric and makes this country, for some, a terrible place to call
home. The recent wave of Black church burnings should inspire in all of us the desire to closely examine and evaluate the state of race relations in this country today. It is disheartening to know that Black churches still burn. Equally troublesome is the Supreme Court's willingness to protect racially motivated cross burnings, which lie on the continuum of racial violence with church burnings, as expression protected by the First Amendment.

The history of church burning in the American past is long and turbulent. Church burning represents the dangerously violent heights to which racial hatred may rise. Like cross burning, the message of racial hate and promised harm is clearly articulated to African-Americans when a Black church is burned. However, unlike cross burning, the burning of Black churches articulates hatred toward the larger Black community, to which the church is inextricably linked.

In light of the recent church burnings across the country, the Supreme Court's decision in *R.A. V. v. City of St. Paul* is clearly erroneous. In a decision to protect free speech by protecting symbolic hate speech, in this case cross burning, the Court has converted the ideal of free speech into a free-for-all for racists. History and the experiences of countless victims of racially motivated assaults provide evidence of the painfully clear message of hate expressed by racially motivated arson. Given the loathsome history of racial violence in this country, the Court's disregard of racially motivated hate speech, as evidenced by the *R.A. V.* decision, virtually invites Americans to openly express a perilous level of hatred toward one another.

This comment explores the rich past of African-American churches and their roles within Black communities across the country. The historical significance of Black Churches to Black communities makes Black Church arsons especially harmful. Attention will be given to the emergence and development of Black Churches, their

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4. Justice Antonin Scalia, writing for the majority, stated that an ordinance which prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm, or resentment in others . . . on the basis of race, color, creed, religion, or gender," is an unconstitutional prohibition of speech because it focuses on speakers who express views on disfavored subjects. See *R.A. V.*, 505 U.S. at 390. Justice Scalia, writing for the majority, stated that an ordinance which prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm, or resentment in others . . . on the basis of race, color, creed, religion, or gender," is an unconstitutional prohibition of speech because it focuses on speakers who express views on disfavored subjects. See *R.A. V.*, 505 U.S. at 390.

5. Walton, *supra* note 1, at 17 ("[T]error — the imagery of burning churches and the like can call up in the minds of blacks with a living memory of Jim Crow, the brutality of the Old South, and the bloody roll of the 1950s and 1960s.")
functions in Black communities, and their political power. Ultimately, the history of Black Churches and their arson will provide the appropriate basis by which to discern the meaning of Black Church arsons plaguing the 1990s.

This paper will also analyzes the *R.A.V. v. City of St. Paul* decision and its significance in relation to the church burnings of the 1990s. An examination of *R.A.V.* uncovers how the law is applied to protect the expressive aspects of hate speech as free speech, and thereby encourages its proliferation. It is within the history of violence against Black institutions, such as Black churches, that we are presented with solid reasons for overturning the *R.A.V. v. City of St. Paul* decision.

Only through a detailed analysis of the ways in which the law ignores the social and legal significance of racially motivated arson can we begin to find ways to remedy some of the problems associated with racism. The *R.A.V.* decision illustrates what happens when laws are applied without understanding the social contexts in which they will work. Racially motivated church burning is a horrendous social phenomenon that demands legal recourse.

Each time a cross or church is burned the assurance of civil peace in the United States is lost. A loss of civil peace invariably translates into a loss of ordered liberty. The existence of sloppy legal thinking allows for such intolerable practices to slip through the cracks of jurisprudence and ultimately harms us all. To see a Black church burning is to witness not only an assault on African-Americans or their communities but to witness an assault on the true values of freedom which underpin our Constitution.

**II. THE BLACK CHURCH**

**A. A Historical Background of the Significance of Black Churches: Beyond a Monolithic Construct of African-American Religion and Religiosity**

Notions of religious faith and freedom have shaped much of American political and social philosophy. For many Americans religion is not just a way of thinking, but a way of life. In African-American history, “the church” has long stood at the center of Black communities establishing itself as the pre-eminent source for religious enrichment and secular development.

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6 *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (discussing the concept of maintaining public order in order to preserve liberty).

7 *See id.* at 569.

8 THOMAS CUMING HALL, THE RELIGIOUS BACKGROUND OF AMERICAN CULTURE (Frederick Ungar Publishing Co. 1959) (offering a history of religion in America).

9 *See ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 4 (The Free Press 1984) (“Scholars of the Black Church, like W.E.B. DuBois, E. Franklin Frazier, and Anne K. Nelsen, have consistently argued that the church is the dominant institution within Black society.”).
To capture a sense of the shared historical experiences of African-Americans, in particular African-American Christians, the phrase "the Black Church" evolved. The phrase has developed into a term of art for expressing the centrality of Black churches in Black communities. Although the term, "the Black Church" is a bit misleading, it presents a tangible quality to the intricacies of racial and religious interstionality unique to African-American history. For many African-American Christians, despite their denominational differences, Black churches have always represented a triumvirate of religion, community, and home. Thus, in an attempt to convey the significance of Black Churches in Black communities, scholars have repeatedly asserted that "Black history and Black church history intersect[ed] at so many points as to be virtually identical." Hence, despite the presence of myriad factions of Black churches in America, the depiction of the monolithic Black Church is pervasive throughout African-American historiography as a matter of historical course.

Even though history illustrates many moments in which the social and political experiences of African-Americans either affected or were affected by Black churches, aspects of Black history and Black church histories in many ways remained distinct. In essence, the term "the Black Church" is a misnomer. The term "the black church" implies that all Black churches share or have shared the same aspirations and strategies for creating cohesive African-American communities. This is far from true.

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12 See Paula Giddings, When and Where I Enter 284 (Bantam Books 1984) ("The Black Church was the most cohesive institution in the deep South capable of reaching large segments of the Black populace."). See also John Hope Franklin and Alfred A. Moss, Jr., From Slavery to Freedom 211 (Alfred A. Knopf 1988) ("Another agency that offered both spiritual and material relief during Reconstruction was the Negro Church.").
14 See C. Eric Lincoln, The Black Church Since Frazier 108 (Schocken Books 1974) ("The Black Church has always stood as the symbol of freedom . . . [b]ut it was never completely unanimous on the issue of whether it must not also be the instrument of freedom.").
15 See id. at 115-16 ("The Black Church, then, is in some sense a 'universal church', claiming and representing all Blacks.").
16 See Albert J. Raboteau, Slave Religion 204 (Oxford Univ. Press 1978). In nineteenth century Maryland, prior to emancipation, a large free Black population in Baltimore inspired a separatist movement within the African Methodist churches which resulted in the creation of the African Methodist Episcopal Church. See also Robert C. Smith, We Have No Leaders 99 (State Univ. of New York Press 1996). The largest organization of African-Americans, the National Baptist Convention (NBC) was a conservative, accommodationist institution which opposed the civil rights struggle of the 1960s. The Progressive Baptist Convention, led by Martin Luther King, actively supported and took part in leading the Civil Rights Movement.
A deconstruction of the monolithic Black church begins with the acknowledgment of the innumerable differences found among Black communities and the reflection of those differences within their community churches.\footnote{Since the Church has been the main form or focus of organized social life among [Negroes] it has been affected by integration [social and economic], and as a result there are shifts in individual affiliations to Black religion from church to church.” Id. at 89-90.} Black communities differed from region to region.\footnote{See id. at 44 (describing churches in the Black Belt of Georgia and in Alabama).} They were divided along social lines, composed of persons from different economic levels, and maintained varying political philosophies.\footnote{Black churches struggled with the issue whether to support the movement for Black Power or focus on the attainment of shared power with whites. See id. at 127. Reactions of church members to racial violence varied. Some wanted to dissociate themselves from the political arena hoping that that would shield them from the violence while others wanted to get more involved in the political process in the hopes of opposing the violence in a more direct fashion. See id. at 109.} Black communities in the inner cities of the United States have traditionally differed from those in rural areas.\footnote{See AUGUST MEIER AND ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 213-50 (Hill and Wang 1970).} Ultimately, the needs and concerns of the members of these varying communities were also dissimilar from area to area.\footnote{See generally, E. FRANKLIN FRAZIER, THE NEGRO CHURCH IN AMERICA 52-71 (Schocken Books 1963).} Therefore, like all other Americans, social stratification was a reality of Black Americans. For African-Americans such stratification was affected by the wide range of attitudes toward race, class, gender, education and political affiliation.\footnote{See generally, FRAZIER, supra note 21, at 55 (Frazier gives the example of “storefront” churches in inner cities as an alternative to traditional church options available to African-Americans.).} The social differences that countenanced each sub-community of the larger Black community was also reflected in the identities of Black Churches.

The diversity of Black communities was reflected in the variety of Black Churches.\footnote{See id. at 58 (Frazier gives the example of “storefront” churches in inner cities as an alternative to traditional church options available to African-Americans.).} African-American community churches varied in denominational affiliations,\footnote{See PARIS, supra note 21, at 85 (“Middle class Negroes [had a tendency to] join the Presbyterian, Congregational, and Episcopal churches.”).} theological practice, and regional location.\footnote{See id. at 113 (“For example, the ante-bellum regional split in the Methodist, Presbyterian, and Baptist denominations.”).} In *The Negro Church in America*, the sociologist E. Franklin Frazier noted, “Methodist and Baptist denominations were separate church organizations based upon distinctions of color and what were considered standards of civilized behavior.”\footnote{Id. at 37.} Not only did Black
churches differ culturally and ideologically, but each church also differed in the ways it evolved.\textsuperscript{27} Many Black churches were created in response to racial segregation.\textsuperscript{28} Many African-American churches were established in response to African-American dissatisfaction with the teachings of "white churches."\textsuperscript{29} Some were established simply to bring varying forms of Christianity into Black communities which already had either one or several established Black churches.\textsuperscript{29} Consequently, the concerns of independent Black churches reflected the varying concerns of their congregants.\textsuperscript{31}

Nevertheless, despite their regional, denominational, and theological differences, Black churches maintained striking commonalities.\textsuperscript{32} Black churches were consistently at the social and religious centers of Black communities.\textsuperscript{33} The interwoven fabric of the secular and the ecclesiastical within many Black religious institutions created a base upon which African-Americans could organize politically and persist spiritually.\textsuperscript{34} Black churches were not only given to the teachings of Christianity but they were faithfully relied upon to address the specific issues which affected their members.\textsuperscript{35}

Since the establishment of the first independent African-American church in America in 1773, Black churches have flourished.\textsuperscript{36} Even though many African-American churches were created in reaction to racial discrimination and segregation,\textsuperscript{37} what developed was more than separate places to worship for African-

\textsuperscript{27} See C. Eric Lincoln, Race, Religion and the Continuing American Dilemma (Hill and Wang 1984).
\textsuperscript{28} August Meier and Elliott Rudwick, From Plantation to Ghetto 83 (Hill and Wang 1970).
\textsuperscript{29} Id.
\textsuperscript{31} See Lincoln, supra note 27, at 110.
\textsuperscript{32} See Peter J. Paris, The Social Teaching of the Black Churches 6 (Fortress Press 1985) ("In each case the Black Church was the primary community institution owned and controlled by Blacks themselves.").
\textsuperscript{33} See id. at 112 ("The black churches have constituted a place of power both within the black community and as the black community's representative in the white society.").
\textsuperscript{34} See id. at 8 ("There is an integral relationship between the black churches and the black community...in which there is no radical disjunction between the sacred and the secular spheres of human existence.").
\textsuperscript{35} See August Meier and Elliott Rudwick, From Plantation to Ghetto 83 (Hill and Wang 1970) ("The distinction between the sacred and the secular was not closely drawn.").
\textsuperscript{36} See C. Eric Lincoln, Race, Religion and the Continuing American Dilemma (Hill and Wang 1984) (The church was founded by George Lile in 1773 at Silver Bluffs, South Carolina.).
\textsuperscript{37} See e.g., Meier and Rudwick, supra note 35, at 83 (for example, "In white churches blacks were relegated to sit in gallies, 'nigger pews' or 'African corners'.").
Instead, churches became religious institutions devoted to addressing the needs of members of the Black community.

B. Understanding the Church as a Community

The Negro church was not only an arena of political life for the leaders of Negroes, it had a political meaning for the masses. Although they were denied the right to vote in the American community, within their churches, especially the Methodist Churches, they could vote and engage in electing their officers. The election of bishops and other officers and representatives to conventions has been a serious activity for the masses of Negroes . . . . For the Negro masses, in their social and moral isolation in American society, the Negro church community has been a nation within a nation.

In church-centered Black communities, the relationship between one's community and one's church was intimate. Far more than just a place to worship, the Black Church was a nation within a nation. The meshing of Black community life with the religious experiences of African-Americans precipitated the birth of the dichotomy between church and religion found within the construction of Black religions. For many African-Americans, church was not only a place to receive religious instruction on the doctrines of Christianity, church was a community in which to learn about one's world.

Black churches were organizational sites for social and political activities, centers for economic development and growth. As microcosms of the larger society, Black churches provided an environ-

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38 See id; PETER J. PARIS, THE SOCIAL TEACHING OF THE BLACK CHURCHES 17-19 (Fortress Press 1985). Paris discusses the emergence of the A.M.E. Church as a church born not only on theological grounds but sociological ones, devoted to the issues of race which affected African-American social and religious life. "The [Black Christian tradition represents a formal union of the eschatological and the socio-political realms . . . ."

39 See Paris, supra note 38, at 7 ("Constrained in every dimension of their common life by the dehumanizing conditions of white racism, Blacks made their churches agencies for teaching the race how to respond to racial hostility in creative and constructive ways.").

40 E. FRANKLIN FRAZIER, THE NEGRO CHURCH IN AMERICA 49 (Schocken Books 1963).

41 See ALBERT J. RABOTEAU, SLAVE RELIGION 156 (Oxford Univ. Press 1978).

42 See Frazier, supra note 40, at 49.

43 Frazier refers to this as the secularization of Black Churches in which African-American churches "[l]ost their predominantly other-worldly outlook and began to focus attention upon the [Negro's] condition in this world," while maintaining their primary identity as religious institutions. Id. at 56.

44 See id. at 46-47 ("In South Carolina the Negro Baptists who became dissatisfied with the white control of the college for Negroes finally established their own school."). The church also served as a place for political organization. Bishop Henry Turner of the A.M.E. Church organized Negroes in the Republican Party in Georgia and was elected to the Georgia legislature. See id. at 47.

45 See id. at 46. Black churches raised money to pay for schools through church suppers and other programming.
ment free of oppression and racism for African-Americans. In Black Churches, African-Americans were consistently exposed to social, political, and economic opportunities which could be sought and had by all members equally.

The representational structure of African-American churches confirmed Black preachers as both religious and community leaders. The sermons of many Black preachers expounded messages of Christianity analogized to the daily experiences of African-Americans. Thematic expressions of overcoming oppression and "lifting while climbing," were first articulated in church sermons.

Using their authority as religious leaders, Black preachers incorporated the teachings of Christianity into political manifestos. Slavery, emancipation, and the continued struggle for civil rights, provided the context for analysis of Biblical stories such as the escape of the Jews from Egypt. The idea of "freedom through collective deliverance," as articulated in the Book of Exodus, gave African-Americans a sense of political and community direction through religious belief and expression. The notion of divine intervention which permeated the lessons of Exodus did not translate seamlessly into a positive mandate for African-Americans to overcome oppression. Yet, the teachings of African-American churches nurtured the motivations of Black people to oppose and overcome racial persecution. African-Americans' belief in divine intervention, coupled with

47 See E. FRANKLIN FRAZIER, THE NEGRO CHURCH IN AMERICA 48 (Schocken Books 1963) ("[T]he church became the arena of their political activities. The church was the main area of social life in which Negroes could aspire to become the leaders of [men].").
48 C. ERIC LINCOLN, RACE, RELIGION AND THE CONTINUING AMERICAN DILEMMA 96 (Hill and Wang 1984) ("The church is still in an important sense the people... the church leaders are still the people's representatives."); see also, FRAZIER, supra note 47, at 44 ("It is inevitable that preachers who had played such an important role in the organized social life of [Negroes] should become political leaders ... ").
49 Id.
50 ALBERT J. RABOTEAU, SLAVE RELIGION 311 (Oxford Univ. Press 1978) ([S]laves prayed for the future day of deliverance to come and they kept hope alive by incorporating as part of their mythic past the Old Testament exodus of the Israelites out of slavery. The appropriation of the Exodus story was, for the slaves, a way of articulating their sense of historical identity as a people. That identity was also based, of course, upon their common heritage of enslavement. The Christian slaves applied the Exodus story, whose end they knew, to their own experience of slavery, which had not ended. In identifying with the Exodus story, they created meaning and purpose out of the chaotic and senseless experience of slavery. Exodus functioned as an archetypal event for the slaves. The sacred history of God's liberation of his people would be or was being repeated in the American South.
51 PETER J. PARIS, THE SOCIAL TEACHING OF THE BLACK CHURCHES 109 (Fortress Press 1985) ("In their pulpits they could condemn virtually any social evil ... ").
53 Id.
54 Id.
a community spirit to struggle and to overcome social, political, and economic hardships, inspired many Black Church members.

C. Finding a Home in the Church

During the decades of slavery in America, slave associations were a constant source of concern to slave owners. For many members of white society, Black churches and religious meetings symbolized the ultimate threat to white existence. Nevertheless, African-American slaves established and relied heavily on their churches. “Religion offered a means of catharsis ... African-Americans retained their faith in God and found refuge in their churches.” However, white society was not always willing to accept the involvement of slaves in Christianity. As one slave recounted “[t]he white folks would come in when the colored people would have prayer meeting, and whip everyone of them. Most of them thought that when colored people were praying it was against them.”

Religious exercises of slaves were closely watched to detect plans for escape or insurrection. African-American churches took on an air of militancy in the eyes of white Americans. Insurrections such as Nat Turner’s in Virginia, born out of the religious inspiration of slaves, horrified white Americans. Understanding the potential end which could result from the religious experiences of African-American slaves, many white Americans opposed the participation of Blacks in Christianity.

Despite the social adversity that opposed their existence, Black churches were established, and served as integral parts of Black
communities. According to E. Franklin Frazier, during times of slavery, and well after emancipation, "the [Negro] church gave support to [Negro] family life [and was] the most important agency of social control [among Negroes]." Insofar as whites could not understand and were afraid of Black religiosity, "the Negro church with its [unique] forms of religious worship was a world which the white man did not invade." Therefore, out of this history of separation and exclusion, Black Churches rooted themselves as the souls of the communities in which they stood.

After emancipation, as racial domination thrived in reconfigured forms, Black churches became virtually the only place for African-Americans to find refuge. As African-American Christians moved from slavery to emancipation their religious practices and houses of worship also changed. They moved away from the "hush-harbors" that they retreated to for solace as slaves, and built churches. Just as the prayer meetings which took place in slave "cabin room[s]" were devoted to countless pleas for deliverance from slavery, the sermons that were given in Black churches addressed the post-emancipation needs and concerns of members of Black communities.

Inevitably, Black churches became sources for Black empowerment. Black churches, such as H.H. Proctor's Congregational Church housed schools, employment bureaus, shelters for the aged and orphans, and meeting places. "In 1886 [African-Americans] organized the National Baptist Convention, in an attempt to reduce the influence of white national bodies among blacks." Black churches worked collectively to deal with Black issues, especially racial discrimination in segregated schools, neighborhoods, and businesses.

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66 Id. at 51.
68 ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 3 (The Free Press 1984) ("The tripartite system of racial domination- economic, political, and personal oppression- was backed by legislation and the iron fist of Southern governments.").
69 Paris, supra note 67, at 108.
70 ALBERT J. RABOTEAU, SLAVE RELIGION 212 (Oxford Univ. Press 1978) ["In the secrecy of the quarters or the seclusion of the brush arbors ("hush harbors") the slaves made Christianity truly their own."]
71 Id. at 219.
72 JOHN HOPE FRANKLIN AND ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM, 259 (Alfred A. Knopf 1988).
73 Id. at 258.
75 Id. at 4-7.
As racially motivated violence and terrorism ran rampant across the country, Black churches were staunch in their resistance. In 1908, The Christian Index published the “Colored Methodist Bishops’ Appeal to White America-1908.” In their statement, church leaders responded to the surge of mob violence and lynchings occurring across the country, denouncing terrorism waged against Black persons and imploring the country to suppress the spread of anti-Black violence. As anti-Black terrorism proliferated into the twentieth century, Black churches grew increasingly vehement in their calls for castigation of racial violence. However the more involved Black Churches became in sparring against the racial intolerance and violence targeted against them, the more the churches and their members were chastised.

By the commencement of the Civil Rights era, Black churches were well established social and political power bases for African-Americans. The enormous presence of Black churches in African-American communities, naturally, sanctioned them with the political power to lead Black people in the movement for civil rights. Yet, Black Churches were torn on whether and how best to get involved in the movement. Some churches and church organizations were completely opposed to any involvement in the political struggle for civil rights. Yet, those that chose to participate did so fervently, organizing by rallies, protests, and marches, while teaching the lessons of Christianity and community involvement. Ultimately, racism made individual African-Americans the targets of racial violence. Racism plus the concentrated political power of African-Americans in Black churches confirmed African-American churches as the central targets for racial violence waged against the entire Black community.

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76 MOLEFI K. ASANTE AND MARK T. MATTSON, THE HISTORICAL AND CULTURAL ATLAS OF AFRICAN-AMERICANS 101 (Macmillan Publishing 1991) (Mobs burned victims to death, hanged them, and burned their bodies, mutilated them to death, and drowned them.).
77 Id.
78 Id.
79 Id.
80 Id.
81 C. ERIC LINCOLN, RACE, RELIGION AND THE CONTINUING AMERICAN DILEMMA 109 (Hill and Wang 1984) (Pastors lost their pulpits because of their commitment to the cause.).
82 JOHN HOPE FRANKLIN AND ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM, 413 (Alfred A. Knopf 1988) (“One of the most important influences in improving the position of Negroes in American life at mid-century was the role of religious institutions and organizations.”).
83 LINCOLN, supra note 80, at 108 (Black Churches were agents of social change.).
84 ROBERT C. SMITH, WE HAVE NO LEADERS 98-99 (State Univ. of New York Press 1996).
85 For example, the Sixteenth St. Baptist Church was very active during the Civil Rights Movement as an organization devoted to Christian teachings as well as community development through political participation. FRANK SIKORA, UNTIL JUSTICE ROLLS DOWN xi (The Univ. of Alabama Press 1991).
86 Id. at 108. Black Churches were bombed for their activity in the movement for civil rights.
D. Sometimes When There’s Racial Hate . . . There’s Fire

Extra-legal violence has been an effective means of communicating racial hatred throughout American history, especially as a method of social and physical control. Fire in particular was used not only to inflict physical harm upon disfavored persons in communities, but to send messages which threatened further harm to either persons or property. The pages of American-African history document an undeniable record of the racially motivated use of fire to either threaten or inflict harm upon African-Americans.

During the Civil Rights Movement, “the church functioned as the institutional center” for Black mobilization. Churches provided “an organized mass base and meeting place,” for African-Americans to strategize their moves in the fight against racial segregation and oppression. As Black Churches became the epicenter of the social and political struggles for African-American equality, they increasingly became targets for racially motivated violence. Thus, a broad assault on members of a Black community could effectively take place by burning a Black church. The bombing and burning of Black churches translated into an attack upon the core of civil rights activism, as well as upon the larger Black community.

The most infamous example of church destruction, occurred on Sunday, September 15, 1963. When the Sixteenth Street Baptist Church in Birmingham, Alabama, was fire bombed, the explosion was felt by the entire Black community. Not only were four children killed in the attack and several people injured, but a community’s sense of security within their church was forever shaken.

The burning of the Sixteenth Street Baptist Church signified the depths to which racial hatred could fall. Like many other churches

82 FRANKLIN and MOSS, supra note 81, at 282.
84 Id. at 101. Between 1890-1900, 1700 African-Americans were lynched. This decade was classified by the authors of this text as one of the most dangerous decades for African-Americans to be living. The authors give an example of the lynching of Henry Lowry during the 1920s reported in the MEMPHIS PRESS newspaper that was absolutely outrageous. The journalist writes, “Inch by inch the Negro was fairly cooked to death. Every few minutes fresh leaves were tossed on the funeral pyre until the blaze passed the Negro’s waist. Even after the flesh had dropped away from his legs and the flames were leaping toward his face, Lowry retained consciousness . . . .”
86 Id.
88 FRANK SIKORA, UNTIL JUSTICE ROLLS DOWN XI (The Univ. of Alabama Press 1991).
89 Id.
90 Id. The victims were Denise McNair, age eleven, and Carole Robertson, Addie Mae Collins, and Cynthia Wesley, all age fourteen.
bombed before and after, the Sixteenth Street Baptist Church was attended predominantly by African-Americans. \(^9\) Throughout the Civil Rights Movement, the Church was active in the struggle to desegregate southern public schools and supported the call for equal rights for Black people in America. \(^9\) Even though the Ku Klux Klan (KKK) was implicated in this crime, \(^9\) members of the KKK were not the only persons responsible for similar acts of terror throughout the country. Unfortunately, this was not an isolated incident. \(^9\)

In January 1957, four Black Churches were bombed in Montgomery, Alabama. \(^9\) In April, two were burned in Bessemer, Alabama. \(^10\) In 1958, burned churches were reported in Birmingham and Memphis. \(^10\) In 1959, a church was reported to have been burned in Roscoe, Georgia. \(^10\) In 1963, a church was reported to have been bombed in Pine Bluff, Arkansas. \(^10\) In Vicksburg, Mississippi, two people were killed in a church that had been used to register for Black voters when it was bombed in 1964. \(^10\)

Starting in 1964, Meridian, Mississippi, was added to the list of places in which Black churches were attacked. \(^10\) In January 1968, two more Black churches were bombed in Meridian. \(^10\) On February 22, the New Hope Baptist Church, "site of a Head Start program and civil rights activities," was torched. \(^10\) On February 23, the parsonage of the Newell Chapel Methodist Church was finally burned after a previous failed attempt. \(^10\)

As a result of the violence, some churches were forced into social incapacitation. Members of the First Union Baptist Church in Meridian were so afraid of being bombed that they opposed using the church for a much needed Head Start Program. \(^10\) Thus, racially motivated arsons, though not successful in destroying the souls of Black communities, managed nonetheless to inflict a significant amount of harm on churches, their congregants, and surrounding communi-

\(^{9a}\) Id. at 81.

\(^{9b}\) Id. at 6. The church was also a rallying site for Martin Luther King Jr.'s followers.

\(^{9c}\) Id. at ix.

\(^{9d}\) See Barbara Patterson, Defiance and Dynamite, NEW SOUTH, May 1963, at 8-11.

\(^{9e}\) DAVID M. CHALMERS, HOODED AMERICANISM 356-65 (Doubleday 1965).

\(^{10a}\) Id. at 356.

\(^{10b}\) Id. at 358-59.

\(^{10c}\) Id. at 358.

\(^{10d}\) Id. at 364.

\(^{10e}\) CHARLES M. CHRISTIAN, BLACK SAGA 424 (Houghton Mifflin Company 1995).

\(^{10f}\) JACK NELSON, TERROR IN THE NIGHT 108 (Simon & Schuster 1993).

\(^{10g}\) Id. at 106.

\(^{10h}\) Id. at 106-107.

\(^{10i}\) In the first attempt to destroy the Newell Chapel, the fire was detected early enough to be extinguished by the fire department. However, on the second attempt, the church was torched and burned to the ground. Id. at 109.

\(^{10j}\) Id. at 108.
WHAT DOES IT MEAN TO SEE A BLACK CHURCH BURNING?

In the end, the message of racial hate was burned into the memories of African-Americans and revisits us every time one of our churches burn.

Black Church fires set by arsonists in the 1990s revivify images of Black people excluded from participating in the Christian faith, lynched by angry mobs, and watching their churches torched during the 1950s and 1960s. Images of anti-Black terrorism are so indelible that they are recreated as African-American churches burn in the 1990s. In places like Amite County, Mississippi, during the last year, the smoking remains of burned or burning Black churches have re-inscribed the message of racial hatred which permeated the 1960s.

In Amite County, Mississippi, racial hate is unquestionably apparent. Graffiti writings of scrawled racial epithets and swastikas on the walls of burned Black churches articulate the unrelenting presence of racism. It is not surprising that Amite County, once deemed one of the two most notorious “church burning capitals of the world,” is again a major target for attack. In Amite County, “Black residents [here] have long been the victims of [other] racially motivated attacks—mailbox shootings, cross burnings, hooded Klansmen yelling racist slurs while riding through Black neighborhoods.” Such incidents illustrate how far we have not come with regard to eradicating racial terrorism. Therefore, when the Springhill Freewill Baptist Church was burned in 1996, the flames rekindled the fear and outrage produced by the burning of Black Churches a generation earlier.

The arsons of the 1990s inspire fear based not only on what was learned in Black history books, but rather on the recollections of real experiences. Margaret Tobias, a current resident of Amite County, not only “witnessed church bombings of the 1960s, she survived an

[112] Id.
[113] Id.
[114] Ron Nixon and Dennis Bernstein, Who’s Torching the Black Churches?, VIBE, Oct. 1996, at 96 (The National Council of Churches (NCC) led team visits to burned churches across the country and visited, “more than thirty burned churches since March and found evidence of racist motivation,” for the burnings. “The teams have documented case after case of spray painting of racist graffiti, use of molotov cocktails and other incendiary devices, vandalism, targeting of churches with a history of strong advocacy for African-American rights, and intimidation—including death threats and racist insults by phone and mail.”).
[115] Id at 95. Pike County, Mississippi is also coined a church burning capital of the world.
[116] Id. at 96.
[117] See id. at 97.
attempted arson on her home in 1965." Now, thirty years later, as member of the Springhill Freewill Baptist Church, Tobias is, again, a witness and victim of church desecration.

Among the most disturbing aspects of the burning of Black Churches today is the demolition of the comfortable myth that such acts of terrorism ended with the Civil Rights Movement. According to the late Rev. Dr. Mac Charles Jones, former Associate to the General Secretary for Racial Justice, National Council of Churches, "[o]ver the past four years (1992-1996) there have been more Black Churches burned than during the entire Civil Rights Movement." From January of 1995 through July of 1996, more than seventy Black and multiracial churches were burned. More churches were burned during that eighteen month period than during the previous five years combined. As one commentator wrote, the era of "night riders, cross burnings, church burnings, home burnings, and farm burnings" was thought to have passed. Instead the burnings of Black Churches across the country teach us that racial violence is an ugly fact of our American reality.

To burn a Black Church is to conjure up images of past and future fires set to harm members of Black communities. It is in this context of violence and the communication of violence that incidents of cross burning like that which was addressed by our nation's Supreme Court in R.A.V. must be understood. Contextually the historically racist meaning of fire as a threat is understood by arsonists and victims alike. Consequently, whether fire is used to burn a cross or a church such expression must not be viewed solely as "speech," but rather as an incontrovertible threat.

Fundamental to the problem of racial terrorism is our government's willingness to constitutionalize hateful speech, which creates an environment that nourishes hatred against Black communities and results in burned churches. By the time a church is burned to the ground the harm has already been done, and in every case the harm is irreparable. Although some may argue that there is a clear
difference between cross burning and church burning, given the history of the expressive meaning of both such argument would stand without merit. R.A.V. v. City of St. Paul\(^{129}\) vividly illustrates the consequences of inaction in the face of racial intolerance.

III. THE R.A.V. DECISION

A. Constitutionalizing Hate Speech: Where Law and Principles Collide

One month after the acquittal of four police officers in the racially biased beating of Rodney King,\(^{130}\) the Supreme Court handed down its decision in R.A.V. v. City of St. Paul.\(^{131}\) In a unanimous result, the Court held that the St. Paul Bias Motivated Crime Ordinance which prohibited cross burning, was constitutionally invalid.\(^{132}\) The Minnesota statute provided:

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

Justice Scalia, writing for a majority of the Court, concluded that the ordinance unconstitutionally proscribed certain types of speech, here hate speech, on the basis of its content.\(^{133}\) The Court's cursory examination and understanding of the messages relayed through cross burning and church burning laid a poor foundation for the reasoning that was used to decide R.A.V.

In R.A.V., the Court concluded that, "the ordinance [was] facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech address[ed]."\(^{134}\) In its assessment of what made the ordinance invalid, the Court neglected to carefully consider what exactly the ordinance was invalidating. Unlike most other forms of speech, racially motivated hate speech, like cross burning, is harmful speech.\(^{135}\) First Amendment jurisprudence reveals numerous examples of the regulation of harmful

\(^{129}\) See R.A.V., 505 U.S. at 377.

\(^{130}\) See Id. at 371.

\(^{131}\) See R.A.V., 505 U.S. at 377.

\(^{132}\) See id. at 381.


\(^{134}\) See R.A.V., 505 U.S. at 381.

\(^{135}\) Id.

\(^{136}\) See Samuel Walker, Hate Speech 1 (University of Nebraska Press 1994).
Although the First Amendment prevents government from regulating speech because of the ideas it expresses, and "content-based regulations are presumptively invalid," R.A.V. disappoints all who look to the Court to resolve the tension between the social value of free speech and the social harm of hate speech.

In R.A.V., the Court failed to understand that the prohibition of cross burning in St. Paul was not simply an infringement of the expression of a politically debatable idea. Rather, the prohibition of cross burning, in this case, was a protection against the infringement of the civil rights of all citizens, by protecting public safety and order. In Cox v. New Hampshire, the Court held that, "civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

When Robert Viktora and his friends constructed and burned a cross on the front lawn of a Black family that lived across the street, they were clearly breaching any public order and peace that may have existed. The burning of the cross exemplified the abusive level to which racially motivated hate speech may rise and the dangers of physical destruction which accompany such speech. The actions of Viktora and his associates were not simply a meaningless prank. In this case, the culprits chose not only to burn a cross on any family’s lawn, but they chose to burn that cross on the lawn of a Black family. Their actions were meaningful. Like the centuries of lynchings of Black men, women, and children, and the decades of burning Black churches across the country, Robert Viktora’s burning cross was a profound expression of malevolence, one which has often stood as a promise of doom to millions of African-Americans.

Despite the fact that the St. Paul Bias Motivated Crime Ordinance was designed to address the problems historically associated with hate speech, the majority found that the danger of censorship was
greater than the state's interest in protecting its minority citizens. Even though the Court makes censorship an important issue here, it is not the most critical one. The most crucial issue, which the Court failed to understand and deal with appropriately, was the harm traditionally associated with racially motivated fires. It is the danger of the destruction which predictably follows such conflagration that justifies that it be regulated on the basis of its content.

When persons are terrorized or even killed because others hate their race, the threat to life far outweighs the threat of censorship. In R.A.V., the burning cross served as the instrument of harm and the embodiment of terror. The expression of racial hatred that a burning cross conveys becomes nothing more than the skin in which terrorist acts are cloaked. The majority mistakes the skin of cross burning, as a form of expression, for substance and thus allows itself to theorize away the irreparable harm inflicted on the objects of such acts of terror.

The Justices themselves provided several reasons as to why its content-based argument falls on its face. First, the First Amendment is a content-based amendment. As Justice Stevens so aptly points out in his concurrence, "our entire First Amendment jurisprudence creates a regime based on the content of speech." In order to determine if a form of expressive activity ought to be protected by the First Amendment, not only does the Court have to look at what is said, but the Court must also consider how, when, and where the expression is made. Therefore, content analysis implies contextual analysis.

Should a form of speech fall within or outside of this rule the court would have to categorize that speech based on its content. Clearly it is not enough to say that speech is proscribable, because someone is expressing herself or himself. It is the "what" and the "how" of that expression which triggers the First Amendment. Justice Scalia concedes that some "statements must be taken in context."

148 See id. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. . . . But, the "danger of censorship" presented by a facially content-based statute, requires that that weapon be employed only where it is "necessary to serve the asserted [compelling] interest. See Leathers v. Medlock, 499 U.S. at 448 (1991). See also Burson v. Freeman, 504 U.S. at 213 (1992).
150 See R.A.V., 505 U.S. at 393.
152 See R.A.V., 505 U.S. at 432 (Stevens, J., concurring).
154 See id. at 422. In his concurrence, Justice Stevens notes that content makes a difference in First Amendment jurisprudence.
156 See id. at 399 (White, J., concurring).
158 Id. at 420 (Stevens, J., concurring).
159 See id. at 383.
160 See id. at 420.
162 Id. at 383.
Racial hatred which inspires violence suggests that such hate speech should be fairly included in the proscribable category of fighting words.\textsuperscript{157} The Court has shown through its precedents clear instances in which the content of some forms of speech have been evaluated and judged unworthy of constitutional protection.\textsuperscript{158} It is more than reasonable that racially motivated hate speech such as cross burning should be added to that list.

Secondly, in order to determine whether speech falls into a protected or unprotected category, the Court has to evaluate the content of the speech.\textsuperscript{159} Thus strangely the Court submits itself to the content valuation process that it is claiming to reject. Even more odd, despite the centrality of content valuation to supporting the Court's analysis and final judgment, it is on this point that the Justices diverge in viewpoints.

According to Justice Stevens' separate concurrence, "the Court believes [that] all content-based regulations are equally infirm and presumptively invalid,"\textsuperscript{160} a theory Stevens rejects. Instead he contends that "our decisions establish a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."\textsuperscript{161} Therefore, in support of the premise that First Amendment jurisprudence rests on content analysis, Justice Stevens writes, "whether a magazine is obscene, a gesture a fighting word, or a photograph of a child pornography is determined, in part, by its content."\textsuperscript{162} Even Justice Scalia must admit that in order to argue that the cross burning in \textit{R.A. V.} was a type of speech protected by the First Amendment, he had to first determine the content of the speech. In failing to recognize the inescapable presence of content evaluation in First Amendment jurisprudence the Court makes a serious error in its analysis and final judgment. Hence although the Court's opinion clearly puts forth an analysis of the statute based on an appraisal of the speech content that is rejected by Minnesota's ordinance, the opinion puts forth an argument fraught with circularity.

Justice Scalia conceded that the ordinance addressed speech that "arouses anger, alarm, or resentment."\textsuperscript{163} He acknowledged that the speech, "may insult, or provoke violence,"\textsuperscript{164} and that such speech

\textsuperscript{157} See \textit{id.} at 381.
\textsuperscript{159} See \textit{R.A. V.}, 505 U.S. at 420.
\textsuperscript{160} \textit{Id.} at 428.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 421.
\textsuperscript{163} \textit{Id.} at 391.
\textsuperscript{164} \textit{Id.}
"contained abusive invective." Yet, the Court chose to strike the ordinance anyway. The problem here is that even though the Court went through an analysis of why content proscription is constitutionally invalid, it completely evaded the issue of harm inherent in cross burning.

It is necessary to evaluate the content of the speech in order to categorize the speech as protected or unprotected. The categories of protected and unprotected speech are themselves based upon the content of the speech which falls within them. As Justice White in his concurring opinion asserted: "All of the categories of speech which are not protected by the First Amendment are content based, [but] are not protected because their expressive content is worthless or of de minimis value to society." The existence of proscribable categories such as obscenity and fighting words, show that content valuation is central to any First Amendment jurisprudential determination.

In making any decision regarding First Amendment speech the court has always had to base its opinions upon the content of the speech. Hence, First Amendment jurisprudence rests on the very notion of content discrimination which the Court has claimed to be unconstitutional.

The Minnesota Supreme Court held that the St. Paul ordinance only proscribed speech that fell within the constitutionally unprotected category of "fighting words." However, citing *Chaplinsky v. New Hampshire*, from which the "fighting words" doctrine originated, the Court rejected the notion that cross burning was proscribable under the "fighting words" doctrine because St. Paul's ordinance was content based. Under *Chaplinsky*, speech which falls within the category of fighting words is that which is "likely to cause an average addressee to fight." Although Justice Scalia conceded that the ordinance was constructed to address "fighting words," and cross burning could be construed as falling within that category, the ordinance was nevertheless struck.

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165 *Id.*
166 See *id.* at 381.
167 See *id.* at 421.
168 *Id.* at 400.
169 See *id.* at 421.
170 *Id.*
171 See *id.* at 380-81.
172 315 U.S. 568 (1942).
173 Justice Scalia wrote, "Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *R.A.V.*, 505 U.S. at 381.
175 *R.A.V.*, 505 U.S. at 380-81.
176 *Id.*
The Court reasoned that since the ordinance only addressed fighting words "that insult and provoke" on the basis of race, it was impermissibly content-based. However, what Justice Scalia failed to understand was, inherent in the concept of fighting words is the notion that racially derogatory words tend to insult and provoke persons and thereby incites them to fight. If fighting words are proscriptable under the Constitution because they inspire victims to act violently, then the Court should see through its own reasoning, and that of precedent, that the ordinance is justifiably valid.

Justice Stevens wrote, "Congress may choose from the set of unprotected speech... to proscribe only a subset... because those threats are particularly likely to cause 'fear of violence,' 'disruption,' and actual 'violence.' Precisely this same reasoning, however, compels the conclusion that St. Paul's ordinance is constitutional." In other words, since the speech being proscribed is already a subset of proscribable speech, it should certainly not be awarded constitutional protection because of its content.

Justice Scalia explained that "fighting words," "despite their verbal character, are essentially a 'non-speech' element of communication... analogous to a noisy sound truck." In this case not only is cross burning a 'noisy sound truck' for the purposes of the ordinance, the burning of a cross is a 'noisy sound truck,' plus.

There is absolutely no value in burning a cross on a person's lawn other than to incite that person or other witnesses. The only logical inference to be drawn from this is that cross burnings are fighting words. The noise which emanates from the sight of a burning

177 See R.A.V., 505 U.S. at 381.
178 See id. at 381.
179 SAMUEL WALKER, HATE SPEECH 1 (University of Nebraska Press 1994). It is irrelevant whether the person hearing the words is provoked into fighting by virtue of the fact that the words were said and the addressee heard them, or if the addressee is attacked and therein compelled to fight irrespective of hearing the words. What the Court should focus on is the potential for violence which, as history has shown, is likely to follow the enunciation of racial epithets. The Court should be cognizant of the reality that a person who is willing to burn a cross on someone else's lawn or burn a church is more likely than not willing to act violently against the persons toward whom the fire was directed.
180 See R.A.V., 505 U.S. at 424 (Stevens, J., concurring).
181 Id.
182 Id.
183 Id.
184 The term is best described in Chaplinsky as "words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
185 R.A.V., 505 U.S. at 386.
186 Id. at 432 (Stevens, J. concurring). Such words are harmful "because by their very utterance they inflict injury." In this case the cross burning represents "physical intimidation."
187 See id. at 424.
cross manifests itself in fear and emotional pain for its victims. Thus, the only thing that comes from cross burning is an abusive exclamation of racial intolerance.

According to Chaplinsky, fighting words constitute speech that is "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," and may therefore be restricted. Cross burning is not only a visual articulation of hate, it is a physical threat of violence. The act of burning a cross on someone's lawn is contrary to the existence of social order. Even Justice Stevens, in his concurrence, asserted that "threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot."

In his examples, Justice Scalia undersells the gravity of the harm produced by hate speech such as cross burning or church burning. There is an obvious distinction between saying "all papists are misbegotten" and burning a cross on the lawn of a Black family. In the first instance papists maintain the power to respond to their critics by saying that they are in fact misbegotten or some other vocalization of their discordance. As Justice Stevens asserted in this case, the ordinance is even-handed in this respect. However, when a cross or church is burned the victims are held captive to an assault which is not only audible but physical. In the case of cross burning the victims are usually not afforded ready access to an 8-15 foot cross and flammable apparatus to respond to their attack. Moreover, if such were the case, would we really want people to respond to burning crosses by burning more crosses? To accept the Court's reasoning is to respond affirmatively.

There is a clear difference between words that are fighting words and words which may result in a fight. Any debate or difference in opinion can potentially deteriorate into violence. However, there are certain words, terms, and phrases, which when put together in any setting, almost always result in a fight or similar destructive behavior. The type of speech which the St. Paul ordinance pro-

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189 Samuel Walker, Hate Speech 1 (University of Nebraska Press 1994).
189 Chaplinsky, 315 U.S. at 572.
190 See R.A.V., 505 U.S. at 432 (Stevens, J., concurring).
191 Id. at 416.
192 In addition to his "noisy sound truck" example, Justice Scalia purported a threat against the President as justifiably proscribable speech because there is an "overwhelming interest in protecting the safety of the Chief Executive," citing Watts v. United States, 394 U.S. 705, 707 (1969). This is not to say that a threat against the President is not justifiably proscribable speech but that hate speech of this caliber is comparably overwhelming and can justifiably be proscribed without offense to the Constitution. See R.A.V., 505 U.S. at 388.
193 Id. at 435 (Stevens, J., concurring).
194 Id. at 432 (Stevens, J., concurring).
scribed is this kind of speech. Racially motivated hate speech is not debatable speech, it is speech used to provoke harm and cause injuries. Here, the words, coupled with the intimately associated history of violence, places them on a level which justifies the ordinance. The Court also asserted that St. Paul’s ordinance goes “beyond mere content discrimination, to actual viewpoint discrimination.” However, in order for the Court to assert such a claim it would have to argue that cross burning represents one side of a multi-sided debate. In this case fighting words, like cross burning, does not articulate a debatable position. As Justice White wrote, “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.”

Racially motivated hate speech such as cross burning affords its speakers constitutional soapboxes upon which to engage in unconstitutional discrimination against racial minorities. Cross and church burning, force their victims to become part of a captive audience, to be filled with fear. Such arsons literally disrupt the of peace of a community.

Citing Simon and Schuster, Inc., Justice Scalia wrote that “content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” This offends the basic principles of the First Amendment. However, this rationale is flawed. The marketplace of ideas has strictly been used to imply the place in which political exchange may be had on any subject available for debate. In order for a concept to be restricted from the marketplace of ideas it must be, in its political sense, an idea.

Cross burning is not an idea. Cross burning is an act which conveys a non-debatable message. Once a person lights a cross on another’s lawn or torches their church, there is no rebuttable statement to reasonably attack. Therefore, cross and church burning are shorthand symbols for racial hatred. As Justice White averred, “by characterizing fighting words as a form of ‘debate’, ante, the majority legitimates hate speech as a form of public discussion.”

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195 Id.
196 Id. at 391.
197 Id. at 403 (White, J., concurring).
198 See id. at 432 (Stevens, J., concurring).
200 See R.A.V., 505 U.S. at 401 (White, J., concurring).
201 See id. at 432 (Stevens, J., concurring).
202 See id.
203 Id. at 402 (White, J., concurring).
This is not to argue for a First Amendment jurisprudence which rests upon a categorical regime of content analysis. In concurring with Justice Stevens, one would be inclined to accept the premise that the categorical approach does not take context seriously. However, in the case of First Amendment analysis context is critical. In attempting to strike a balance between remedying the harm and creating a jurisprudence which guides us toward the appropriate remedy, the Court must be attentive to what such acts as cross and church burnings really mean. This cannot be done by devaluing the violent and debilitating character of fighting words such as racially motivated hate speech.

The Court's most compelling argument asserted that the St. Paul statute was unconstitutionally overbroad. Citing Broadrick v. Oklahoma, Justice White wrote, "the overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression." However, Justice White also pointed out that St. Paul's interest in protecting its minority citizens is compelling. As the Minnesota Supreme Court acknowledged, the wording of the ordinance was sufficient to cover specific fighting words and the acts commonly associated with them. Therefore, applying the reasoning of Justice White and the Minnesota Supreme Court, the overbreadth argument is moot and renders the ordinance constitutionally valid with regard to its content and reach. It is ironic, however, that in the majority opinion, the Court did not even address the issue of overbreadth, but rather focuses on a misguided tour of content analysis. As Justice Stevens maintained at the beginning of his concurring opinion, "[c]onduct which creates special risks or causes special harms maybe prohibited by special rules." The cross burning in R.A.V. unquestionably caused a special harm. Like church burn-

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204 See id. at 426 (Stevens, J., concurring).
205 See id. at 432 (noting protection depends on context).
206 See id. at 436.
208 R.A.V., 505 U.S. at 401.
209 See R.A.V., 505 U.S. at 403 (White, J., concurring) (writing that the ordinance survives strict scrutiny insofar as it "is necessary to serve a compelling state interest.").
210 See id. at 433 (Stevens, J., concurring) (highlighting that "the St. Paul ordinance regulates speech . . . on the basis of the harm the speech causes.").
211 See id. at 381.
212 Id. at 416 (Stevens, J., concurring).
213 In his concurrence Justice Blackmun wrote: "I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of St. Paul from specifically punishing the race-based fighting words that so prejudice their community." Id.
ing, cross burning warns of danger to come,214 leaving an indelible stain of anger and fear upon its victims.215 The rules applied in this case should be tailored to recognize the level of harm inflicted upon homeowners, church-goers, members of the Black community and the nation as a whole. Such rules should, at a very minimum, be focused on achieving justice and ordered liberty. In reversing the Minnesota Supreme Court, the Court either failed to see the complex existence of such harms or simply ignored their gravity.

B. Feeling the Fire: Understanding the Significance of Burning a Cross and Burning a Church

Unlike the directed message of hate sent to an individual when a cross is burned on her lawn or her home destroyed by fire, an assault on a Black church is more diffuse, since it is targeted toward the larger community in which it stands.216 The national government217 and private organizations218 offer programs which lend aid to burned churches. These programs, though well intentioned, do not address the central problem of Black church arsons.219

Like cross burning, the burning of Black Churches signifies the savagery of hate when based on an irrational disgust for what is inherently human, one's race. By failing to appreciate the context in which such fires take place, the Justices underestimated their meaning. Cross burning and church burning have everything to do with freedom, but little to do with free speech. Cross burning and church burning are acts mixed with a history of slavery and its racist aftermath — of murder, rape, and torture.220

Church burnings and cross burnings not only threaten the lives of African-Americans, but have traditionally been preludes to violence of great proportions.221 Civil order does not survive when racially motivated arson is present. If civil peace is to exist then courts

214 Id. at 408 (White, J., concurring) (pointing out that the speech being prohibited, "conveys an overriding message of personal injury and imminent violence.").
215 See id. at 408-09 (referring to cross burning as "a message that is at its ugliest when directed against groups that have long been the targets of discrimination").
217 The government offers programs in which loans are made available to qualified churches so that they may have funds to rebuild burned churches. See also Republican-Led Congress Takes Steps To Fight Church Burnings, HALEY BARBOUR-RNC, (June 1996), (Congress takes steps to fight church burnings by enacting and enforcing laws which provide harsher penalties for racially motivated criminal acts.).
218 The National Council of Churches proffer programs in which private parties as well as public organizations can donate funds to their "church building" fund, so that destroyed churches can be rebuilt. Id.
221 See Press Release, supra note 218.
must not use the Constitution to protect those things that under-
mine the essential concept of freedom for all, that is a basic element of constitutional order. There is little real difference between burn-
ing crosses on lawns and burning a church to the ground. Given the historical relationship between cross burning and church burning, courts must broaden and deepen the sweep of their analysis, to avoid perpetuating injustices, hatred, and destruction.

Racism manifest in physical violence and destruction poisons our nation, eroding freedom to be secure in one’s person and one’s thoughts. To allow crosses to burn is to encourage other forms of racially motivated arson, including the burning of churches. To ignore the message behind the burning of Black churches is to legit-
mize racial victimization and clothe it with constitutional protection.

IV. CONCLUSION

R.A.V. constitutionalized the theory that a particular sub-category of the broader constitutionally proscribed category, fighting words, is constitutionally protected free speech. Had the Court taken the time to truly understand the fearful and hateful legacy of American history, it would have decided R.A.V. differently. Hence the process would have begun to recognize the extraordinarily oppressive meaning of church arson, through the proper appraisal of the price cross burning to our society.

R.A.V. inevitably “permits, indeed invites, the continuation of expressive conduct that is [in this case] evil and worthless in First Amendment terms.” We have seen the legacy of R.A.V. prevail as Black Churches burn, congregants despair, and freedom goes up in smoke.

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223 Id. at 402 (White, J., concurring).