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Foreword

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INTRODUCTION

At the risk of echoing Dean Wolk, I want to begin by saying how glad the King Hall community is to be hosting this splendid event. I truly cannot remember another constitutional law conference, here or elsewhere, that has assembled a more interesting and bright group of scholars. There is a whole lot of candlepower in this room right now.

Many people at King Hall contributed to this day. I want to extend special recognition to Amy, Carmen, and everyone else in the Development Office downstairs, to Marshelle in the front office, to the Law Review editors and personnel — for their generous commitment to edit and publish the pieces presented here today — and to the Dean's office for its financial and moral support.

Although not particularly graceful, the title of this symposium — "Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality" — captures, I think, the gist of why we are here. And for the benefit of my older but smaller brother,[1] who is present today and who

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[1] Professor Akhil Amar of the Yale Law School delivered the lunchtime remarks during the conference.

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insists that I haven't turned a smart phrase since working for Harry Blackmun, let me say that *I did not draft* the conference title.

But putting the title to the side, when Alan Brownstein — the real force behind this symposium and the natural choice for introduction speaker if he didn't have to save his voice for more substantive discussion — first described to me his idea, it resonated. For both me and Alan, the notion of a conference devoted to scholarship grew (as I suppose much scholarship should) out of our own struggles to make sense of recent free speech cases in order to teach them in class.

Take, for example, Justice Scalia's controversial majority opinion in *R.A.V. v. City of St. Paul*[2] — a case on which Mary Becker's thought-provoking piece,[3] among others, touches — involving the constitutionality of an ordinance prohibiting racially-motivated fighting words. I had done *some* serious thinking about *R.A.V.* shortly after it came down. Indeed, the elder Professor Amar wrote a short case comment for the Harvard Law Review and, as usual, had conscripted me to review countless drafts.[4] But it wasn't until I had to dissect the case for classroom purposes that I fully appreciated how complicated the First Amendment issues were because of the racially-charged context in which they arose.

Let me be clear. I was not, of course, surprised by the fact that First Amendment law was being made in a politically important and sensitive area. Important free speech cases of the twentieth century had often been generated, and shaped, by important political issues of the day. The relatively sparse protection afforded speech in cases of the 1920's was, I think, at least partially driven by the hypernationalism and fear of Bolshevism that accompanied the end of World War I.[5] Likewise, McCarthyism and the political response to it surely affected the direction of free speech doctrine in the fifties.[6] And who would deny that

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[2] 505 U.S. 377 (1992).

[3] Mary Becker, *How Free is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996).

[4] Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992). Please note the lack of a thank-you footnote in the Comment.

[5] *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[6] *See, e.g.*, Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S.

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the civil rights movement had a profound effect on First Amendment evolution?[7] The Court in *New York Times v. Sullivan*[8] did not constitutionalize the law of defamation in a vacuum, after all. Similarly, the Vietnam War protests forced the Court to define free speech protection for high school and college students,[9] clarify its attitude toward profane speech,[10] and consider the question of symbolic non-verbal speech,[11] all important issues that hadn't been systematically addressed before.

So the fact that *R.A.V.* represented a judicial response to political reality as well as First Amendment principle is hardly unusual. But what struck me about *R.A.V.* and other cases that Alan and I kicked around was that the politically-charged context giving rise to the free speech claims also generated legitimate arguments that other values of constitutional dimension were at stake as well. And, unlike many of the earlier cases in which expansive free speech rights were being invoked in order to promote other constitutional objectives, say racial equality,[12] in cases such as *R.A.V.*, litigants were arguing that constitutional interests such as racial justice required the subordination of expression.[13]

Nor, as the title of the conference suggests, is racial justice the only constitutional value that has been competing with freedom of expression. In cases like *Frisby*[14] and *Madsen*,[15] the Court has had to decide how much expression may be restricted in order to facilitate access to reproductive services. And in cases like *Rosenberger*,[16] the Court has had to decide the extent to

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203 (1961); Dennis v. United States, 341 U.S. 494 (1951).

[7] *See, e.g.*, Cox v. Louisiana (Cox I), 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[8] 376 U.S. 254 (1964).

[9] *See, e.g.*, Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

[10] *See, e.g.*, Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973); Cohen v. California, 403 U.S. 15 (1971).

[11] *See, e.g*, Spence v. Washington, 418 U.S. 405 (1974); United States v. O'Brien, 391 U.S. 367 (1968).

[12] *See* cases cited *supra* note 7.

[13] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992).

[14] Frisby v. Schultz, 487 U.S. 474 (1988).

[15] Madsen v. Women's Health Ctr., Inc., 114 S.Ct. 2516 (1994).

[16] Rosenberger v. Rector of the Univ. of Va., 115 S.Ct. 2510 (1995). *See also* Capital

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which public institutions can disfavor certain speakers in order to preserve Establishment Clause values.

Now I am not saying that these intersections between free speech and other constitutional values have never arisen before in our constitutional history. But they seem more prevalent and more important today. And they seem real tricky. One aspect of their complexity, and one reason why we selected religion, abortion and equality in particular, is that the free speech law that is made — the doctrinal rule that is forged — in any one of these contexts often spills over to the others. Let me give you two quick examples.

First, reconsider *R.A.V.* Scalia's majority opinion repeatedly and forcefully asserts that, as a matter of free speech law, when government regulates unprotected speech — like fighting words — in a content or subject matter-based way, strict judicial scrutiny is required, even if the government regulation does not discriminate on the basis of viewpoint.[17] Thus, in *R.A.V.* itself, St. Paul's selective prohibition of *racial* fighting words was invalidated because the regulation was subject-specific.[18] This new free speech doctrine, emerging from a clash between speech and racial equality, has implications for the *abortion speech* context. As Alan will elaborate later, Congress' Freedom of Access to Clinic Entrances Act (FACE)[19] makes it a crime to utter a threat — a form of unprotected speech — to someone because she is obtaining or providing any reproductive health services. In other words, the statute singles out certain unprotected speech because of its subject matter. As such, should it be invalidated like the law in *R.A.V.*? I'll leave you in suspense until Alan's presentation.[20]

Next, think about *Rosenberger*, the recent religious speech case involving the University of Virginia. The majority opinion there held that, for free speech purposes, U. Va.'s decision to exclude publications having to do with religion from generally available

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Square Review & Advisory Bd. v. Pinette, 115 S.Ct. 2440 (1995).

[17] *R.A.V.*, 505 U.S. at 386.

[18] *Id.* at 393-94.

[19] 18 U.S.C.A. § 248 (West Supp. 1995).

[20] Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553 (1996).

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university funding violated the First Amendment because it constituted viewpoint, not just subject-matter, discrimination.[21] But does this mean that whenever government tries to draw a line between expression concerning religion and expression concerning secular subjects, government is engaging in viewpoint discrimination? What about the so-called Leonard law,[22] about which Tom Grey may have a few words later.[23] That California statute imposes the same First Amendment restrictions that bind public universities onto private California universities, such that in enacting codes to deal with racist and sexist excesses on campus, Stanford has to pretend it is the UC. As if that weren't bad enough, there is more: religious schools are exempt from the requirements of the Leonard law.[24] But wouldn't this exemption for religious schools be viewpoint favoritism that runs afoul of *Rosenberger*? We'll see what people think. Mike Paulsen's fine piece[25] deals with what I see as related questions. But lest I steal anyone's thunder, let me shut up, sit down, and let the real experts have at it.

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[21] *Rosenburger*, 115 S.Ct. at 2517-18.

[22] CAL. EDUC. CODE § 94367 (West Supp. 1996).

[23] Tom Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996).

[24] CAL. EDUC. CODE § 94367.

[25] Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996).

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