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Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle's Eye

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Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle's Eye

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I. INTRODUCTION

The First Amendment to the United States Constitution is heralded domestically and abroad for protecting freedom of speech and thus promoting democracy, individual self-realization, and the search for truth. This assessment is well justified, especially when comparing the United States to authoritarian regimes. One scholar, however, has described the U.S. Supreme Court's First Amendment jurisprudence as "arbitrary and unpersuasive."[1] Another has said it "resembles the Ptolemaic system of astronomy in its last days."[2]

In particular, the Court has divided speech into protected and unprotected categories.[3] The Court also maintains that laws restricting protected expression, based on the speech's content, must be viewed with great skepticism.[4] The Court's use of strict scrutiny helps explain why it has found most federal laws passed to prorect minors from non-obscene Internet pornography unconstitutional. Such material is known as indecent speech. Crafting a law that can meet the Court's formalistic strict scrutiny in these cases is like trying to pass a camel through a needle's eye.

Yet, strict scrutiny is not always justified or used for indecent speech cases. In some non-Internet cases the Court has actually

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1. Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 652 (2002).

2. Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 885 (1996).

3. *Id.* at 884–85.

4. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–98 (1972).

ignored content discrimination. The Court has instead used a relaxed scrutiny level and then concluded that the state's interest outweighs the speaker's interest. The Court has also on other occasions ignored its usual categorical speech divisions.[5]

In this paper, I recommend that the Court stop the formalism and the inconsistencies. Actually, I go a step further and recommend that the Court borrow a page from the way foreign courts, such as the South African Constitutional Court, have engaged in an explicit balancing of interests and values while also being minimalist when possible. South Africa provides an excellent comparative lens for several reasons. Its constitutional drafters examined the best provisions from countries like Canada, Germany, Namibia, and the United States and then tried to improve upon them.[6] Moreover, its Constitutional Court's decisions are highly regarded internationally, it has a racial history that parallels the United States, and the Court's opinions are stylistically accessible.[7]

There has recently been controversy over the U.S. Supreme Court's increasing use of foreign constitutional law.[8] Chief Justice Roberts, Justice Scalia, and various conservative scholars have said that foreign law is used selectively in order to promote the agendas of particular members of the Court.[9] The implication is that this

5. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 386 (1992) (treating certain fighting words as protected).

6. *See, e.g.*, RICHARD SPITZ WITH MATTHEW CHASKALSON, THE POLITICS OF TRANSITION, A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 156 (2000) (discussing how the German Constitution was relied upon by those debating how to divide power between the South African National Government and the provinces); Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 183–92 (1998) (discussing how the German Basic Law, the Canadian Charter of Rights and Freedoms, and the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia influenced the South African Constitution).

7. *See infra* Part V.A.

8. *See, e.g.*, Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

9. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States Before the Subcomm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of Judge John Roberts); Roger P. Alford, *"Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence: Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653, 654–56 (2006); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 295 (2005); Justice Antoniu Scalia & Justice Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, U.S. Association of

agenda is liberal. Yet this paper shows that foreign law can support a speech restriction that would cause discomfort to some liberals. Perhaps foreign law does not have to be ideological after all if courts survey foreign sources more comprehensively.

This paper has six parts. Part II discusses key U.S. Supreme Court cases establishing the speech categories and the rule against content discrimination. Part III shows how these principles play out in the Court's Internet free speech decisions. Part IV demonstrates how the Supreme Courr has been inconsistent in its treatment of unprotected speech and in its treatment of conrent discrimination. Part V shows how the most important American Internet speech case would have been resolved if the Supreme Court openly adopted the proportionality analysis used in South Africa, which is derived from Germany and Canada.[10] Part V also addresses some possible criticisms. Part VI offers a brief conclusion.

II. THE SUPREME COURT'S CATEGORIES

The U.S. Supreme Court has a categorical approach to speech. Several kinds of expression are unprotected including obscenity, fighting words, incitement, threats, child pornography, and libel.[11] The Supreme Court cases establishing these categories balanced the speaker's interests against the state's interests and tried to provide clear rules for the future. This is categorical or definitional balancing, as opposed to ad-hoc case by case balancing.[12] This section will briefly discuss the Court's categorical approach in its First Amendment jurisprudence, including the foundational obscenity

Constitutional Law Discussion at American University Washington College of Law (Jan. 13, 2005) (transcript available at http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument) (debating the Supreme Court's use of foreign law in interpreting the Constitution).

10. A noted Canadian scholar, David Beatty, has authored a book about proportionality analysis in a global context. The book, however, does not focus on freedom of expression issues. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); *see also* William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579 (2006) (arguing that balancing should have been used to resolve a noteworthy free speech case regarding an anti-abortion Web site, that contained veiled threats against abortion providers, since traditional First Amendment categories did not easily apply).

11. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1150 (2005).

12. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948 (1987).

cases; the Court's content and viewpoint distinction; and the Court's time, place, and manner cases.

This categorical approach is evident in *Ashcroft v. Free Speech Coalition*, where the Supreme Court in 2002 stubbornly refused to broaden the unprotected category of child pornography to include virtual images, because the Court said its concern had always been with the harm done to real children.[13] Because virtual child pornography does not require the use of real children, the Court found that the state's interest was weak and declared the statute unconstitutional.[14]

New technologies, however, require a more sophisticated analysis of the harms that can be caused, not simple adherence to the past. There was evidence, for example, before Congress and the Court that these virtual images excite pedophiles and are utilized by them as a tool of seduction.[15] Understandably, the Court's majority feared that the law might prohibit artistic material such as the award winning movie "Traffic" or the play "Romeo and Juliet."[16] Yet, as Chief Justice Rehnquist contends in his dissenting opinion, the law could have been construed as not encompassing such material. For example, Chief Justice Rehnquist argues that the statute only makes problematic those visual depictions of young-looking adult actors engaged in actual sexual activity, not depictions that simply imply or suggest sex might be taking place.[17] The U.S. Supreme Court is now considering a revised version of this law.[18]

The unprotected category of speech most relevant to Internet pornography is obscenity. In *Miller v. California*,[19] the Court adopted a three part obscenity test:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken

13. 535 U.S. 234 (2002).

14. *Id.* at 249–50, 256.

15. *Id.* at 253.

16. *Id.* at 247.

17. *Id.* at 269.

18. *See* United States v. Williams, 127 S. Ct. 1874 (2007) (mem.) (granting certiorari); Petition for Writ of Certiorari, *Williams*, 127 S. Ct. 1874 (No. 06-694).

19. 413 U.S. 15 (1973).

> as a whole, lacks serious literary, artistic, political, or scientific value.[20]

The Court made clear this only covered "hard core" sexual content.[21] The focus was on the morality of the surrounding community, not some supposedly objective national standard.[22]

In *Paris Adult Theatre I v. Slaton*,[23] the Court determined that consenting adults lacked a First Amendment right to view obscene material at an establishment, even though no children were present.[24] The Court pointed to "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[25]

In addition, the Court explained that the state legislature could assume that "commerce in obscene books, or public exhibitions focused on obscene conduct, [would] have a tendency to exert a corrupting and debasing impact leading to anti-social behavior" given the universal belief that exposure to classic works of art, literature, and theater ennobled the soul.[26] The Court also said it owed deference to the state legislature.[27]

In contrast to obscenity, which is unprotected by the First Amendment, a law that regulates speech based on its content receives strict scrutiny.[28] The law must be narrowly tailored to promote a compelling governmental interest. No less restrictive alternatives should be available. Few laws satisfy strict scrutiny. The purpose behind the Court's exacting review of content-based regulations of speech is to ensure that the government cannot pick and choose the topics that enter the marketplace of ideas.

The Court has rightly expressed an even greater constitutional animosity towards laws that discriminate not only on content but also on viewpoint. In these instances, the government actually

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20. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

21. *Id.* at 27.

22. *Id.* at 30.

23. 413 U.S. 49 (1973).

24. *Id.* at 57.

25. *Id.* at 58.

26. *Id.* at 63.

27. *Id.* at 64.

28. CHEMERINSKY, *supra* note 11, at 1057 ("[C]ontent-based discrimination must pass strict scrutiny, and the Court has recently indicated that content-based distinctions within these categories also must past strict scrutiny.").

outlaws one side of an argument. This kind of ideological bias is almost never permitted.[29]

When a law only regulates the time, place, or manner of speech rather than the speech itself, the Court takes a more lenient approach. Since the speech still has an outlet, such laws do not get strict scrutiny. The laws must simply further an important governmental interest, must not be content discriminatory, and must provide real alternative avenues of communication.[30]

Under the Supreme Court's current categorical approach, indecent speech receives the same protection as political speech because it does not fall into an unprotected category. This is controversial. For example, in *Young v. American Mini Theatres, Inc.*,[31] the Court examined the constitutionality of a law zoning the location of adult establishments that provide sexually indecent entertainment. Justice Stevens made a famous statement in his plurality opinion favoring relaxed scrutiny. He wrote that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities.'"[32] Justice Powell, however, concurred in the result but disagreed on the reasoning by refusing to treat non-obscene erotic materials as deserving less First Amendment protection.[33]

Similarly, in *FCC v. Pacifica Foundation*,[34] Justice Stevens authored a plurality opinion reasoning that a radio broadcast of George Carlin's "Seven Dirty Words" comedy monologue should be treated as low value protected speech.[35] Justice Stevens said there was no "exposition of ideas."[36] Thus, the First Amendment interest was outweighed by the "social interest in public order and morality."[37] Again, Justice Powell disagreed, reasoning that "[t]his is a judgment

29. *See, e.g.*, NOWAK & ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 598–99 (2007).

30. City of Erie v. PAP's A.M., 529 U.S. 277, 296–98 (2000).

31. 427 U.S. 50 (1976).

32. *Id.* at 70.

33. *See id.* at 73–83 (Powell, J., concurring in part and concurring in the judgment).

34. 438 U.S. 726 (1978).

35. *Id.* at 746–47.

36. *Id.* at 746 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

37. *Id.*

for each person to make, not one for the judges to impose upon him."[38]

It is particularly significant that *Pacifica* involved an effort to protect children, yet the Court still treated the law with great skepticism. Justice Powell did, however, join with Justice Stevens in finding that the broadcast medium "invaded" the home and was especially dangerous.[39] Thus, the Court has ostensibly been serious about the "protected" versus "unprotected" speech distinction, and about using strict scrutiny when there is content discrimination.

III. THE INTERNET FREE SPEECH CASES

The Supreme Court has generally used the highest scrutiny when examining laws restricting indecent speech on the Internet. This is surprising as the Court has historically not protected speech emanating from new technologies such as film.[40]

A. Reno v. ACLU

In *Reno v. ACLU*,[41] the Court found unconstitutional the Communication Decency Act (CDA), which essentially prohibited the transmission and display of indecent speech aimed at minors on the Internet.[42] The CDA's affirmative defenses allowed owners of indecent Web sites to show that they were trying to prevent access by juveniles.[43]

The Court struck down the CDA, in part because it had vagueness and overbreadth problems.[44] Indeed, the law was broader and had more severe penalties than similar laws regulating access by minors to indecent books and magazines, that had been examined in earlier Supreme Court cases.[45] The Court noted that the CDA might

38. *Id.* at 761 (Powell, J., concurring in part and concurring in the judgment).

39. *Id.* at 759–60.

40. *See generally* Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125, 1131–36 (1998) (discussing the Court's response to the advent of film).

41. 521 U.S. 844 (1997).

42. *Id.* at 885.

43. *Id.* at 860–61.

44. *Id.* at 870–73, 877.

45. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (concerning a law restricting the access that minors have to adult magazines at stores).

even drive out of business some non-profit sites that could not afford the age verification methods.[46]

The Court's main holding, however, was that the CDA was unconstitutional because it would make it illegal for many adults to place constitutionally protected indecent material on the Internet, since children might see the images.[47] This de facto content discrimination meant that the law should receive strict scrutiny. The Court then ruled against the CDA because of its vagueness, its overbreadth, the availability of Internet filters as an alternative, and the supposedly benign nature of the Internet technology compared to more invasive broadcast mediums.[48]

The problems with the *Reno* Court's emphasis on content discrimination will be discussed later. Several other flaws in the Court's reasoning deserve mention. The Court said the Internet was not as dangerous as broadcast technology because the Internet allegedly requires affirmative steps to gain access, such as knowing a password.[49] Moreover, the Internet allegedly has warning pages that keep minors away from serious adult content.[50]

Yet the Internet is more dangerous than print or broadcast because its interactivity and anonymity allow it to be used by pedophiles. Indeed, children have been brutalized after being lured into real world meetings with adults through virtual chat rooms.[51] The sexual material on the Internet is also far more graphic than anything on the most exotic cable station. Moreover, the increase in the number of high speed broadband subscribers means that the Internet is available in many homes, without affirmative steps being needed for access, just like television. And the warning pages on the Internet may only cause young viewers to find more creative ways to access the forbidden fruit, especially since they often contain sexual

46. *Reno*, 521 U.S. at 877, 881.

47. *Id.* at 877 (noting that the CDA would "curtail a significant amount of adult communication").

48. *Id.* at 864, 869.

49. *Id.* at 856, 870.

50. *Id.* at 854.

51. Kende, *supra* note 40, at 1162. The recent popularity of Internet social sites such as "MySpace" has apparently created additional dangers. *See, e.g.*, CNNMoney.com, *MySpace Sued by Families of Sexually Abused Teens*, http://money.cnn.com/2007/01/18/technology/myspace_lawsuits/index.htm; *see also* NAT'L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 362–64 (Dick Thornburgh & Herbert Lin eds., 2002).

teasers.[52] There may be good reasons to protect the Internet from government regulation, but the "safer than broadcast" argument is not one of them.

The fact that Justice Stevens used the highest scrutiny in *Reno* is all the more puzzling since he had earlier authored the *Young* and *Pacifica* opinions saying that indecent speech had little social value.[53] Perhaps he was dazzled by the Internet surfing tour he apparently received, courtesy of the U.S. Supreme Court library, when *Reno* was pending.[54] In addition, as Chief Justice Rehnquist and Justice O'Connor argued in a separate opinion, the Court could have at least upheld the CDA as applied to situations where one adult knowingly sends an indecent message to an unrelated minor.[55]

B. Ashcroft v. ACLU II

Congress's next attempt at protecting children from indecent Internet speech was the Child Online Protection Act (COPA). COPA tried to solve the CDA's vagueness problems by establishing a three-part definition of indecent speech for children modeled on *Miller*'s obscenity test. COPA also only applied to for-profit entities and only covered the Web, not emails.[56] In *Ashcroft v. ACLU* (*Ashcroft I*), the Court ruled that COPA was not unconstitutional—even though COPA was a national regulation based on community standards, which can vary dramatically from place to place.[57] Subsequently, however, the Court in *Ashcroft v. ACLU* (*Ashcroft II*) affirmed entry of a preliminary injunction against COPA on other grounds.[58]

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52. *See* Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 145 (2003).

53. FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. Am. Mini Theaters, Inc., 427 U.S. 50 (1976).

54. Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A ("The court's library arranged for a demonstration of the Internet, and several clerks eagerly showed their justices how to navigate the network.").

55. *Reno*, 521 U.S. at 892–93 (O'Connor, J., concurring in the judgment in part and dissenting in part).

56. 47 U.S.C. § 231(a)(1), (e)(2) (2000).

57. *Ashcroft I*, 535 U.S. 564, 585 (2002).

58. *Ashcroft II*, 542 U.S. 656, 66–67 (2004); ACLU v. Gonzales, 478 F. Supp. 2d 775, 809 (E.D. Pa. 2007); *see also* ACLU.org, *Landmark Online Free Speech Trial Wraps Up on*

Justice Kennedy, in *Ashcroft II*, ruled that the key question was whether less restrictive alternatives were available to COPA.[59] Thus, he used the strictest scrutiny even though sexually explicit speech was involved. He then concluded that filtering devices were both less restrictive and more protective.[60] They are less restrictive in that the blocking occurs at the viewer end, not the speaker end. Adults can still access the sites.[61] Filters are also more protective because they can block large portions of international pornography unlike COPA.[62]

As with *Reno*, the problems with the Court's use of strict scrutiny will be discussed later. But, as Justice Breyer explained in his dissent, filtering devices should not have been treated as a less restrictive statutory alternative since they were already available to parents.[63] Filters are also terribly over- and under-inclusive.[64] They often exclude sexual material that is highly educational and fail to exclude other material that is inappropriate for children.

C. United States v. American Library Ass'n

Admittedly, the Supreme Court has upheld one law regulating Internet pornography, but only because of the convergence of several factors not present in the other cases, and only regarding libraries. Thus, this single case does not mean the Court has become less protective of the Internet. Instead, *United States v. American Library Ass'n*,[65] involved a federal law that conditioned government funding for Internet access on installing child protection filters at the libraries' computer terminals.[66] In upholding the law, the Court relied on the congressional power to establish spending conditions and noted that libraries could reject government funds rather than

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Monday, November 20, Nov. 17, 2006, http://www.aclu.org/freespeech/internet/27450prs20061117.html. On remand in *ACLU v. Gonzales*, the district court held that the statute was not narrowly tailored to Congress's compelling interest of protecting minors, was unconstitutionally vague, and was unconstitutionally overbroad. 478 F. Supp. 2d at 777–78.

59. *Ashcroft II*, 542 U.S. at 665–66.

60. *Id.* at 666–67.

61. *Id.* at 667.

62. *Id.*

63. *Id.* at 683–84 (Breyer, J., dissenting).

64. *Id.* at 684–86 (Breyer, J., dissenting).

65. 539 U.S. 194 (2003).

66. *Id.* at 198–99.

install filters.[67] Although it usually rejects content-based restrictions, the Court explained that libraries regularly make content-based decisions in choosing books.[68] The Court also rejected the argument that library Internet access is a public forum.[69] Lastly, the Court added that any imprecision in filters was alleviated by the statutory provision allowing librarians to unblock certain sites upon patron request.[70]

One interesting aspect of this case is that Justice Breyer authored a concurrence, though he wrote the *Ashcroft II* dissent denigrating filters.[71] Patrick Garry has also correctly pointed out that the Court's view of the Internet is more sophisticated in this case than in *Reno*.[72]

To sum up, the Court usually subjects laws aimed at indecent speech on the Internet to strict scrutiny, and the result is that minors remain unprotected.

IV. THE OTHER FIRST AMENDMENT

There is another First Amendment besides the one just discussed. This "other" First Amendment does not stick with categories and rigid scrutiny levels.[73] But the Court keeps it hidden. This section will discuss the cases embracing this other First Amendment.

A. R.A.V. v. City of St. Paul, Minnesota

In *R.A.V. v. City of St. Paul, Minnesota* (*RAV*), the U.S. Supreme Court struck down an ordinance designed to penalize hate speech, such as cross burning, even though the Minnesota Supreme Court had construed the law as only covering racist fighting words.[74] The U.S. Supreme Court, however, determined that the law was

67. *Id.* at 203. For a discussion regarding the latitude Congress has to attach conditions to funding, see *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

68. *Am. Library Ass'n*, 539 U.S. at 204.

69. *Id.* at 206.

70. *Id.* at 201.

71. *Id.* at 215 (Breyer, J., concurring).

72. Patrick M. Garry, *The Flip Side of the First Amendment: A Right to Filter*, 2004 MICH. ST. L. REV. 57, 70–71.

73. *Id.* at 80–81 (discussing cases that do not stick to rigid scrutiny levels); *see supra* note 9 (referencing scholarship supporting balancing).

74. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391–92 (1992).

impermissibly content and viewpoint discriminatory since other fighting words were permitted.

RAV throws a monkey wrench into the Court's neat, categorical First Amendment jurisprudence. Though fighting words are unprotected, racist fighting words are protected. *RAV* suggests that the crucial question is content discrimination, and that the categories can be overridden.[75] Lower federal courts have used *RAV* to invalidate numerous hate speech codes at universities and elsewhere.[76] Interestingly, there is evidence suggesting that some universities and other institutions still adopt such codes.[77] Moreover, *RAV* has been affirmed in two more recent U.S. Supreme Court cases, though each case has been distinguished factually in controversial ways.[78]

75. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) ("[T]he principle of content neutrality has become the core of free speech analysis."); Heyman, *supra* note 1, at 653 ("I argue that the courts' increasing reliance upon the content discrimination doctrine to resolve difficult First Amendment problems only obscures the crucial issues, and leads to hyper-technical decisions that are inaccessible to the public."). Heyman points out that this emphasis on content neutrality reflects the central tenets of the dominant liberal ideology. *Id.* at 657.

76. *See, e.g.*, Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 1006 (2006) (citing J. Peter Byrne, *Constitutional Academic Freedom after* Grutter*: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 947 (2006)) (describing how virtually all university speech codes that have been challenged have been struck down as unconstitutional).

77. There is a national organization, the Foundation for Individual Rights in Education (FIRE), that keeps track of speech codes that still exist and it often threatens to sue the offending universities. *See, e.g.*, Samantha Harris, *Speech Code of the Month: Fayetteville State University*, FIRE'S THE TORCH, Jan. 2, 2007, http://www.thefire.org/index.php/article/7622.html; Samantha Harris, *Victory for Free Speech at Massachusetts College of Liberal Arts*, FIRE'S THE TORCH, Jan. 16, 2007, http://www.thefire.org/index/php/article/7654.html.

78. Shortly after *RAV* was decided, in *Wisconsin v. Mitchell*, the Supreme Court found it constitutional for a criminal penalty to be enhanced based on whether a racist motivation was involved. 508 U.S. 476, 490 (1993). The Court said this was distinguishable because the underlying crime was not based on racist speech being singled out. *Id.* at 488. Moreover, the Court said that the defendant's motive, or level of intent, often played a part in criminal sentencing. *Id.* at 485. Recently, the Court in *Virginia v. Black* ruled that it was constitutional for a law to prohibit the burning of a cross with an intent to intimidate. 538 U.S. 343, 347 (2003). The Court there said that a law aimed at intimidation was analogous to a law against threats. *Id.* at 360. No content discrimination was involved. *Id.* at 362. It should be mentioned that critics have said both cases are inconsistent with *RAV*. *See, e.g.*, Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 974–78 (2004).

RAV highlights the problems with the Court's First Amendment doctrine. Indeed, in his majority opinion, Justice Scalia had trouble reconciling his analysis with several other decisions. For example, federal law prohibits threatening the President of the United States.[79] That law singles out only one type of threat, yet it has been found constitutional. It looks viewpoint discriminatory.

Justice Scalia reasoned, however, that the law can single out threats against the President because there is a powerful national interest in ensuring the President can carry out his duties without interference.[80] According to Justice Scalia, this was not impermissible discrimination since the law was essential to preserving social stability. Yet this is not a convincing ground upon which to distinguish racist fighting words since they are more likely than other fighting words to disrupt social stability by causing urban riots and violence.

Justice Scalia also had to reconcile his approach with Title VII, the federal law prohibiting employment discrimination, including sexual harassment. Harassment can include offensive statements.[81] Thus, Title VII can penalize workers or supervisors for making sexist statements, but not for other offensive comments. Justice Scalia, however, reasoned that Title VII was aimed at prohibiting discriminatory conduct, and that it only incidentally covered some speech. By contrast, he said that the *St. Paul* hate speech law only prohibited disfavored expression.[82] Yet courts have upheld harassment claims based largely on speech in several cases.[83]

Finally, Justice Scalia said that *St. Paul* should have banned all fighting words to avoid content discrimination.[84] Yet it is a bit odd that the solution to a difficult First Amendment problem would be to ban more speech, not less. This certainly suggests the content discrimination principle's limits.[85]

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79. 18 U.S.C. § 871 (2000).

80. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992).

81. *Id.* at 389–90.

82. *Id.* at 392.

83. *See generally* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

84. *See R.A.V.*, 505 U.S. at 391–92.

85. The distinction between what is considered indisputably harmful (child pornography) versus what is considered worthy of protection (racist fighting words) is itself a social construction in which the notion of a truly objective and content or viewpoint neutral perspective is illusory. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE

B. Indecent Adult Establishments

The "other" First Amendment also appears in the Supreme Court's "secondary effects" jurisprudence. In several cases, the Supreme Court has ruled that laws which zone the location of adult theaters[86] and laws that restrict nude dancing[87] are constitutional because they are relatively benign time, place, and manner restrictions. Adult theaters still exist but are located in certain areas, rather than others. Moreover, erotic dancing can still be done, but not in the buff. Strict scrutiny is therefore unwarranted because these laws do not ban the speech entirely based on its content. They simply channel the speech to other locations or form. The Court is thus more lenient since these laws give expression an outlet.

Critics, however, attack zoning laws as content-based restrictions targeting sexually-explicit speech, arguing that such restrictions deserve strict scrutiny. The Supreme Court has responded that the zoning of such establishments is due to their unpleasant secondary effects.[88] Adult theaters often bring a criminal element with them and are bad for commercial and residential neighborhoods. A Court plurality, in *City of Erie v. PAP's A.M.*,[89] has likewise reasoned that nude dancing has detrimental secondary effects.[90]

These laws, however, are content discriminatory on their face and in their impact. For example, banks generate crimes (bank robberies) yet banks are not pushed into the bad parts of town. Judge Richard Posner has explained that the secondary effects doctrine "cannot be taken completely seriously. Politically unpopular speech has secondary effects as well, in particular a heightened risk of public disorder; yet the Supreme Court has made clear that government cannot, by banning unpopular speakers in order to

L.J. 589, 615 ("One does not 'see' a viewpoint-based restriction when the harms invoked in defense of a regulation are obvious and so widely supported by social consensus that they allay any concern about impermissible government motivation."). An interesting treatment of similar jurisprudential issues can be found in LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION? (2005).

86. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 52 (1986).

87. City of Erie v. PAP's A.M., 529 U.S. 277, 290–91 (2000).

88. Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 71 (1976) (discussing the detrimental effects of adult theaters to the quality of urban life).

89. *PAP's A.M.*, 529 U.S. 277.

90. *Id.* at 290–91.

prevent disorder, allow a 'heckler's veto.'"[91] The Court in these cases even admits there is a content discriminatory element, but asserts that secondary effects are the major concern.[92] Yet this confuses one possible purpose behind the law (reducing crime) with the law's indisputable content-based impact.[93] Moreover, the sexual content of these establishments is intimately connected to the distasteful secondary effects.

The secondary effects analysis is particularly weak when applied to nude dancing. Whether an erotic dancer is totally or partly naked will not change an establishment's effect on the neighborhood. Justices Scalia and Thomas acknowledged this problem in *Erie* but deferred to the municipality.[94] Justice Souter wrote a concurrence saying that such deference is unjustified without an evidentiary showing of adverse community effects.[95] The confusion in the Court's approach is augmented by the great divisions among the Justices in these cases.

C. Other Problems

The U.S. Supreme Court's speech categories, and its focus on content discrimination, create numerous other problems. First, the protected and unprotected speech categories are insufficient for commercial speech, which has its own separate test.[96] What is bizarre, however, is that racist fighting words actually get more constitutional protection than commercial speech. This is because laws restricting commercial speech receive a type of intermediate scrutiny that is similar to that applied to time, place, and manner restrictions, whereas the *RAV* decision says that laws prohibiting racist fighting

91. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 366 (2003).

92. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) ("To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters.").

93. Chemerinsky, *supra* note 75, at 60. Some of the strongest free speech advocates acknowledge the bias problem. *See, e.g.*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115–17 (1987).

94. City of Erie v. PAP's A.M., 529 U.S. 277, 310 (2000).

95. *Id.* at 310–11.

96. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

words get strict scrutiny.[97] This is backwards. Racist hate speech is more harmful.

Second, it is often unclear whether a law is content discriminatory,[98] particularly given relatively new technologies where there may be multiple interests and values at stake. Consider cable television, which involves an audience, programming writers, local government, and a cable system which all arguably have some type of speech interest implicated in each broadcast. Unfortunately, resolution of this very difficult question is frequently decisive. Winning or losing, therefore, requires the artificial elevation of a small distinction into a fundamental one as pointed out by the likes of Justice Stevens[99] and Erwin Chemerinsky.[100]

For example, in *Turner Broadcasting System, Inc. v. FCC*,[101] the U.S. Supreme Court addressed whether it was constitutional to mandate that cable television systems provide access to local broadcasters including those that are commercial and those that are acting in the public interest. Justice O'Connor thought the preference for the local entities revealed a bias for public interest programming.[102] Other Justices, however, reasoned that the law simply reduced the monopolistic control of the cable system and opened up speech channels.[103] Similar internal divisions among the Justices exist in other cable television cases such as *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[104] and *United States v. Playboy Entertainment Group, Inc.*[105] Indeed, the pro-speech result in this last case seems inconsistent with the pro-government result in *Erie*, the nude dancing case, though they were decided the same year.

97. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 394 (1992) (noting that racist fighting words are "presumptively invalid").

98. This issue was a focus of debate in the leading symbolic speech case involving a law prohibiting draft card mutilation. United States v. O'Brien, 391 U.S. 367 (1968).

99. The Honorable John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1302, 1304, 1307, 1311 (1993).

100. Chemerinsky, *supra* note 75, at 64.

101. 512 U.S. 622 (1994).

102. *Id.* at 676.

103. *Id.* at 656–57.

104. 518 U.S. 727 (1996).

105. 529 U.S. 803 (2000).

Moreover in *Virginia v. Black*,[106] the Court's members disagreed strongly over whether a law that bans intimidating cross burning is content discriminatory. The majority held that the law was aimed at threats and was content-neutral.[107] Justice Souter's dissent argued powerfully that a cross burning, done to intimidate, was racist in nature and thus content discrimination was involved.[108]

Third, the Court has not applied its scrutiny levels consistently. For example, the Court has ruled that time, place, and manner restrictions imposed via judicial injunctions deserve stricter scrutiny than legislative time, place, and manner restrictions.[109] In *Ward v. Rock Against Racism*,[110] the Supreme Court ruled that a law regulating the time, place, and manner of speech in a public forum must be narrowly tailored.[111] But that did not mean the law must be the least restrictive possible regulation.[112] Thus, rhe words "narrowly tailored" have multiple meanings in the Court's First Amendment cases.

Ashcroft II is another example of the inconsistency problem. Both Justice Kennedy[113] and Justice Breyer[114] said they were using strict scrutiny, yet they reached opposite results. Justice Kennedy found that there were less restrictive alternatives to COPA.[115] Justice Breyer, however, reasoned that COPA's specificity, and the importance of the state's interests in protecting minors, outweighed any free speech interests.[116] Actually, neither used "regular" strict scrutiny. Justice Kennedy employed a kind of super strictness while Justice Breyer's balancing resembled intermediate scrutiny.[117]

106. 538 U.S. 343 (2003).

107. *Id.* at 360–63.

108. *Id.* at 385–86.

109. Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 515 (2d ed. 2005). The Court in *Madsen* also split on whether the injunction was content-based or not.

110. 491 U.S. 781 (1989).

111. *Id.* at 803.

112. *Id.* at 798.

113. *Ashcroft II*, 542 U.S. 656, 673 (2004).

114. *Id.* at 677 (Breyer, J., dissenting).

115. *Id.* at 673 (majority opinion).

116. *Id.* at 677–82 (Breyer, J., dissenting.

117. *See also* Mark S. Kende, *Filtering Out Children: The First Amendment and Internet Porn in the U.S. Supreme Court*, 2005 MICH. ST. L. REV. 843.

As the above discussion shows, the Court should stop pretending that there are "fixed" speech categories and that the content discrimination principle solves all problems. Instead, the Court should openly acknowledge that there are gradations of speech and that sexually explicit speech is low on the list—certainly below political expression. This would explain why zoning and nude-dancing laws are treated more leniently than laws restricting more valuable speech. Prior to his decision in *Reno*, Justice Stevens took that view in *Young* and *Pacifica*, and he delivered an important address at Yale Law School highlighting the argument.[118] The idea of low-value protected speech is also recognized in public employment cases where speech on public interest matters gets more protection.[119]

Fortunately, foreign courts can provide assistance here as they have addressed difficult freedom of expression issues using a more open analysis of the competing interests and values.

V. SOUTH AFRICAN FREE SPEECH CASES

In contrast to the U.S. Supreme Court's categorical formalism, numerous other courts, including South Africa's Constitutional Court and the European Court of Human Rights, openly weigh the burden on the individual against the government's justification, as well as other interests, in deciding speech issues.[120] This section will discuss several Constitutional Court cases and will examine how the South African approach could be applied by the U.S. Supreme Court to Internet pornography restrictions. The section will also look at some possible criticisms of the South African method.

A. South Africa

There are several reasons to use South Africa as a model for free speech jurisprudence. First, the South African Constitution sits atop the modern constitutional pyramid. Cass Sunstein describes it as "the

118. The Honorable John Paul Stevens, *supra* note 99, at 1309–11.

119. *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (using balancing in a public employee case); Connick v. Myers, 461 U.S. 138 (1983).

120. The former Chief Justice of the Israeli Supreme Court has discussed the essential nature of balancing in constitutional cases. AHARON BARAK, THE JUDGE IN A DEMOCRACY 164 (2006).

most admirable constitution in the history of the world."[121] Its drafters tried to improve upon provisions from the best democratic constitutions.[122]

Second, it appears that the South African effort has succeeded. The young Constitutional Court has rendered internationally significant decisions regarding the death penalty, socio-economic rights, gender discrimination, etc., that have advanced democracy and human rights in South Africa.[123]

Third, South Africa and the United States have similar racial histories. The U.S. had slavery and segregation, while South Africa suffered the racist brutality of Apartheid. Both nations still feel the effects. This common history is relevant to the hate speech debate and to the idea of harms-based speech restrictions.

Fourth, South African Constitutional Court decisions typically discuss similar cases from other countries, as well as international human rights norms. Indeed, the South African Constitution mandates such analysis in certain cases.[124] Thus, the Court's decisions are a constitutional treasure trove.

Fifth, the intellectual caliber of the decisions is excellent. Moreover, they are written in English and are designed to be more accessible to the public than, by comparison, Federal Constitutional Court decisions in Germany.

The South African Constitution drafting process had two stages. First, after the 1990 release of Nelson Mandela from prison, a group of "elites" representing the nation's various constituencies negotiated an interim Constitution and a power sharing arrangement. The 1994 interim Constitution provided for the

121. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 261 (2001).

122. SPITZ & CHASKALSON, *supra* note 6; Sarkin, *supra* note 6.

123. For example, the leading recent casebook on comparative constitutional law by American academics references South African cases in these areas. VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 646, 1331, 1684 (2006). The Constitutional Court's decisions in the area of sexual orientation discrimination have also received significant international attention, especially the recent decision mandating that gay couples be allowed to marry. *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.).

124. Chapter 2, Section 39 of the Constitution of the Republic of South Africa specifies that, "When interpreting the Bill of Rights, a court, tribunal or forum– (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; (b) must consider international law; and (c) may consider foreign law."

election of a legislature that then drafted the Constitution, which was finalized in 1996. The Constitution's goal was to transform the country from a brutal racist society to a multi-racial democracy that honored human dignity and helped the disadvantaged.[125]

The central speech provision of the South African Constitution is found in Section 16 of Chapter 2 and states that:

> (1) Everyone has the right to freedom of expression, which includes-
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart iuformation or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to-
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

At first glance, the explicit exclusion of hate speech and incitement from constitutional protection seems to make the South African Constitution less speech-protective than the U.S. Constitution's First Amendment, which says, "Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." On the other hand, South Africa's Constitution may be more protective since it offers express protection for academic freedom, artistic creativity, and other media besides the press.

Moreover, the hate speech provision reflects the South African Constitution's emphasis on protecting human dignity and transforming the country from its racist heritage. Interestingly, the drafters almost left out any hate speech reference under the theory that such speech could be regulated by statute given the

125. S. AFR. CONST. 1996, preamble.

Constitution's strong equality and dignity protections.[126] This paper now discusses the Constitutional Court's central speech decisions.

1. Case

The Constitutional Court, in *Case v. Minister of Safety and Security*,[127] overruled the conviction of several men in a bench trial for possessing sexually explicit videotapes. The men allegedly violated the Indecent or Obscene Photographic Matter Act of 1967. Section 2(1) of the Act says that possession of "any indecent or obscene photographic matter" is illegal. Section 1 explains that indecent or obscene includes:

> photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.[128]

The Act reflects the Apartheid era's Calvinist morality. Indeed, the Minister of Justice in 1967 said that the law prevented the moral undermining of a "'Christian, civilised country such as the one in which we are living.'"[129]

Justice John Didcott authored the Constitutional Court's majority opinion. He ruled that these individuals had a constitutional right to privacy that included possessing these videotapes at home.[130] The Court's decision resembled the U.S. Supreme Court ruling in *Stanley v. Georgia*[131] that a man could not be prosecuted for possessing obscene films in his home. Interestingly, Justice Didcott did not reference *Stanley*, even though the interim Constitution specified that the Court may look at foreign law.

Justice Didcott also declined to decide whether the Interim Constitution's freedom of expression clause included a right to

126. Lene Johannessen, *A Critical View of the Constitutional Hate Speech Provision*, 13 S. AFR. J. HUM. RIGHTS 135, 141 (1997) ("Stated otherwise, s 16(2) is superfluous if it aims to provide the state with a right to introduce and enforce hate speech legislation.").

127. 1996 (3) SA 617 (CC) (S. Afr.).

128. *Id.* ¶ 9 (judgment of Justice Mokgoro) (quoting Indecent or Obscene Photographic Matter Act of 1967 s. 1).

129. *Id.* ¶ 12 (quoting 19 HANSARD, HOUSE OF ASSEMBLY DEBATES 2659 (1967)).

130. *Id.* ¶ 91 (judgment of Justice Didcott).

131. 394 U.S. 557, 568 (1969).

receive information because the 1967 Act was likely to be revised.[132] He did, however, suggest that the law was overbroad, writing that "the trouble one now has with section 2(1) is that it hits the possession of other material too, material less obnoxious and sometimes quite innocuous which we cannot remove from its range."[133] He also said that the Act contained a "preposterous definition" that "covers, for instance, reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world."[134]

Justice Yvonne Mokgoro authored a separate opinion addressing the freedom of expression issues. She concluded there was a constitutional right to receive information. Since the later 1996 Constitution explicitly includes such a right, her concurring opinion shed light on how that provision could be interpreted.

She initially explained that the 1967 Indecency Act's definition was based in part on the 1963 Publications and Entertainment Act. The 1963 Act defined matters "harmful to public morals" as encompassing lust, passionate love scenes, night life, physical poses, inadequate dress, divorce, marital infidelity, "or any other similar related phenomenon."[135]

Justice Mokgoro wrote that the Apartheid authorities knew that the public morals test was broad enough even to include pin-up calendars. The courts, therefore, also required the material be "corrupting," defined from an objective perspective.[136] But Justice Mokgoro said that courts still engaged in "ad hoc" case-by-case analysis under such a standard.[137] This resembles Justice Stewart's statement about obscenity that "I know it when I see it."[138]

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132. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 92 (S. Afr.). Section 15 of the Interim Constitution said that: (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research. (2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

133. *Id.* ¶ 93.

134. *Id.* ¶ 91.

135. *Id.* ¶ 10 (judgment of Justice Mokgoro) (quoting Public and Entertainment Act of 1963 s. 6).

136. *Id.* ¶ 14 (citing *S v H* 1974 (3) SA 405 (T) at 408 (S. Afr.)).

137. *Id.* ¶ 16.

138. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Next she addressed whether sexually explicit speech was protected by the interim Constitution's free speech provision.[139] She noted that the American First Amendment did not protect obscenity.[140] She said some scholars took the view that freedom of speech should focus primarily on political speech.[141]

Ultimately, she rejected the American categorical view regarding obscenity:

> [T]he American bill of rights does not contain a limitations clause. Where, as in the case of our Constitution, the listing of rights is accompanied by a clause that provided for the limitation, on a principled and considered basis, of all enumerated rights, the better approach would seem to be to define the right generously, and to interpose any constitutionally justifiable limitations only at the second stage of the analysis.[142]

In other words, the South African Constitution provides for a two stage analysis. First, the Court determines if a right has been violated. If so, the Court analyzes whether the government can justify the violation. Thus, in certain cases, a right can be violated without the Constitution being offended, unlike in the United States.

Given this approach, Justice Mokgoro reasoned that the Court can define the right broadly and leave the difficult part to the limitations analysis. Indeed, as previously mentioned, she defines freedom of expression as including the right to receive information.[143] This means that the rights of audiences, as well as those of speakers, should be considered at the first stage. Justice Mokgoro further reasoned that limiting expression to the political realm would exclude areas like artistic speech.[144] She acknowledged the "marketplace of ideas" theory that free speech leads to truth. But she advocates the "self realization" view:

> [A] sine qua non for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous

139. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 17 (S. Afr.) (judgment of Justice Mokgoro).

140. *Id.* ¶ 20.

141. *Id.* ¶ 23.

142. *Id.* ¶ 21.

143. *Id.* ¶ 29.

144. *Id.* ¶ 23.

> power. Viewed in that light, the right to receive others' expressions has more than mere instrumental utility, as a predicate for the addressee's meaningful exercise of her or his own rights of free expression. It is also foundational to each individual's empowerment to autonomous self-development.[145]

She then explained that the South African Constitution's provisions are "part of a web of mutually supporting rights" promoting human dignity and social transformation.[146] By contrast, the U.S. Constitution focuses more on individual liberty and the clauses are not linked explicitly. The word "dignity" does not appear in the U.S. Constitution, though dignity is at the heart of the post World War II international human rights movement that so influenced South Africa.

Next, Justice Mokgoro compared the United States and Canada. She described the U.S. Supreme Court's difficulties in deciding on an obscenity standard and explained how the Court ended up focusing on community morals.[147] She also found *Miller*'s three-part obscenity test to be vague, especially on the question of whether a work has serious literary, artistic, political, or scientific value.[148]

She then contrasted the U.S. focus on community standards with Canada's focus on pornography's harms to women, including "the encouragement of violence, and the reinforcement of gender stereotypes."[149] Canada's statute is based on the novel anti-pornography law authored by legal scholar Catherine MacKinnon.[150] This law has been rejected as content discriminatory by American jurisdictions but Canada upheld the law under its proportionality review.[151]

Justice Mokgoro wrote that the harm approach "may offer a more promising route," than the American focus on morality,

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145. *Id.* ¶ 26.

146. *Id.* ¶ 27.

147. *Id.* ¶ 42.

148. *See id.* ¶ 41.

149. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 45 (S. Afr.) (judgment of Justice Mokgoro).

150. Amy Adler, *What's Left? Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1511 (1990) (noting the Canadian statute based on MacKinnon's work).

151. *Compare* Am. Bookseller's Ass'n. v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), *with* Regina v. Butler, [1992] 1 S.C.R. 452.

though the harm approach also has many critics.[152] Her preference for Canada is consistent with the South African Bill of Rights having borrowed more from the 1982 Canadian Charter of Rights and Freedoms—with its emphasis on human dignity—than from the eighteenth-century U.S. Constitution.[153]

Justice Mokgoro, however, in the end refused to select an approach. Instead, she said that the government had failed to show that the 1967 Act is a justifiable rights limitation since the Act is constitutionally overbroad.[154] The interim Constitution's Limitations Clause required that the law at least be "reasonable" among other basic requirements.[155] She concluded that the law was so overbroad thar it did not even meet that standard.[156] Interestingly, she relied on a Canadian case as the overbreadth doctrine's source despite its frequent usage by American courts.[157] She noted that courts in Apartheid-era South Africa sometimes declared statutes to be *ultra vires.*[158]

Justice Mokgoro also agreed with Justice Didcott's opinion that the conviction at issue in *Case* violated the defendants' right to privacy.[159] She did not join Justice Didcott's opinion, however, because she reasoned that the home was not impregnable from all state intrusion.[160]

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152. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 47 (S. Afr.) (judgment of Justice Mokgoro).

153. *See* Sarkin, *supra* note 6, at 180, 184, 186; *see also* Regina v. Butler, [1992] 1 S.C.R. 452 ("[T]here is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women . . . ."); DAVID DYZENHAUS & ARTHUR RIPSTEIN, EDS., LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 787 (2001) (arguing that hate speech subverts the Canadian value of dignity).

154. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 80 (S. Afr.) (judgment of Justice Mokgoro).

155. *Id.* ¶ 36. Section 33 of the Interim Constitution contained the Limitations Clause which specified that, "The rights entrenched [in Chapter 3] may be limited by a law of general application, provided that such limitation – (a) shall be permissible only to the extent that it is – (i) reasonable; and (ii) justifiable in an open and democratic society based upon freedom and equality."

156. *See id.* ¶¶ 50, 61.

157. *See id.* ¶ 49.

158. *See id.* ¶ 51.

159. *Id.* ¶ 65.

160. *Id.*

Justice Tholie Madala's opinion is interesting because he explicitly stated that laws protecting minors from sexually explicit speech should be treated differently than laws geared to keep the materials from adults. He therefore joined Justice Didcott's privacy approach except for its application to children.[161] It is not totally clear, though, whether he objected to the horrors of child pornography or to children seeing any kind of pornography. He also relied on the U.S. Supreme Court's decisions in *Stanley*[162] and *New York v. Ferber*.[163] He described the U.S. Supreme Court's willingness to provide special protection to children in speech cases as an example of that Court's "elasticity . . . allow[ing] the American courts to develop different principles in response to differing circumstances."[164] However, for the reasons discussed above, the U.S. Supreme Court's approach to the First Amendment is better described as inconsistent rather than elastic.

Finally, Justice Albie Sachs concurred in the opinions of both Justice Didcott and Justice Mokgoro given the Act's vagueness and overbreadth. Indeed, he stated that the privacy and expression analyses overlap.[165]

To summarize, Justice Mokgoro's *Case* opinion outlines a two-stage rights analysis that favors balancing instead of the U.S. Supreme Court's categorical approach. This approach will allow the Constitutional Court to bypass the definitional problems that obsess the U.S. Supreme Court, such as whether nude dancing is "speech." She concluded that the 1967 Act is overbroad, rather than choosing between American and Canadian approaches to sexually explicit speech. This pragmatic minimalism is characteristic of the South African Constitutional Court and is very different from the U.S. Supreme Court's convoluted discussion of speech categories in *RAV* and *Reno*.[166]

161. *See id.* ¶¶ 105–07 (judgment of Justice Madala).

162. Stanley v. Georgia, 394 U.S. 557 (1969).

163. 458 U.S. 747 (1982).

164. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 106 (S. Afr.) (judgment of Justice Madala).

165. *Id.* ¶ 112 (judgment of Justice Sachs).

166. *See generally* Iain Currie, *Judicious Avoidance*, 15 S. AFR. J. HUM. RTS. 138 (1999); Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753 (2002).

2. Islamic Unity

The Constitutional Court's decision in *Islamic Unity Convention v. Independent Broadcasting Authority*[167] involved hate speech. An Islamic community radio station broadcast statements asserting that Israel was illegitimate, that Jews were not gassed during World War II, and that only a million Jews died during that war.[168] The station was sanctioned under the following national broadcasting regulation:

> Broadcasting licensees shall . . . not broadcast any material which is indecenr or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely ro prejudice the safety of the State or the public order or relations between sections of the population.[169]

The main constitutional question was whether speech could be restricted because it was "likely to prejudice relations between sections of the population."[170] The Broadcast Board found that the radio statements were likely to create prejudice against Jewish people.

The Court initially indicated that freedom of expression may be even more important in South Africa's new democracy than in the United States.[171] Deputy Chief Justice Pius Langa reasoned that it would be problematic to justify most speech restrictions given the country's authoritarian past.[172] Thus, even offensive speech should be tolerated. Justice Langa, however, explained that freedom of speech could not be absolute because some expression could endanger other constitutional values such as equality, dignity, and national reconciliation.[173]

Justice Langa next discussed how these other values were reflected in part two of the 1996 Constitution's freedom of expression provision which specified that hate speech was unprotected. The Constitution defines hate speech as "'advocacy of hatred' that is based on . . . race, ethnicity, gender or religion, and

167. 2002 (4) SA 294 (CC) (S. Afr.).

168. *See id.* ¶ 1.

169. *Id.* ¶ 22.

170. *Id.* ¶ 23.

171. *See id.* ¶ 26.

172. *See id.* ¶ 27. Justice Langa is now the Chief Justice.

173. *Id.* ¶ 30. Indeed, Section 10 of the South African Bill of Rights says that, "Everyone has inherent dignity and the right to have their dignity respected and protected."

which amounts to 'incitement to cause harm.'"[174] Justice Langa noted that racist speech impinged on human dignity,[175] and stereotyped people based on immutable characteristics.[176] He argued that racist speech "reinforces and perpetuates patterns of discrimination and inequality. Left unregulated, such expression has the potential to perpetuate the negative aspects of our past and further divide our society."[177]

The problem, though, was that the broadcasting regulation did not require that the racist expression take the form of advocacy, or that it incite harm. Consequently, the regulation did not precisely prohibit hate speech as defined by the South African Constitution. The regulation therefore outlawed protected speech, and a limitations analysis was required.[178]

Justice Langa then applied the overbreadth doctrine:

> The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny broadcasters and their audiences the right to hear, form, and freely express and disseminate their opinions and views on a wide range of subjects. The wide ambit of this prohibition may also impinge on other rights, such as the exercise and enjoyment of the right to freedom of religion, belief and opinion . . . .[179]

The Board, however, argued that the prohibition was narrow because it only governed broadcasters, provided no criminal sanction, and permitted broadcasters to opt out.[180] Justice Langa disagreed.[181] He contended that the regulation was not narrow since it affected all listeners.[182] Moreover, the sanctions were serious because a license could be suspended.[183] Justice Langa was not

174. *Islamic Unity Convention v. Indep. Broad. Corp.* 2002 (4) SA 294 (CC) ¶ 33 (S. Afr.) (quoting S. AFR. CONST. 1996 § 16(2)(c)).

175. *See id.*

176. *See id.* ¶ 45.

177. *Id.* ¶ 45.

178. *See id.* ¶¶ 47–50.

179. *Id.* ¶ 44.

180. *Id.* ¶¶ 47–49.

181. *Id.*

182. *See id.* ¶ 47.

183. *See id.* ¶ 48.

convinced by the Board's argument that the opt-out provision saved the law from being unconstitutional.[184] He also reasoned that less restrictive alternatives existed.[185] The Court, therefore, struck the regulation down, although the Court allowed the Board to continue prohibiting hate speech under the Constitution's definition.[186]

The *Islamic Unity* decision has several important dimensions. First, it shows that hate speech restrictions do not mean that everything racially offensive is outlawed. A well-drafted constitutional provision still permits controversial speech that does not incite. The slippery slope concerns of those opposed to hate speech restrictions, therefore, may be exaggerated.

Second, the Court showed it would uphold speech restrictions aimed at real harms, not at speech that offends. This is similar to Justice Mokgoro's sympathy for the Canadian anti-pornography law in *Case*. This focus on harm also justifies protecting children from some speech.

Third, the *Islamic Unity* Court's emphasis on overbreadth, as in *Case*, prevents it from having to perform a more complex and confusing categorical analysis as Justice Scalia did in *RAV* and as Justice Stevens did in *Reno*. The Constitutional Court, for example, does not resolve how the speech provision's internal limitations clause (where one finds the hate speech exception) relares to the general South African Limitations Clause in Section 36.

The case, however, is not flawless. The Court is mistaken in suggesting that freedom of speech is as important as human dignity under the South African Constitution, as shown by the next case.

3. Khumalo

In 2002, the Court not only decided *Islamic Unity*, but later issued a ruling in a major defamation case, *Khumalo v. Holomisa*.[187] In *Khumalo*, a politician claimed he was injured by a newspaper article that associated him with a gang.[188] The claim led the Court to consider whether freedom of speech was violated by the fact that a

184. *See id.* ¶ 49.
185. *See id.* ¶ 50.
186. *Id.* ¶ 57.
187. 2002 (5) SA 401 (CC).
188. *Id.* ¶ 1.

South African common law defamation claim could be brought without the plaintiff having to allege that the statement was false.[189]

The Court upheld the common law's constitutionality in an opinion authored by Justice Kate O'Regan.[190] Early in her opinion, she implicitly distinguished *Khumalo* from *Islamic Unity* by writing that "although freedom of expression is fundamental to our democratic society, it is not a [paramount] value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom, and equality."[191]

She also wrote that "the protection of human dignity is a foundational constitutional value."[192] She elaborated that dignity involves the individual's self worth, and his reputation to others.[193] She noted further that given the mass media's power, it has a "constitutional duty to act with vigour, courage, integrity, and responsibility."[194] She said that defamation cases require the balancing of dignity interests and free speech interests.[195]

The Court then explained that truth, or falsity, is not irrelevant in the South African context.[196] A defendant can prevail in a defamation suit by showing the truth of her statement.[197] This admittedly protects less speech than in the United States, where defamation plaintiffs must allege falsity. Moreover, public figures in the United States must show actual malice, which is the "high-water mark of foreign jurisprudence" protecting speech.[198] But South Africa values the person's dignitary interest more highly. Justice O'Regan notes that truth can also sometimes be tough to show, and thus the risk was placed on the defendant, not the plaintiff.[199]

189. *Id.* ¶ 3.
190. *Id.* ¶ 45.
191. *Id.* ¶ 25.
192. *Id.* ¶ 26.
193. *Id.* ¶ 27.
194. *Id.* ¶ 24.
195. *Id.* ¶ 28.
196. *Id.* ¶ 36.
197. *Id.* ¶ 37.
198. *Id.* ¶ 40.
199. *Id.* ¶ 44.

The burden on the defendants, however, is not to show truth in all cases. That would have a massive chilling effect on speech.[200] Instead, the accused need only show that her decision to publish was "reasonable" given all the circumstances, which could include the difficulty of proving the truth or falsity of certain assertions.[201] Justice O'Regan concludes that:

> In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity. Moreover, the defense of reasonable publication will encourage editors and journalists to act with due care and respect for the individual interest in human dignity prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.[202]

To summarize, Justice O'Regan clarified that dignity trumps free speech as a paramount value in South Africa, unlike in the United States. She also balances the competing interests, as opposed to employing the U.S. Supreme Court's categorical framework. The major flaw in her approach, however, is that the reasonableness test is vague and could chill speech. The test does, however, provide an incentive for elevating societal discourse, something that the United States certainly could use.[203]

4. South African Broadcasting

The Constitutional Court's most recent speech case was its 2006 ruling in *South African Broadcasting Corp. v. National Director of*

200. *Id.* ¶ 39.

201. *Id.*

202. *Id.* ¶ 43.

203. Kevin Saunders has written about the "coarsening of [American] society." SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 57, 202 (2003).

Prosecutions.[204] The issue in that case was whether the courts could constitutionally refuse to broadcast some important criminal trials concerning national figures.[205] The Court upheld the decision not to broadcast after balancing freedom of speech interests against the need for court proceedings to be fair.[206] The Court relied in part on the fact that no foreign jurisdiction—including the United States—had yet required televised court proceedings where the parties opposed it.[207]

B. Applying the South African Approach

Now let us return to the issue of Internet pornography aimed at minors. As previously discussed, current U.S. Supreme Court doctrine makes it difficult to successfully regulate such material.[208] How might an Internet speech case in the U.S. Supreme Court be decided using the proportionality analysis common throughout much of the world, including South Africa?[209] *Ashcroft II* is the paradigmatic case for re-examination because the Supreme Court struck down COPA even though Congress carefully crafted it to cure the problems with the CDA.[210]

In a proportionality analysis, the first issue would be whether COPA infringed on freedom of speech. The answer would be yes. The Supreme Court would use a broad definition of speech that

204. 2007 SA 512 (CC) (S. Afr.).

205. *Id.* ¶ 2.

206. *Id.* ¶¶ 67–68.

207. *Id.*

208. *Compare* Young v. Am. Mini Theaters, Inc., 427 U.S. 50 (1976), *with* Reno v. ACLU, 521 U.S. 844 (1997).

209. If this type of case were to be ruled upon by the South African Constitutional Court, it would be obliged under the South African Constitution to follow international law. One way in which this is significant is that South Africa has ratified the International Convention on the Rights of the Child which says in Article 13 Section 1 that children "have the right to freedom of expression." Convention on the Rights of the Child, art. 13, § 1, Nov. 20, 1998, 1577 U.N.T.S. 3. This includes the right to "receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." *Id.* This right to receive could pose an obstacle to a law like COPA. However, Section 2 says that, "The exercise of this right may be subject to certain restrictions, bnt these shall only be such as are provided by law and are necessary . . . (b) For the protection . . . of public order, or of public health or morals." *Id.* art. 13, § 2. This latter section could justify COPA. The U.S. Supreme Court need not consider this Convention because the United States is one of the few countries that has not ratified it.

210. *Ashcroft II*, 542 U.S. 656 (2004).

would include sexual material, even if aimed at minors. Thus, the crucial question would be whether the government could justify COPA under a limitations analysis. Interestingly, the South African approach would resemble Justice Breyer's balancing in his COPA dissent.[211]

Section 36 of the South African Bill of Rights specifies that courts should look at the following criteria:

> (1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
>
> (a) the nature of the right
>
> (b) the importance of the purpose of the limitation
>
> (c) the nature and extent of the limitation
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.[212]

There are two possible rights at stake. First, there is the speaker's right to be heard, and then there is the audience's right to receive information. Children have little right to view such information, as indicated by the U.S. Supreme Court's several rulings that the government has a compelling interest in keeping the material away from them.[213]

The adult producers of commercial pornography undoubtedly do have a speech interest, but it is not of the highest caliber. They are generally making money by sexually stimulating viewers, not sharing political or artistic ideas.[214] The obvious lower value of this speech matters under the more nuanced South African approach. To repeat Justice Stevens: "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified

211. *See Ashcroft II*, 542 U.S. 656, 691 (2004) (Breyer, J., dissenting).

212. S. AFR. CONST. 1996, Ch. 2, § 36(1).

213. *See, e.g.*, *Ashcroft II*, 542 U.S. at 675 ("To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials.") (citation omitted).

214. *See* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922, 923, (1979) (asserting that hardcore porn is sex, not speech).

Sexual Activities' exhibited in the theaters of our choice."[215] Adult website viewers also have a speech interest, but it is largely preserved by COPA's affirmative defenses designed to ensure adult access.

The next question is the importance of the interests served by COPA. COPA seeks to prevent children from being exposed to material that could debase their morality and their view of human sexuality. It is also designed to avert a distorted view of women that could in the long run cause sexual violence.[216] These goals are very important and bolster the well-being of families, communities, and society as a whole.

Third, one must look at the nature and extent of the limitation. COPA is well drafted in that it has specificity requirements, affirmative defenses to allow adult access, and a requirement that the speech lack social value.[217] It does not simply ban all sexually explicit material, and thus lacks the overbreadth problems that arose in *Case* and *Islamic Unity*. A related question though is whether the affirmative defenses work. Since the age verification requirements now only apply to commercial entities, the CDA case concerns about driving non-profits out of business no longer apply. Thus, it seems likely they will be effective, though not perfect.

Fourth, one must examine the relationship between the purpose and the limitation. In other words, will COPA result in healthier and more moral children with better attitudes toward women? Admittedly, there is conflicting social science evidence about the effects of viewing sexually explicit material. Justice Didcott stayed away from the freedom of speech issue in *Case* because of a similar dispute.[218]

Some of the evidence, though, suggests that sexnally explicit material that depicts violence against women creates problematic attitudes in eighteen through twenty year-old males and in adults.[219] There is, however, virtually no evidence regarding the impact of

215. Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70 (1976).

216. Child Online Protection Act § 1402, Pub. L. No. 105–277, 122 Stat. 2681-736 (1998).

217. 47 U.S.C. § 231 (d)(1)(A)(i) & (6)(c) (2000).

218. *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) ¶ 93 (S. Afr.) (judgment of Justice Didcott).

219. NAT'L RESEARCH COUNCIL, *supra* note 51, at 152, § 6.2.2 nn.25–28 (referencing studies). The controversial 1986 Meese Commission on Pornography report took this view. *But see* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 244 (2001).

sexually explicit material on younger children due to the ethical limitations on carrying out such studies.[220] Kevin Saunders suggests that the portrayal of violence is the most harmful.[221] Given the disputed evidence, it would seem that courts should be deferential to the conclusions of the U.S. Congress, especially when Congress is trying to protect children, rather than usurp such a legislative role.

Finally, are less restrictive alternatives available? As previously discussed, filters do not qualify as alternatives.[222] Perhaps the best critique would be that the law should be limited to material that involves depictions of violence towards women as just discussed. Thus, COPA would likely be upheld or slightly narrowed.

It is worth reemphasizing that under the South African minimalist approaches in *Case* and *Islamic Unity*, U.S. Supreme Court cases like *Reno* and *RAV* would probably come out differently.[223] Instead of their detailed and confusing analyses, they would have been decided on overbreadth grounds.

To summarize, *Ashcroft II* would likely have been upheld under a proportionality analysis as a permissible balancing of the interests in child morality and adult access ro free speech. Unfortunately, the rigid categorical approach of the Supreme Court allows no such common sense approach.

C. Criticisms

At the conference, two major criticisms were levied against these arguments.[224] Before addressing these criticisms, it must be acknowledged that the South African and U.S. Constitutions reflect different values, as well as different historical and cultural backgrounds. One cannot, therefore, expect these nations' courts to agree on everything. These differences, however, do not mean that the Supreme Court and the Constitutional Court cannot learn from each orher. Certainly, there has been an international trend

220. NAT'L RESEARCH COUNCIL, *supra* note 51, at 152, § 6.2.2 nn.25–28.

221. *See generally* KEVIN SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996).

222. *Ashcroft II*, 542 U.S. 656, 683–84 (2004) (Breyer, J., dissenting).

223. Cass Sunstein is among a group of constitutional law scholars who advocate judicial minimalism in most constitutional cases. CASS SUNSTEIN, ONE CASE AT A TIME (1999).

224. These criticisms are not new since the hate speech debate has been going on for years among academics and in communities. *See, e.g.*, MARI MATSUDA, ET AL., WORDS THAT WOUND (2003).

recognizing the increasing importance of human dignity as perhaps a core global value.

1. Judicial subjectivity

The most fundamental objection to the South African approach was that the weighing of interests in proportionality analysis gives too much subjective discretion to judges. Take racist hate speech for example. Professor Loewy argued that Southern white judges probably took offense at much of what the 1960's civil rights protesters said. These judges might have found the protester's statements to be threatening to whites. Loewy says it would have been problematic if these judges had the power to balance the state's interest in social stability versus the protester's speech interest. Presumably, he believes the speech should have been caregorically protected. He could have argued a "lower" pornography standard would give judges too much discretion to be puritanical.

A related argument is that there is nothing to balance since allowing racist or pornographic speech does not mean the government, or anyone else, will actually implement the ideas. The government therefore has no concrete basis for interfering with these First Amendment freedoms.

One response is that these Southern judges were not exactly friendly to the civil rights protesters even under the American approach. Thus, the supposed categories are easily manipulated. Moreover, these criticisms omit discussion of the South African Constitution's approach which only permits restrictions on racist hate speech that amount to incitement to harm. The state may well have an interest in preventing the encouragement of illegal activity. This distinguishes South Africa from the U.S. Supreme Court's controversial decision in *Beauharnais v. Illinois*,[225] which outlawed publications that exposed members of a race to derision or obloquy. Indeed the one South African hate speech case discussed at the conference ended up with a victory for the racist speaker. The slippery slope of judicial discretion is not so slippery. Moreover, there is certainly a tradition of outlawing harmful speech in the United States as seen by the laws against child pornography that have been

225. 343 U.S. 250 (1952).

upheld.[226] And Canada has found laws against pornography to be valuable vindications of the dignity interests of women.

In addition, the Fourteenth Amendment's Equal Protection Clause provides more constitutional ammunition for the American Justices to treat the speech of the civil rights protesters differently than racist inciting speech and to protect women from subordination.[227] Also, the idea that hateful racist messages are no different than other offensive messages seems questionable.[228] The concurring Justices in *RAV* correctly pointed out that racial messages could well be more inflammatory in a communiry.

These criticisms also do not respond to the demonstration of how the Court has already been balancing interests in the sexually explicit zoning cases and in the new technology cases. Even now, a kind of proportionality analysis is the only game in town. The least the Court can do is be honest about it.[229] Indeed, Professor Loewy himself explicitly weighs some competing interests in his commentary.[230] The proportionality "game" is not standard-less either, since American judges are experienced in balancing interests in numerous other areas of the law. Indeed, the U.S. Supreme Court's obscenity test is the result of a weighing of inrerests that led to the Court's adoption of three criteria that make up the category. By abandoning the pretext of its strict scrutiny analysis, the Court would allow itself to refine the standards underlying the proportionality approach, thus reaching better results in a more forthright way.

2. The low value definition

Another criticism is that my characterization of racist hate speech as being low value, due to its harmful nature, does not fit the technical American definition of low value speech. This is true. The

226. New York v. Ferber, 458 U.S. 747 (1982).

227. Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992).

228. Charles Lawrence, *If He Hollers Let Him Go*, *in* WORDS THAT WOUND, *supra* note 224, at 72.

229. Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994). *See generally* DAVID BEATTY, THE ULTIMATE RULE OF LAW (2004).

230. Arnold H. Loewy, *Free Trade in Ideas Is (or Ought To Be) Absolute for Adults*, 2007 BYU L. REV. 1585, 1586.

U.S. Supreme Court says that commercial speech is of less value to core First Amendment principles than political speech.

This criticism only begs the question, however, since my argument is that the current American categories and levels of speech are problematic. Let us not forget the prominent First Amendment scholar who said that these doctrines resemble the last days of Ptolemaic astronomy. Even Professor Loewy questions the obscenity category.[231] It is no accident that the Canadian Supreme Court has rejected the American obscenity approach and replaced it with a focus on whether sexually explicit speech is likely to cause real harms.

To put it another way, it is likely that the average intelligent American adult would, if asked, say that racist inciting fighting words are more dangerous to the general welfare than commercial speech. The racist fighting words are therefore of low value by comparison. Similarly, as the Canadian Supreme Court found, degrading Internet porn is also problematic. When such common sense notions are contradicted by the current legal framework, it suggests the framework needs to be reevaluated.

VI. CONCLUSION

This Article has argued that American free speech doctrine employs unworkable categories and tries ro hide inconsistent approaches. Moreover, the U.S. Supreme Court frequently balances various interests despite its statements to the contrary. Though the South African Constitutional Court's decisions are far from perfect, the Constitutional Court openly acknowledges and weighs the real factors that are playing a role in its decisions. The South Africans also do a better job of avoiding unnecessarily broad rulings. If the U.S. Supreme Court had used proportionality analysis in *Ashcroft II*, it would probably have upheld COPA after engaging in a nuanced weighing of various factors, since the child's interest in avoiding Internet porn is so strong. Similarly, important legislative initiatives such as CP80[232] will receive a more sympathetic evaluation from a Supreme Court that reconsiders its current problematic approach.

231. *Id.* at 1588–90.

232. Cheryl B. Preston, *Making Family-friendly Internet a Reality: The Internet Community Ports Act*, 2007 BYU L. REV. 1471.