First Amendment Fetishism

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INTRODUCTION

The Supreme Court, starting in 1971, has lit upon a reckless path of protecting speech that is, by any reasonable measure, appallingly vulgar, emotionally hurtful, and dangerous. Against the wishes of the community, the Court has protected a roster of extremely offensive speech:

- a rageful repetition of the F-word uttered by a teacher before children in a school auditorium;¹
- a White skinhead’s cross burning on the front lawn of a Black family’s house;²
- the public burning of the American flag by an avowed Communist who hated the United States and who cared nothing for the emotional pain that he would cause Americans across political persuasions;³ and
- the commercial trafficking of videos that gleefully depict pit bulls who are fighting each other to death as they were trained by their malevolent owners to do.⁴

In protecting such remarkably offensive speech, the Court has failed to take seriously the claims of the community in wanting to regulate speech which is violative of the community’s desire to create a public culture of civility, dignity, and mutual respect.\(^5\)

Going against the grain of scholarship that has celebrated the victories of the individual speaker against his community, this Article argues that the community’s right to regulate speech should be afforded far more deference by courts than the right has previously received. There has been a surfeit of theorization relating to why we need a right of speech.\(^6\) But there has been a dearth of accompanying theorization for why the right of speech should be restricted in order to realize the collective aspirations of the community.\(^7\) This Article aspires to fill that gap.

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\(^5\) Given the Court’s extreme permissiveness toward highly offensive speech, it is perhaps not a surprise that our public culture appears to so many Americans as plagued by a severe lack of civility. *See generally Nastiness, Name-Calling & Negativity: The Allegheny College Survey of Civility and Compromise in American Politics, ALLEGHENY COLL., 3–6, 11–18 (2010) (analyzing opinions on civility in politics).

\(^6\) Much of the scholarship on the right of speech has focused on how the individual speaker, exercising his rights, can contribute to the discovery or dissemination of some truth. Such scholarship, however, has tended to eschew a discussion of the community’s right to regulate the speaker. *See, e.g., William P. Marshall, In Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1, 1 (1995); C. Edwin Baker, Scope of the First Amendment: Freedom of Speech, 25 UCLA L. REV. 964, 973–974 (1978); Lee C. Bollinger, The Tolerant Society 45 (1986); Thomas I. Emerson, The System of Freedom of Expression 6–7 (1970); Laurence H. Tribe, American Constitutional Law 785–86 (2d ed. 1988); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 24–27 (1948); Owen Fiss, The Irony of Free Speech 2–3 (1996); Cass R. Sunstein, Democracy and the Problem of Free Speech 18–20 (1993). The Supreme Court has also argued that the right of speech is vital to discover truth. Here too there has been relatively little discussion about the right of the community to regulate speech. *See Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977) (rejecting a prohibition on commercial speech that tries to achieve “its goal by restricting the free flow of truthful information”); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (justifying commercial speech on the premise that “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”). The famous opinions by Justices Brandeis and Holmes were also informed by a desire to view the right of speech as a means to discover the truth. *See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (urging a judicial attitude toward political speech that has faith in “the power of reason as applied through public discussion”); overruled in part by Brandenburg v. Ohio, 395 U.S. 444; Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (advocating that competing political perspectives “should be given their chance and have their way.”); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (defending political speech on the view that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

\(^7\) There have been efforts to restrict some categories of extremely offensive speech. Such efforts, however, have derived from moral doctrines about trying to protect
This Article is organized as follows. Part I introduces the origins of a phenomenon that the Article calls First Amendment fetishism. The Supreme Court began in the early 1970s to protect highly offensive speech that was harmful to the community and whose value to public discourse was dubious. What was particularly concerning about the Court’s sudden move toward First Amendment fetishism was that the move was bereft of anything resembling a passable justification. Part II suggests that First Amendment fetishism was not logically inevitable. Instead, the Court could have drawn from the insights of originalism for an alternative approach. If the Court had done so, it would have recognized that the framers and their Founding Generation did not interpret the First Amendment as a means to engage in extremely offensive speech that was injurious to the community.

Part III enlists the ideas from originalism to fashion a jurisprudence of community as an alternative to First Amendment fetishism. A jurisprudence of community prioritizes the right of the community to prohibit exceptionally offensive speech that has little value to the community. Part III illustrates through case precedent how the Supreme Court, prior to its irresponsible immersion in the 1970s into First Amendment fetishism, had adopted an approach that was congruent with a jurisprudence of community. Part III-develops the arguments expressed by such precedent into a theory of jurisprudence that affords meaningful deference to the community. Part IV examines a series of contemporary cases in which the Court, consumed by First Amendment fetishism, has protected jarringly offensive speech devoid of redeeming value to society. Part IV then illustrates how these cases could have been decided differently in terms of a jurisprudence of community.

Finally, the Article concludes.

I. THE ORIGINS OF FIRST AMENDMENT FETISHISM

In 1971, the Supreme Court embarked on a series of precedents that reimagined the right of speech in seemingly unbounded terms. Specifically, the precedents empowered the speaker to severely assail the norms of the community. Three cases heralded the onset of the Court’s new attitude toward the right of speech: *Cohen v.*
California,9 Gooding v. Wilson,10 and Rosenfeld v. New Jersey.11 The respective speakers in Cohen, Gooding, and Rosenfeld publicly indulged in the worst profanity, and did so without regard for how they would violate the community’s expectations for respectful behavior. The Court’s decision to protect such speakers treated the right of speech as an item of fetish, as something to be worshipped rather than as something that had to be weighed against the right of the community for laudable ends such as peace and civility.

A. Cohen

Cohen signaled the onset of the Court’s First Amendment fetishism.12 In 1968, nineteen-year-old Paul Robert Cohen wore a jacket into a Los Angeles courthouse emblazoned with the words “Fuck the Draft.”13 For his display of profanity, Cohen was convicted by a jury of violating a California statute that forbade disturbance of the peace.14 The Supreme Court overturned Cohen’s conviction.15 Authoring the Court’s opinion, Justice Harlan announced that California “certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed.”16 California lacks said power, explained Harlan, because “there is no showing of an intent to incite disobedience to or disruption of the [military] draft...”17 Note what Harlan had established as the limit to what Cohen may express in a courthouse. Cohen, according to Harlan, was fully entitled under the First Amendment to visibly display on his jacket the word “Fuck”—even though Cohen did so in a courthouse—as long as the word did not “incite disobedience to or disruption of the [military] draft.”18 Harlan thus dismissed as irrelevant the issue of whether a community could hold a speaker to account for publicly displaying profanity in a courthouse that contained children. For the rest of his judicial opinion, Harlan endeavored to justify his decision. Unfortunately, Harlan stumbled at every turn.

What he accomplished with reckless resolve, however, was the creation of a set of tropes and maneuvers that would serve as a guide for subsequent jurists to adopt when they too sought to fetishize the First Amendment. To begin, Harlan grossly misstated the position by the community of Californians who had enacted the law. Ignoring what California had stated in its brief, Harlan cast the community of Californians who had adopted the statute in Cohen, along with the community of Angelinos who had served as jurors and applied said statute, as the modern equivalent of morally vengeful Puritans who were bent on purging the public of any

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12 Cohen, 403 U.S. at 15.
13 Id. at 16.
14 Id.
15 Id. at 17.
16 Id. at 18.
17 Id.
18 Id.
According to Harlan, the community of Californians had “act[ed] as guardians of public morality” and tried to “remove this offensive word from the public vocabulary.”

Pause and consider the substance of Harlan’s allegation. How could California—how could anyone—back in 1971 when Cohen was adjudicated even imagine that it would be possible to “remove” the F-word “from the public vocabulary”? Harlan’s characterization of California’s motives was preposterous. Yet its chief purpose was not to accurately summarize California’s intentions. Its chief purpose was to instill a level of paranoia in the public to justify Harlan’s fetishism for the right of speech.

If Harlan had duly acknowledged the arguments by California, he would have had to concede that there was no effort afoot to cleanse the public vocabulary of the F-word. What the community of Californians tried to do in Cohen was far more modest. The community tried to protect the solemnity of a courthouse and to protect the right of parents to shield young children therein from public profanity. California explicitly stated in its brief that under its law “[i]ndividuals are free to determine whether they will read the books which contain language similar to that used by appellant.” However, those “present in the corridor of the Los Angeles County Courthouse were not free to avoid the appellant’s jacket” and “[t]hese individuals were a ‘captive audience’ forced to observe appellant’s offensive conduct.” In response, Harlan offered the nearly ironic consolation that those who were offended by Cohen’s display of “Fuck” on his jacket “could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”

Disappointingly, Harlan neglected to realize that an audience could not unsee in their minds what they had seen with their eyes. While Harlan sketched California’s law in implausibly sinister strokes, he depicted Cohen’s speech in fatuously precious ones. Harlan began by calling the reader’s attention to “the constitutional backdrop against which our decision must be made.” “The constitutional right of free expression,” he announced, “is

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19 Id. at 22.
20 Id. at 22–23.
21 Lest one forget, it was in 1969 that the movie Midnight Cowboy was awarded the Academy Award for Best Picture. See Scott Tobias, Midnight Cowboy at 50: Why the X-Rated Best Picture Winner Endures, THE GUARDIAN (May 24, 2019), https://www.theguardian.com/film/2019/may/24/midnight-cowboy-50th-anniversary-x-rated-best-picture-winner [https://perma.cc/7E4L-MP9N]. Midnight Cowboy was rated X because of its depiction of male prostitution and homosexuality. The film was a watershed moment that signaled the willingness of filmgoers to experience art that pushed the envelope of what was acceptable. See id.
23 Id.
24 Id.
25 Id.
27 Id. at 24.
powerful medicine in a society as diverse and populous as ours.”

The mention of medicine was odd. How was Cohen’s display of “Fuck” in a courthouse that included children a form of “powerful medicine” for society? Harlan lit upon the following explanation. The right of speech, he wrote,

is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

The above passage did not illuminate how Cohen’s “Fuck the Draft” functioned as “powerful medicine” for society, as Harlan had promised. The only thing that Harlan’s passage contained were platitudes about the virtues of the right of speech. For example, he celebrated the right of speech because of its potential for “public discussion.” But there was nothing in Cohen’s invocation of “Fuck” that invited others to discuss the military draft with him. Certainly, no one in the captive audience of a Los Angeles courthouse would have wanted to engage Cohen. Harlan himself had acknowledged the offensive nature of Cohen’s speech and had counseled the captive audience to “avert[] their eyes.”

Other parts of Harlan’s passage were no more applicable to Cohen’s public profanity. Harlan had suggested that the right of speech is meant to put power in “the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry.” Missing from Harlan’s paean to democracy is how the community of Californians—based on deliberations by their legislators and their representatives in the jury—had made the collective decision to punish Cohen for his inappropriate profanity in a courthouse. The punishment was not an aberration from the collective will of a “capable citizenry;” the punishment was a manifestation of said will. No more effective is Harlan’s assertion that the right of speech “comport[s] with the premise of individual dignity.” Harlan does not realize that the “premise of individual dignity” cuts both ways. He does not understand that there was nothing “dignified” in Cohen’s profanity and, indeed, that the latter’s profanity probably offended the dignity of the captive audience of parents and children and others who had to endure it. This misstep in Harlan’s opinion, like his others, was an attempt to do something which was almost certainly impossible: support the right of a speaker to display the word “Fuck” in a courthouse with a captive audience. Such was the fervor of Harlan’s fetishistic view of the right of speech.

28 Id.
29 Id.
30 Id. at 21.
31 Id. at 24.
32 Id.
Near the end of his opinion, Harlan makes unequivocal his devotion to a fetishistic adoration of the right of speech. Trying to underscore the futility of regulating profanity in public, he asks a question that can only be asked by an alien from outer space who is ignorant of social norms among English-speaking Earthlings: “How is one to distinguish this [word “fuck”] from any other offensive word?” Harlan poses the question as if it were a riddle that no one could solve. But the question is not difficult. The F-word holds a special place of stigma in our moral vocabulary. Regardless, Harlan simply wanted to use the contrived question as a prop to make his point that morality was a hopelessly indeterminate idea and that the very attempt to regulate profanity in a courthouse was therefore logically doomed from the start. Harlan’s intention becomes clearer with this pronouncement: “Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” For Harlan, California had no right to regulate Cohen’s profanity because “one man’s vulgarity is another’s lyric.” The absurdity of this aphorism in relation to the facts of Cohen are obvious when we take but a moment to realize that any reasonable person would intuit that wearing a jacket that said “Fuck” on it in a courthouse is inappropriate. (Put differently, imagine yourself in this surreal scenario: having been summoned to a courthouse packed with people, you earnestly wonder, “Should I wear the jacket that says ‘L.A. Dodgers,’ or should I wear the jacket that says ‘Fuck’ on it?”)

This Article has dwelt on what Harlan wrote in Cohen, but it is just as vital to note what he did not write. Conspicuously, Harlan refused to place any responsibility on Cohen for choosing alternative means for his expression. While statutes that prohibit disturbance of the peace like the one in Cohen may seem banal, they represent the community’s values. Speech which violates said statutes can also violate the community’s sense of what is proper. The facts in Cohen bear this out. Cohen was punished for violating the disturbance of peace statute because he flaunted his profanity in a place that the community held in special regard: a courthouse. It is a matter of commonsense that a courthouse is a quasi-sacrosanct

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33 Id. at 25.
35 *Cohen*, 403 U.S. at 25.
36 Id.
37 Id.
39 Id.
location in which its inhabitants are expected by the community who erected the courthouse to demonstrate a high degree of respectful behavior from those who enter it. Cohen was convicted of failing to observe this obvious expectation by the community.

To be clear, Cohen was not convicted for expressing his resentment against the military draft. He was convicted for expressing profanity in a courthouse. Lest the reader feel that Cohen had every right to display the F-word in a courthouse that contained children, it should be remembered that Cohen enjoyed the easy availability of other venues. Back in 1968, when the nineteen-year-old Paul Robert Cohen was arrested in Los Angeles, he could have worn his vulgar jacket to any number of suitable locales: a Stooges concert at the Whiskey, a UCLA fraternity party, a raucous war protest near the Convention Center. Harlan in Cohen did not

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40 The Supreme Court thus declared in 1820 that the “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.” Anderson v. Dunn, 19 U.S. 204, 227 (1821). Likewise Justice Douglas had declared that “[a] courtroom is a hallowed place where trials must proceed with dignity. . . .” Illinois v. Allen, 397 U.S. 337, 351 (1970) (Douglas, J., concurring). Consistent with this opinion, the United States Court of Appeals for the Federal Circuit has stipulated the following as a matter of courtroom decorum: “Attire for counsel and spectators should be restrained and appropriate to the dignity of a Court of Appeals of the United States.” Attending Oral Argument, U.S. CT. OF APPEALS FOR THE FED. CIR., https://cafc.uscourts.gov/home/oral-argument/attending-oral-arguments/ [https://perma.cc/5J4V-5SJ7] (last visited Sept. 28, 2023). It should also be noted that Cohen had been arrested in a Superior Court in Los Angeles. In 2011, the Superior Court made explicit its expectation for decorum: “Persons in the courtroom or appearing in court by remote video may not dress in an inappropriate manner so as to be distracting to others of usual sensibilities.” Superior Court of California, County of Los Angeles, Court Rules, Rule 3.43 (2011). Such reminders should scarcely be necessary for a reasonable person. As one federal district court said, “When he is not in court, Plaintiff is free to express the ideas he wishes to express, and to wear the attire he chooses to wear. When he is appearing as a litigant in civil court, however, he should expect that his choice of expressive attire will be limited in accordance with reasonable standards of courtroom decorum.” Bank v. Katz, 2009 WL 3077147, at *3 (E.D.N.Y. Sept. 24, 2009).

41 Cohen, 403 U.S. at 19.

42 In upholding Cohen’s conviction, Justice Alarcon wrote for the California Court of Appeals:

The defendant has not been subjected to prosecution for expressing his political views. His right to speak out against the draft and war is protected by the First Amendment. However, no one has the right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from such exposure.


43 Id.
place any responsibility on Cohen to find alternatives for his profanity. Rather, Harlan placed the burden on the captive audience in a courthouse to suffer Cohen’s profanity.

B. Gooding

The Supreme Court’s campaign to undermine the community quickly became apparent. Just one month after the Court decided Cohen, it once again eagerly took up another case involving gratuitous profanity in public—Gooding v. Wilson. Gooding involved a Georgia law which read: “Any person who shall, without provocation, use to or of another, and in his presence. . . opprobrious words or abusive language, tending to cause a breach of the peace. . . shall be guilty of a misdemeanor.” In enacting this law, the community of Georgians, like the community of Californians in Cohen, was trying to prohibit speech which was violative of the community’s norms of civility and mutual respect.

Unfortunately, the Supreme Court invalidated Georgia’s law because the law supposedly suffered from substantial overbreadth. According to the doctrine of substantial overbreadth, a statute will be struck down if the statute prohibits substantially more speech than what the First Amendment prohibits. But there was nothing substantially overbroad about Georgia’s statute in Gooding. If anything, Georgia’s statute was admirably specific. Under Georgia’s statute, a person would be charged only if they, without provocation, said words to another in the latter’s presence that was “opprobrious” or “abusive” and “tended to cause a breach of the peace.” A community, consulting the views of a reasonable person, can surely identify words that fall within these prohibited categories. Even if the Gooding Court perceived these categories as too ambiguous, it could have applied the statute to the instant facts to flesh out the statute’s meaning. The Court, however, chose not to do that. In fact, Justice Brennan, authoring the Court’s opinion, did not even mention what the unruly speaker, Johnny C. Wilson, had said.

The omission was suspicious. After all, if Brennan had shown that Wilson’s speech was not abusive or opprobrious, it would have been easier for Brennan to have defended the Court’s decision that Georgia’s statute went too far by punishing Wilson. The reason for Brennan’s omission becomes clearer when we consult Justice Blackmun’s dissenting opinion. Blackmun’s dissent makes obvious that Wilson’s speech—with its wholly gratuitous profanity and menacing threats—would have undermined Brennan’s efforts to protect it. According to Blackmun,

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45 Id. at 519.
46 Id. at 521.
47 See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (“To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).
48 Gooding, 405 U.S. at 528.
Wilson was arrested for interfering with military recruitment by blocking the entrance to the recruitment center. During Wilson’s arrest, he said to a police officer, who [was] attempting to restore access to a public building, “White son of a bitch, I’ll kill you,” and “You son of a bitch, I’ll choke you to death,” and [said] to an accompanying officer, “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”

Reflect on what was happening. Wilson was blocking the entrance to a military recruitment center. He was thereby preventing the military from recruiting soldiers, something that the military—as a matter of its First Amendment rights—had every right to do. Wilson was also spewing racist and violent threats that were, in the view of the community, “opprobrious,” “abusive,” and “tending to cause a breach of the peace.”

Under these circumstances, it was completely appropriate for the community to want to punish Wilson. His behavior was assultive of basic norms of civility that were necessary for a community to exist. Wilson verbally assaulted the dignity of the police officers who were only doing their duty, and he therefore violated the community’s expectation that its members should treat each other with mutual respect. Further, there was no discernible value to Wilson’s statements. He was not putting on offer what Harlan saw in Cohen as the value of the right of speech—a “public discussion. . . [to] produce a more capable citizenry and more perfect polity. . .” Therefore, a jury composed of citizens from the community—applying the norms of civility adopted by the community—decided to convict Wilson.

Wilson’s abusive language, with its furious threats of murder, was the textbook definition of “fighting words.” Fighting words, like obscenity and child pornography, have been denied First Amendment protection by the Court. In 1942, the Supreme Court clearly expressed that fighting words were those that form “no essential part of any exposition of ideas, and are of such slight social value as a

49 Id. at 519 n.1; id. at 534 (Blackmun, J., dissenting).
50 Id.
51 See Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009) (holding that the government speech is not subject to scrutiny under the Free Speech Clause because the government, like private actors, also enjoys a right of speech).
52 Gooding, 405 U.S. at 519.
56 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (introducing the doctrine of “fighting words”). For extensive discussion of Chaplinsky, see infra Part III.
59 See Chaplinsky, 315 U.S. at 573.
It was no wonder that Justice Brennan, in a case that was purportedly about the right of speech, made the awkward decision to omit what the menacing racist Johnny C. Wilson had said. Had Brennan not done so, he would have had to make the farfetched argument that Wilson’s speech was deserving First Amendment protection along with the equally implausible argument that Wilson should not be punished under the Georgia statute.

C. Rosenfeld

Regrettably, Justice Brennan’s decision in Gooding set the precedent for other cases in which the Court would afford fetishistic protection for the right of extremely offensive speech. On the same day that it decided Gooding, the Court decided Rosenfeld v. New Jersey.61 Rosenfeld was the last in the trio of cases, along with Gooding and Cohen, that would constitute the Court’s embrace of First Amendment fetishism. With Rosenfeld, the Court made unequivocal that it had embarked on a jurisprudence that chafed against the Court’s traditional respect for the rights of the community and instead regarded the protection of the individual’s right of speech, however offensive, as an end in itself.

In 1972, David Rosenfeld was convicted of having violated a New Jersey statute that forbade disturbance of the peace.62 The statute read: “Any person who utters loud and offensive or profane or indecent language in any public street or other public place, public conveyance, or place to which the public is invited . . . is a disorderly person.”63 There “had been racial conflicts” in the area and a meeting was held in a school auditorium to discuss them.64 There were 150 people at the meeting.65 In front of this crowd, Rosenfeld, a white twenty-five-year-old school teacher, decided to speak.66 Rosenfeld became “emotionally involved and concluded his talk with the remark that if we Whites didn’t do something about the problem, ‘then the Mother F. . . ing town, the M.F. county, the M.F. state and the M.F. country would burn down.’”67 These demure abbreviations of “M.F.” were the handiwork of the New Jersey Supreme Court, a tacit acknowledgement that the profanity in its unabbreviated form was inappropriate for Rosenfeld to have shouted in a school auditorium. Rosenfeld, however, did not opt to follow the New Jersey Supreme Court’s preference for proper moral conduct; he arrogantly and repeatedly used the

60 Id. at 572.
64 Rosenfeld, 62 N.J. at 596, 598.
65 Rosenfeld, 408 U.S. at 904.
66 Id.
67 Rosenfeld, 62 N.J. at 596.
expletive “mother fucker.” He did so, moreover, knowing that there was in the audience about forty children.

Rosenfeld was arrested for violating the New Jersey law. His punishment was nominal: a $50 fine and $10 in court costs. But, feeling as if some grave injustice had been done to him, the foulmouthed Rosenfeld appealed his punishment to the U.S. Supreme Court. The gambit paid off, something that was not unexpected given the Court’s decisions in Cohen and Gooding. The Court remanded the case to the New Jersey appellate court with the terse instruction that the lower court reconsider Rosenfeld “in the light of Cohen v. California . . . and Gooding v. Wilson . . .” The Court never inquired why the obnoxious Rosenfeld—one who worked as a public-school teacher of all things—could not have expressed his outrage without resort to profanity in front of children in a townhall meeting concerning K–12 education.

With Rosenfeld, the Supreme Court made abundantly clear that it would no longer bother with even the appearance of concern for the community’s longing for civility and peace. In 1971, the Cohen Court had at least paid lip service to such things. All that essentially mattered to the Court by 1972 was the need to protect the virtually unbridled right to offend in public. With Rosenfeld and Gooding, the Supreme Court left no doubt that it had embraced a fetishism of the First Amendment for the first time. In other words, by 1972 the Court was dedicated to the proposition that the right of speech should be honored for its own sake even when it was used to violate reasonable moral expectations by the community.

The trio of cases—Cohen, Gooding, and Rosenfeld—suggested that the Supreme Court had commenced with a fetishistic approach toward the right of offensive speech that amounted to a form of Lochnerism. In 1905, the Court developed a jurisprudence in Lochner v. New York that treated the right of contract as a fundamental right that could not be regulated by the community to ensure the health and safety of bakers in New York. As in Cohen, Gooding, and Rosenfeld, the Court in Lochner virtually worshipped the right at issue as a fetish. Since 1937,

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68 Id. at 598.
69 Rosenfeld, 408 U.S. at 904.
70 See Rosenfeld, 62 N.J. at 596, 598.
71 See id. at 595.
72 Rosenfeld, 408 U.S. at 904.
73 Id. at 905.
74 See Cohen v. California, 403 U.S. 15, 21 (1971) (arguing that the captive audience could have averted their eyes if they were offended by Cohen’s profanity).
75 For a discussion of the Supreme Court’s approach to the right of speech prior to the Court’s adoption of First Amendment fetishism, see infra Part III.
the Court has repudiated its fetishism of the right of contract. But as Cohen, Gooding, and Rosenfeld indicate, the Court seems to have shifted its fetishism from the right of contract to the right of speech. And whereas Lochner has now assumed its ignoble status in the dustbin of history, Cohen, Gooding, and Rosenfeld came to dominate in the decades after their adjudication the Court’s approach to extremely offensive speech.

As this Article shows, the First Amendment fetishism that the Court exhibited in Cohen, Gooding, and Rosenfeld came to inform the Court’s protection for other kinds of extremely offensive speech. These included a public and ostentatious burning of the American flag by a Communist who had no concern for how his actions would hurt the community, a burning cross erected by a White skinhead who sought to terrorize an isolated Black family in Minnesota, a merchant that attempted to sell as an article of entertainment videos of pit bulls attacking and killing each other, and a corporation that tried to sell to minors violent video games that permitted the user to commit rape and murder. All these forms of speech occurred in violation of laws that the community had passed to preserve, respectively, the following: a love and pride in one’s country, the moral inviolability, regardless of race, of human dignity, the yearning to prevent cruelty to animals, and the concern for the psychological welfare of minors. But, in each instance, the Supreme Court was enveloped in a spirit of fetishism toward the First Amendment, consequently giving short shrift to the concerns of the community.

Part II suggests, however, that First Amendment fetishism was not inevitable. Part II begins with an account of the original understanding of the right of speech because the insights offered by the Founding Generation can be used to develop a feasible alternative to First Amendment fetishism.

78 In West Coast Hotel Co. v. Parrish, the Supreme Court announced that “[t]he Constitution does not speak of freedom of contract.” West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). Later, the Court reiterated that the right of contract was not present in the Fourteenth Amendment. In 1955, the Court, in upholding a law that forbade a contract between a consumer and a seller, declared: “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

79 See infra Part IV.
80 See infra Part IV.A.
81 See infra Part IV.B.
82 See infra Part IV.C.
83 See infra Part IV.D.
84 See infra Part IV.A.
85 See infra Part IV.B.
86 See infra Part IV.C.
87 See infra Part IV.D.
exhibited in Cohen, Wilson, and Rosenfeld lacked the basic accoutrements of a serviceable jurisprudence. The arguments by the Court in each case lacked logical rigor and conceptual coherence; in short, the opinions appeared jerry-rigged. By contrast, originalism furnishes the rigor and coherence necessary for a proper jurisprudence.

II. THE FRAMERS AND THE FOUNDING GENERATION

There persists in America the unfounded myth—one that has underwritten First Amendment fetishism—that the Founding Fathers, and perhaps even the whole of their generation, embraced the right of speech in radically robust terms. Justice Brandeis, for one, derived his First Amendment jurisprudence from this assumption. In one of the most celebrated judicial opinions, Brandeis, concurring in Whitney v. California, made this striking endorsement: “Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .” From this premise, Brandeis extrapolated the principle that “[t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.” As far as Brandeis was concerned, the Founding Fathers believed that “[o]nly an emergency can justify repression.” The ardent with which Brandeis issued these proclamations was incommensurate with the paltry evidence that he furnished to justify them: two brief sentences from Thomas Jefferson.

Even if Brandeis had conducted due diligence, he would have failed to find support for his thesis that the Founding Fathers had adopted his account of the right of speech. The historical record reveals that those Americans who founded the American republic did not share the feelings for the right of speech that Brandeis ascribed to them. Those in the Founding Generation, including the Constitution’s framers, embraced instead the thesis that the values of the community should not be sacrificed at the altar of First Amendment fetishism.

The Founders of the republic gave voice to this thesis in various ways. As will be elaborated, the Founders underscored the priority of the community in the very documents which created the United States: the Declaration of Independence and the Constitution. The Founders also turned to means such as the Federalist Papers and the precursor to contemporary social media in public sermons and pamphlets. Moreover, there was more than ample evidence from state constitutions and the declarations of rights from the states which were ratified before the U.S. Constitution to suggest that the Founding Generation valued the rights of the community over the rights of unruly individuals like those in Cohen, Gooding, and Rosenfeld. Finally, the debates surrounding the Alien and Sedition Act of 1800, contrary to received

89 Id. at 375.
90 Id. at 376.
91 Id. at 377.
92 Id. at 375, n.2.
accounts, supports the view that the Founding Generation interpreted the Constitution as clearly supportive of the rights of the community instead of the rights of an extremist speaker.

A. Declaration of Independence

One way that the Founders announced their view of the presumptive rights of the community over those of the individual was the text that announced the birth of the United States: The Declaration of Independence. The Declaration announced that “all men . . . are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .”93 These words revealed a political theory that prioritized the community, not the individual. The Declaration’s “unalienable rights” were not meant to be wielded by the individual against his community. Quite the contrary. The Declaration asserted that said rights could not exist as tangible entities without the assistance of the government, the institution entrusted with representing the community. The government, in turn, was deemed legitimate, not because it recognized an individual’s right to be exempted from generally applicable laws, but because the government “derive[d] [its] just powers from the consent of the governed . . . .”94 A legitimate government, therefore, was one that drew from the community—“the consent of the governed”—not one that recognized individual exemptions from rules that everyone else had to follow.95 According to the Declaration, when government failed to secure the inalienable rights for the people as a whole, “it [was] the Right of the People to alter or abolish it, and to institute new Government . . . .”96 As far as the Declaration was concerned, the right to resist the government belonged to the people, and, therefore, the community. There was no mention in the Declaration of an individual’s right against his community or even against an unjust government.

The text of the Constitution also lent support for the view that, for the Founding Generation, the community—not the individual—should take precedence. The Constitution’s Preamble focused on the aggregate good of the people, not the rights of the individual.

We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.97

93 The Declaration of Independence para. 2 (U.S. 1776).
94 Id.
95 Id.
96 Id. (emphasis added).
97 U.S. Const. pmbl.
The Preamble’s emphasis was on the community’s collective wellbeing, not the rights of an individual who sought to disrupt that wellbeing in the name of, say, asserting his right to say offensive speech. The Preamble declared that it was made in the name of “We, the people[.]” It was this people who wished to make a better “Union” for all and to promote “tranquility” for the community. It was this people that sought to establish a “common” defense and to promote a “general” welfare for the country.98 By making emphatic that the Constitution was made in the name of the people, the Preamble also implied that the individuals who comprised “the people” referenced in the Constitution had responsibilities to each other.99 The members of a community were expected to act in accord, for example, with their duties to do what was best for the “general welfare.”100 Other parts of the Constitution also referred to the rights of “the people,” not an individual. The Ninth Amendment declared: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”101 In a bookend to the Preamble, the Tenth Amendment read, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”102 There existed in the Constitution, then, rights that belonged to the community which could be asserted against those of the individual.

B. Federalist Papers

It is worth dwelling in this context on the prominent place of community in the most renowned secondary source for interpreting the Constitution: the Federalist Papers. Published between 1787 and 1788, the Federalist Papers were authored by “Publius,” the collective pseudonym for John Jay, James Madison, and Alexander Hamilton.103 It was the aim of Publius to persuade the people to ratify the new federal Constitution.104 To that end, Publius harped throughout the Federalist Papers on the political priority of community and why the adoption of the federal Constitution could strengthen it. Consider Federalist 10, the most famous essay in the collection.105 There, Publius (Madison) began: “Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction.”106 Madison clarified that by “faction,” he meant “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by

98 Id.
99 Id.
100 Id.
101 U.S. CONST. amend. IX.
102 U.S. CONST. amend. X.
104 Id.
106 Id.
some common impulse of passion, or of interest . . . to the permanent and aggregate interests of the community.”\footnote{Id. at 43 (emphasis added).} For Madison, the greatest threat to the fledgling republic was not the government’s effort to stifle a speaker’s effort to express his “taste and style,” the sort of thing that would have likely been treated by the 1970s Supreme Court of \textit{Cohen} and \textit{Gooding} as threats to the First Amendment.\footnote{See Cohen v. California, 403 U.S. 15, 25 (1971) (asserting a speaker’s “taste and style” should take precedence over the moral objections of the community).} Almost 200 years prior to \textit{Cohen} and \textit{Gooding}, the greatest threat for Madison was “a number of citizens” who are trying to undermine the interests of the community.

The theme of community also finds expression in \textit{Federalist 71}. There, Hamilton wrote, “The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs . . . .”\footnote{\textit{The Federalist} No. 71, at 369, 370 (Alexander Hamilton) (The Gideon ed. 2001).} In \textit{Federalist 26}, Hamilton again emphasized that the government should work for the collective good, not for the discrete interests of certain individuals. “And I am much mistaken,” he announced, “if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of government is essential to the welfare and prosperity of the community.”\footnote{\textit{The Federalist} No. 26, at 127 (Alexander Hamilton) (The Gideon ed., 2001).} In \textit{Federalist 27}, Hamilton commended the merits of a Constitution that delegated power to a central government (what he called a “general” government) from the state governments.\footnote{See \textit{The Federalist} No. 27, at 132, 133 (Alexander Hamilton) (The Gideon ed., 2001).} His rationale was that a general government was more likely to protect the “community.”\footnote{Id. at 133.} Owing to “the extent of the country from which will be drawn those to whose direction they will be committed,” Hamilton surmised, “they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humours . . . which, in smaller societies . . . beget injustice and oppression towards a part of the community . . . .”\footnote{Id.} Hamilton argued later in \textit{Federalist 27} that the strong central government imagined by the Constitution will, over time, “conciliate the respect and attachment of the community.”\footnote{Id. at 134.}

C. Colonial Sermons

The authors of the \textit{Federalist Papers} were luminaries in their own time. But theirs was not the only voice of the Founding Generation. Some of the most essential leaders in colonial America were preachers, and their sermons provided insight into how the Founding Generation conceived the relationship between individual rights
and the rights of the community. What becomes apparent from the sermons is that Americans felt that unfettered liberty was a grave danger to a community. The sermons implored Americans to exercise political liberty with an acute self-awareness of how the prospective exercise would affect the community. John Joachim Zubly, a preacher and a member of the Continental Congress, made arguments to that end in a sermon in 1775. "There was a time when there was no king in Israel, and every man did what was good in his own eyes," Zubly announced. Zubly continued, "The consequence was a civil war in the nation, issuing in the ruin of one of the tribes, and a considerable loss to all the rest." In such an environment, "every man should have it in his power to do what is right in his own eyes . . ." It is better for Americans, Zubly advised, to accept the precept that "well regulated liberty of individuals is the natural offspring of laws, which prudentially regulate the rights of whole communities . . ." Zubly was not alone in his sentiments. In 1773, the Calvinist minister Isaac Backus sermonized, "Each rational soul, as he is a part of the whole system of rational beings, so it was and is, both his duty and his liberty to regard the good of the whole in all his actions." For Backus, "the conceit that man could advance either his honor or happiness, by disobedience instead of obedience, was first injected by the father of lies . . ." The prominent Elisha Williams, rector at Yale and member of the Connecticut General Assembly, similarly harped on the priority of the community over the individual. "Every member of a community," Williams urged, "ought to be concerned for the whole, as well as for his particular part . . ." For Williams, "His life and all, as to this world is as it were embarked in the same bottom, and is perpetually interested in the good or ill success thereof . . ."

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117 Id.

118 Id.

119 Id. at 120.

120 Id.

121 Id.


123 Id. at 332.

124 Id.

125 Elisha Williams, The Essential Rights and Liberties of Protestants, in POLITICAL SERMONS, supra note 122, at 60.

126 Id.
Williams provided a metaphor: “Whenever therefore he sees a rock on which there is a probability the vessel may split . . . his own interest is too deeply concerned not to give notice of the danger . . .”\(^1\)

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\[D. \textit{State Bill of Rights}\]

Notwithstanding such religious endorsements for the priority of the community over the individual, one might object that the right of speech under the First Amendment deserves precedence over the rights of the community. This perspective, however, lacks support from both the text of the Constitution and history. While it does not make explicit reference to “the people,” the First Amendment—like the Ninth and Tenth Amendments—has the effect of empowering the people against a speaker who violates the community’s norms for peace and civility. The First Amendment reads, “Congress shall make no law . . . abridging the freedom of speech . . .”\(^2\) The First Amendment forbids only Congress—not the states—from abridging the right of speech. For the Founding Generation, this disparity was not prompted by concerns that the states were more sympathetic to an individual’s right of speech. The difference was attributable to concerns about the rights of local majorities. The reason for restricting Congress was that, as a national body, it was seen by the Founding Generation as being less majoritarian than state legislatures.\(^3\) This perspective may seem odd to the modern reader given that Congress represented the nation in its entirety, the largest majority imaginable. However, at the time of the republic’s founding, the colonists saw their respective state legislatures, rather than Congress, as being more responsive and knowledgeable about the concerns of the state’s residents.\(^4\) The state legislatures, not the Congress, were thus regarded as majoritarian in the eyes of their constituents.

Bearing this in mind, turn to what the states themselves at the republic’s founding thought about the right of speech. What they thought about it differed from the modern Supreme Court’s embrace of First Amendment fetishism. The First Amendment, as part of the Bill of Rights, was ratified in 1791.\(^5\) But more than a decade prior, states had ratified their own versions of the Bill of Rights.\(^6\) These precursors to the Bill of Rights by the states were sometimes called “declarations of rights.”\(^7\) Other times, the rights were embedded in state constitutions. Either way, these state documents illuminated how Americans of the Founding Generation

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\[1\] Id.

\[2\] U.S. CONST. amend. I.

\[3\] Id.


\[5\] Id.


\[8\] See, e.g., PA. CONST. of 1776; MD. CONST. of 1776; N.C. CONST. of 1776; CONN. CONST. of 1818.
thought about an individual’s right of speech in relation to the rights of the community to regulate that speech in the best interests of the people as a whole. In 1776, fifteen years before the First Amendment was ratified, Virginia enacted “the first true Bill of Rights in the modern American sense, since it [was] the first protection for the rights of the individual to be contained in a Constitution adopted by the people acting through an elected convention.”134 In Virginia’s groundbreaking document, there was no mention of the right of speech. But the Virginia Declaration of Rights did mention that “Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . .”135 The Virginia Declaration continued: “[O]f all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety, . . . and that, whenever any majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.”136 To be sure, the Virginia Declaration did acknowledge the rights of the individual vis-à-vis the community. But these were restricted to the rights of religious conscience and of property, not the right of speech.137

Like the Virginia Declaration of Rights, the New Jersey Constitution predated the federal Constitution. Ratified in 1776, the New Jersey Constitution also omitted any reference to the right of speech. In its place, the New Jersey Constitution referred to the right of the people as a collective entity to pass laws for the community. The preface to the New Jersey Constitution thus stated: “Whereas all the constitutional authority ever possessed by the kings of Great Britain over these colonies . . . was, by compact, derived from the people, and held of them for the common interest of the whole society . . . .”138 While these state documents consistently alluded to the right of the community to pass laws for its own welfare, there were no references to the right of speech.

Pennsylvania’s Declaration of Rights of 1776 likewise declared that “all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights.”139 The reference to “natural rights” was not a reference to the rights of the individual against the community. Rather, according to Pennsylvania, the natural rights meant that “the people have a right, by common consent” to change government if it failed to achieve the “great ends” for which it was created.140 Pennsylvania’s Declaration also affirmed that “government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man,

134 SCHWARTZ, supra note 132, at 231.
135 VA. DECLARATION of Rights of 1776, art. III (emphasis added).
136 Id. (emphases added).
137 Id. at art. I; Id. at art. XVI.
138 N.J. CONST. of 1776, pmbl. (emphases added).
139 PA. CONST. of 1776, pmbl.
140 Id. (emphases added).
family, or set of men, who are a part only of that community . . . .” 141 While there was no right of speech under the Pennsylvania Declaration of Rights, there was included a right of assembly. But this right did not belong to an individual. It belonged to “the people.” 142 And the purpose of the right to assembly was not to violate the community’s laws or to engage in offensive speech. It was for the people to “assemble together, to consult for their common good” and “to apply to the legislature for redress of grievances, by address, petition, or remonstrance.” 143

Other states drafted their Declarations of Rights in a manner that resembled Pennsylvania’s. Delaware’s Declaration of Rights emphasized that political liberty resided with the people rather than with individuals who sought to violate laws made by the people. Section 1 read: “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.” 144 There were a few references to the individual’s rights. But these were limited essentially to the right of private property and the right to a fair trial. 145 There was no reference to the right of speech.

The Maryland Declaration of Rights from 1776 also stated that governments are “instituted solely for the good of the whole.” 146 Unlike its sister states, Maryland did refer to a right of speech. But Maryland bestowed the right only to state legislators and only with regard to what they said during official meetings: “That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature.” 147

Consider how Maryland framed the right of speech. For Maryland, the Declaration of Rights was precious as a means to enable elected officials to discuss issues candidly for purposes of passing laws that could help the community. In other words, the “freedom of speech” was created by the Maryland Declaration of Rights to enable public officials to debate, and, eventually, to pass laws that could circumscribe the freedom of individuals like Paul Robert Cohen whose public expression was contrary to what Maryland dubbed the “good of the whole.” 148 Like Maryland’s Declaration of Rights, the Massachusetts Constitution of 1780 referred to the right of speech only in relation to the rights of legislators when they participated in official proceedings. Tellingly, the Massachusetts Constitution also situated said right in “the people.” The Massachusetts Constitution read: “The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.” 149

141 Id. at art. V (emphasis added).
142 Id. at art. XVI.
143 Id. (emphasis added).
144 DEL. DECLARATION OF RIGHTS OF 1776, § 1.
145 See id. at § 10.
146 MD. CONST. of 1776, art. I.
147 Id. at art. VIII.
148 Id. at art. I; Cohen v. California, 403 U.S. 15 (1971).
149 MASS. DECLARATION OF RIGHTS of 1780, art. 21 (emphasis added).
North Carolina’s Declaration of Rights from 1776 stated that “all political power is vested in and derived from the people only” and that “no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.”\(^{150}\) A bulk of the rights mentioned related to criminal justice.\(^{151}\) There was no mention of the right of speech. Connecticut’s 1776 Declaration of Rights, one of the briefest among the states, did not list a right of speech. Nearly all of its rights pertained to due process for criminal charges.\(^ {152}\) Georgia’s 1777 Constitution also did not mention a right of speech, reserving most of its rights to the protection of due process for criminal defendants.\(^ {153}\)

New Hampshire’s Bill of Rights was ratified in 1783, later than some of the other states, but still eight years before the federal Bill of Rights.\(^ {154}\) New Hampshire, following its sister states, emphasized that the purpose of government was for “the general good.”\(^ {155}\) Section III of New Hampshire’s Declaration thus elaborated: “When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void.”\(^ {156}\) New Hampshire acknowledged that some natural rights were “unalienable.”\(^ {157}\) Among these rights were the right of religious conscience and the right to due process for criminal charges.\(^ {158}\) However, there was no right of speech in New Hampshire’s Declaration.

### E. Sedition Act

Other than the First Amendment, the most prominent document of the Founding Generation that explicitly dealt with the right of speech was not a Declaration of Rights or a state constitution but a federal statute: the Sedition Act of 1798.\(^ {159}\) The substance of this statute illustrated that the Founding Generation, far from supporting the right of individual speech, made a powerful bid for the rights of the community against disruptive individuals.\(^ {160}\) The Act read: “[I]f any person shall write . . . any false, scandalous and malicious writing . . . against the government of the United States . . . then such person . . . shall be punished by a fine not exceeding

\(^{150}\) N.C. DECLARATION OF RIGHTS of 1776, §§ 1, 3.

\(^{151}\) Id. at §§ 7–15.

\(^{152}\) CONN. DECLARATION OF RIGHTS of 1776, §§ 2–4.

\(^{153}\) GA. CONST. of 1777, art. 19–39.

\(^{154}\) N.H. BILL OF RIGHTS of 1783.

\(^{155}\) Id. at § 1.

\(^{156}\) Id. at § 3.

\(^{157}\) Id. at § 4.

\(^{158}\) Id. at §§ 5, 15.

\(^{159}\) United States (Sedition Act of 1798), ch. 74, 1 Stat. 596 (1798) reprinted in Howard W. Preston, DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 277–82 (1886).

\(^{160}\) See GREENE, supra note 77, at 14–15.
two thousand dollars, and by imprisonment not exceeding two years."

The Act may appear excessively punitive to the modern reader. Sedition laws, however, were integral to the Anglo-American tradition. In England, they were extant since 1275, and were far severer than the American analogue. Unlike its English variant, the American Sedition Act put the burden on the government, not the speaker, to prove violation of the Act. The government therefore had to prove that the speaker acted with malicious intent, and the Act permitted truth as a defense. Regardless, it was undeniable that the Act held the right of the community above the right of the individual speaker.

Not only did the Sedition Act and its supporters prioritize the community over the individual, those who opposed the Act also believed that the community should come first. James Madison and Thomas Jefferson both authored state resolutions protesting the Sedition Act. Jefferson, a citizen of Virginia, anonymously authored the resolution for Kentucky, and Madison did so for his Virginia. Over time, some have misconstrued the Kentucky and Virginia Resolutions as arguments in favor of an individual’s right of speech, perhaps even prototypes for what this Article has dubbed First Amendment fetishism. A close inspection reveals, however, that the Kentucky and Virginia Resolutions are stubborn arguments for the right of states to nullify federal laws that overreach. Both Jefferson and Madison argued that the Constitution was the creation of the states, not the people in some collective, nationalist sense. Accordingly, for Jefferson and Madison, the states had sole authority to judge whether a federal law violated the Constitution, and, if the law did, the states could nullify the federal law.

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161 An Act in Addition to the Act Entitled “Punishment of Certain Crimes Against the United States” § 2.
164 Stone, supra note 162, at 44.
169 Id. (“[A] nullification, by those sovereignties [states], of all unauthorized acts [by the federal government] done under colour of that instrument, is the rightful remedy. . ..”).
It was on the basis of this preoccupation with states’ rights that both Jefferson and Madison nullified the Sedition Act. Jefferson and Madison are now cheered by some as early advocates for the right of speech, but neither ever publicly criticized the sedition law in their home state of Virginia, even though it was much more oppressive towards the right of speech than was the Sedition Act passed by Congress. What Jefferson and Madison offered in their respective resolutions was not a defense of the right of speech but defense of a certain kind of majoritarianism that was situated in local politics. In their own way, both Founding Fathers supported the rights of a community against a speaker. As for the other states, each condemned the Kentucky and Virginia resolutions. These other states argued that Congress did in fact have constitutional authority to pass the Sedition Act. Therefore, the disagreement between all of the other states, on the one hand, and Kentucky (whose resolution was authored by Jefferson) and Virginia (whose resolution was authored by Madison), on the other, was basically one regarding federalism. Specifically, the disagreement about the Sedition Act centered on whether political authority to regulate speech resided primarily in the state government or the national government; the disagreement was not mainly about the right of speech itself.

F. Other Voices

That the debates surrounding the Sedition Act were chiefly about federalism, rather than the rights of speech also finds support from the comments of those of the Founding Generation who were less famous than Madison and Jefferson. Countering Madison and Jefferson, Harrison Gray Otis, the prominent Federalist Congressman from Massachusetts, said in a speech in 1798 that the right of speech was “nothing

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170 Id. (“That this commonwealth does upon the most deliberate reconsideration declare, that the said alien and sedition laws, are in their opinion, palpable violations of the said constitution.”).

171 See John M. Kang, Against Political Speech, 22 NEV. L.J. 803, 812–17 (2022) (discussing how prominent thinkers on both the Political Left and the Political Right have misconstrued the meaning of the Virginia and Kentucky Resolutions).

172 Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776–1876, 41 (2000) The historian Forrest McDonald helpfully observed that by permitting truth as a defense and requiring proof of malicious intent, the terms of the Sedition Act of 1789 “were more lenient than those of the common-law offense of seditious libel that prevailed in every state.” The objection raised by the Republicans in Congress “was not that it limited freedom of the press but that it made seditious libel a federal offense.” Professor McDonald added, “Jefferson’s and Madison’s responses to these acts, embodied in the Virginia and Kentucky Resolutions, brought the issue of states’ rights back to center stage.”

173 See Kang, supra note 171, at 817–21.

174 See id.

175 See Dow, supra note 166.

176 See Kang, supra note 171, at 812–21.

more than the liberty of writing, publishing, and speaking one’s thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written . . . .”178 The right of speech thus existed for Otis in a web of responsibility in which the speaker owed a duty to others in a community to avoid saying things that were harmful to its members. For to publicly say speech that was “false” and “malicious” violated the community’s expectation that its members treat each other with respect.179 Another Federalist, Connecticut Congressman John Allen,180 was more adamant than Otis. Allen asked rhetorically in a congressional speech, “Because the Constitution guarantees the right of expressing our opinions, . . . am I at liberty to falsely call you a thief, a murderer, or an atheist?”181 Allen added: “Because I have the liberty of locomotion, of going where I please, have I a right to ride over the footman in the path?”182 “The freedom of the press and opinions,” he clarified, “was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter with impunity.”183 Like Otis, Allen too emphasized that the right of speech did not extend to words that undermined the community’s expectation that it should live in peace and be able to require that its members treat each other with dignity.

Allen and Otis never insisted that a speaker should be deprived the right to criticize others. What they objected to was an interpretation of the First Amendment that permitted virtually untrammeled exercise of the right to say things that were “false, malicious, and seditious.”184 In essence, Allen and Otis argued that speakers should be mindful of their duties to their fellow citizens. The right of speech was for Allen and Otis an opportunity for speakers to reflect on whether their prospective speech, if uttered publicly, would engender more harm or benefit for their community. Contrary to the views of the modern Supreme Court in Cohen, the right of speech did not entail for Allen and Otis the right to express one’s “taste and style” by wearing in a courthouse a jacket emblazoned with profanity.

Allen and Otis represented the views of the Federalist Party.185 Their arguments were ushered in favor of the Sedition Act, and, hence, the federal government. Others, like Jefferson, belonged to the Republican Party and preferred that power be located in the states.186 Members of the Republican Party opposed the Sedition Act but they too reiterated that the community should take priority over the individual.

179 See id.
182 Id.
183 Id.
184 See 8 ANNALS OF CONG. 2147, supra note 178.
185 Harrison & Sally Otis, supra note 177; Allen, John, supra note 180.
186 STONE, supra note 162, at 25–29.
Republicans, like the Federalists, asserted that the right of speech should not be protected at the expense of the community. For example, John Nicholas, the Republican Congressman from Virginia, observed, “If there could be safety in adopting the principle, that no man should publish what is false, there certainly could be no objection to it.” The problem for Republicans like Nicholas was that in some states federal marshals selected jurors to determine whether a speaker had violated the Sedition Act. Such Republicans like Nicholas feared that the marshals could be working at the direction of the President, and against the regional wishes of those in the state. A jury impaneled by the federal marshals could be biased in favor of the community, conceived in nationalist terms, whereas a jury impaneled by state officials would be more responsive to the views of the local community. The conflict regarding the Sedition Act thus turned for Republicans like Nicholas on which community should determine whether a speaker had violated the Sedition Act. It was this concern about choosing the proper community as the basis of selection for jurors that had prompted Nicholas to object that “it was not the intention of the people of this country to place any power of this kind in the hands of the General [federal] Government . . . .”

Congressman Edward Livingston of New York, also a Republican, echoed the Federalist view that the right of speech was scarcely inviolate. “Every man’s character is protected by law,” he declared, “and every man who shall publish a libel on any part of the Government, is liable to punishment.” Livingston qualified, however, that “justice will be found in a court in which neither of the parties have influence, than in one which is wholly in the power of the President.” Like Nicholas, Livingston did not oppose the Sedition Act because it was oppressive toward the right of individual speakers who wished to offend the community, but because it privileged the community, conceived nationwide, over the community, conceived statewide.

A significant reason why members of the Founding Generation like Nicholas and Livingston did not privilege the right of speech was because they had been shaped deeply by an English tradition that favored the rights of the community over the individual. In this context, a singularly influential authority for the colonists was

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191 See id.
192 Id. at 2140.
195 Id. at 2154.
Sir William Blackstone’s Commentaries on the Laws of England.\textsuperscript{196} Tellingly, like the state constitutions in America, Blackstone’s Commentaries did not mention the existence of a right of speech. Blackstone did, however, examine the analogous right of the press. What he thought about the right of the press was suggestive of what he probably thought about a hypothetical right of speech. Blackstone emphasized that “[t]he liberty of the press is indeed essential to the nature of a free state . . . .”\textsuperscript{197} “Every freeman,” Blackstone announced, “has an undoubted right to lay what sentiment he pleases before the public: to forbid this, is to destroy the freedom of the press . . . .”\textsuperscript{198} But Blackstone qualified that “this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”\textsuperscript{199} Blackstone meant that what he found objectionable were prior restraints, those laws which required the press to obtain the permission of a government censor before the press published a given document. He explained: “To subject the press to the restrictive power of a licensor, . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”\textsuperscript{200} In this sense, Blackstone’s opposition to prior restraints derived not necessarily from a dedication to an individual’s right of speech, but from the right of the community to prevent one man in the government censor from determining what was suitable for the community to read.

Blackstone stressed, however, that being free of prior restraints did not render the press free of other legal restraints, including those which could be considerably more punitive. He declared that if a speaker “publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.”\textsuperscript{201} The right of speech, then, could not violate those things which the community held dear. Blackstone made this point explicit: “To punish . . . any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order . . . .”\textsuperscript{202} Blackstone mentioned “trial,” and by this he meant jury trial, thus, trial by the community, something that he hailed as “the glory of the English law.”\textsuperscript{203} Blackstone’s statement nicely encapsulates the alternative to First Amendment fetishism presented by the jurisprudence from community. It was not merely “dangerous or offensive writings” which were objectionable to Blackstone.\textsuperscript{204} He

\begin{thebibliography}{99}
\bibitem{197} 4 BLACKSTONE, supra note 196, at 100.
\bibitem{198} Id.
\bibitem{199} Id. (emphasis added).
\bibitem{200} Id.
\bibitem{201} Id.
\bibitem{202} Id.
\bibitem{203} 3 BLACKSTONE, supra note 196, at 250.
\bibitem{204} 4 BLACKSTONE, supra note 196, at 100.
\end{thebibliography}
found objectionable such writings only if a trial by a jury determined that the speech threatens “peace and good order.” Therefore, Blackstone objected to “dangerous or offensive writings” only if a democratic body, the jury, interpreted the speech as such. In this manner, Blackstone’s proposal was not meant to empower a tyrannical ruler—but a community of one’s peers—regarding what was “dangerous or offensive writings.” For good measure, Blackstone added that “the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.”

Here, then, was a critique by the great Blackstone from 1769 of the First Amendment fetishism that took root in the Supreme Court in 1971 in Cohen v. California.

III. FORMULATING A JURISPRUDENCE OF COMMUNITY

The foregoing Part provided the theoretical ballast for a jurisprudence founded on the right of the community rather than the right of the individual. What is missing are the operational details. This Part elucidates these details. A jurisprudence of community toward the right of speech entails the following two traits.

First, the speaker must show convincingly why he could not avail himself of alternative means of expression rather than indulging in speech that was patently objectionable to the community. For example, in Cohen and Rosenfeld, the Court never once asked the respective speaker if he had the right to express his profanity in the place and manner that he did. However, under a jurisprudence of community, the Court would uphold the convictions for both Cohen and Rosenfeld for the profanity which the former expressed in a courthouse and the latter in a school auditorium. It does not take much common sense to discern that neither place is suitable for the public expression of profanity like that in Cohen and Rosenfeld. A jurisprudence of community would require Cohen and Rosenfeld to find alternative means to express their opinions without resort to profanity in places where profanity is not acceptable. The same would hold true for Johnny C. Wilson in Gooding. Wilson had laced with racist invectives his violent threats against a police officer who was doing nothing more provocative than arresting Wilson for having unlawfully obstructed a military recruitment center. Under a jurisprudence of community, Wilson would need to show why he could not have availed himself of less offensive means of voicing his grievance against the police.

Second, the Court should make reasonable efforts under a jurisprudence of community to interpret statutes in a manner where they may pass constitutional muster. The statutes represent efforts by the community to regulate speech that is objectionable to the community, and, to the extent that is feasible, the Court should attempt to honor the community’s wishes by providing a saving construction for the statute. In Gooding, for example, the Court—gripped by a fetishism of the First Amendment—did not provide such a construction.

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205 Id. (emphasis added).
207 Id. at 519.
instead an interpretation of the statute that defied common sense. In Gooding, Georgia had passed a statute that read, “Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.”\(^{208}\) The Court overturned the law as “overly broad” even though the statute—with its specific references to “opprobrious” words and “abusive” language and “breach of the peace”—was narrowly drawn.\(^{209}\) Further, the Gooding Court could have provided a saving construction for the statute by using the facts of the case to flesh out the statute’s boundaries.

The two features of a jurisprudence of community that have been limned are not the stuff of the author’s imagination. They have found sporadic but articulate expression in Supreme Court opinions. Before the Court’s embrace in 1971 of First Amendment fetishism in Cohen, the Court had adopted a nuanced approach to the right of speech that placed the community’s right to regulate highly offensive speech above the individual’s right to publicly express the same.

\[\textbf{A. Fighting Words}\]

A paradigmatic example is Chaplinsky v. New Hampshire.\(^{210}\) Today, Chaplinsky is studied as the case that created the fighting words doctrine.\(^{211}\) In Chaplinsky, the Court declared that fighting words were undeserving of constitutional protection.\(^{212}\) How the Court justified its creation of the fighting words doctrine is examined at length in this Section. The examination will illuminate how the Court—before its immersion into First Amendment fetishism in 1971’s Cohen v. California—had developed the rudiments of a jurisprudence that drew from the right of the community to regulate extremely offensive speech.

The facts of Chaplinsky were as follows: In 1941, Walter Chaplinsky, a Jehovah’s Witness, sought to comply with what he saw as his religious mandate to publicly denounce all other religions.\(^{213}\) He did so on a street crowded with Saturday afternoon shoppers in Rochester, New Hampshire.\(^{214}\) He vocally dismissed priests as “racketeers” and ridiculed organized religions like Catholicism.\(^{215}\) Chaplinsky persisted despite uproar from the crowd. The police worried that there might be a “riot” and that Chaplinsky could be hurt.\(^{216}\) Marshal Bowering hurried to the scene.

\[\textit{Footnotes}\]

\(^{208}\) Id.

\(^{209}\) Id. at 521.

\(^{210}\) See generally Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (introducing the doctrine of “fighting words”).


\(^{212}\) See Chaplinsky, 315 U.S. at 573.

\(^{213}\) See id. at 569–70.

\(^{214}\) See id.


\(^{216}\) Id. at 4.
and repeatedly told Chaplinsky to cease his vitriol. Chaplinsky refused. Chaplinsky was arrested for disturbing the peace, and, as he was being arrested, he said to Marshal Bowering: “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”

For these words, Chaplinsky was charged with violating a New Hampshire law. The law read: “No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or public place, nor call him by any offensive or derisive name . . . with intent to deride, offend or annoy him, . . . .” A jury found Chaplinsky guilty.

Chaplinsky appealed to the Supreme Court. Writing for the Court, Justice Murphy affirmed the conviction. He began his opinion with these words: “It is well understood that the right of speech is not absolute at all times and under all circumstances.” From the outset, then, Murphy—like Sir William Blackstone and the Founding Generation in America—disabused the public of the propriety of rights fetishism. Murphy narrowed the scope of the right of speech. He continued that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” “These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . .” By “fighting words,” Murphy meant “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” According to him, “It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

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217 See Chaplinsky, 315 U.S. at 570.
218 See id.
219 Id. at 569.
221 Id.
222 Id. at 762.
223 See Chaplinsky, 315 U.S. at 574.
224 Id. at 571.
225 Justice Murphy’s words echoed those of Justice Holmes in Lochner who had stated that “[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same” finds little support from the Court’s precedent. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). To be sure, Justice Holmes had dismissed the suggestion that the Constitution contained a right of contract, and Justice Murphy acknowledges that the Constitution obviously contains the right of speech. But their approaches bear resemblance because both tried to place their respective right into perspective by juxtaposing the right against the concerns of the community.
226 Chaplinsky, 315 U.S. at 571–72.
227 Id. at 572.
228 Id.
229 Id.
With these words, Murphy, on behalf of the Court, established in 1942 a category of “unprotected” speech: fighting words. He thereby fashioned a doctrine that limited the scope of a preexisting right and hence served as the reverse of rights fetishism. Yet his was not an act of suppression. His was one of refinement, an effort to mitigate the harms of rights fetishism while protecting the right of speech. Murphy’s creation of the fighting words doctrine is worth examining as an exemplar of a measured alternative to First Amendment fetishism. Specifically, his creation of the fighting words doctrine was an exemplar that took seriously the moral claims of the community. In doing so Justice Murphy introduced a series of conceptual distinctions that were intended to help the jury to sift the facts in a case like *Chaplinsky* for purposes of determining law violation. At the outset, Murphy distinguished between merely offensive words (which could form some part of the exposition of ideas) and fighting words (which were not essential to said exposition). To wit: Chaplinsky’s condemnation of religions other than his own as a “racket” was not fighting words, but his address to Marshal Bowering as a “damned Fascist” was. The former, while offensive, was an opinion about a matter of public concern. The latter was a profane and personalized insult. Murphy thus empowered the jury to make meaningful decisions about whether the facts of an instant case were applicable to the law. He further developed the definition of fighting words by stating that they were those which tend to incite “immediate breach of the peace.” With these moves, Murphy fleshed out his argument that there existed values—in *Chaplinsky*’s instance, peace and order—which the community could assert against the speaker.

In response to the potential concern that his definition of fighting words might seem vague, Murphy advised that the jury should consult the views of the common man, a man who is a fair approximation of the average man in the community. Murphy thus drew from the same jurisprudence of community that had informed the views of Blackstone and the Founding Generation. “The test,” Murphy explained, “is what men of common intelligence would understand would be words likely to cause an average addressee to fight.” For good measure, Murphy stipulated that “[d]erisive and annoying words can be taken as coming within the purview of [the statute] . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.” Murphy thus placed sensible restrictions on the jury while also empowering it to make decisions on behalf of the community.

There are other aspects of *Chaplinsky* that require amplification for purposes of explaining how Murphy’s jurisprudence of community serves as a better alternative to First Amendment fetishism. Murphy noted that Chaplinsky called Marshal

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230 See id. at 573.
231 See id. at 572.
232 Chaplinsky, 315 U.S. at 569.
233 Id. at 572 (emphasis added).
234 See id. at 573.
235 Id. (emphases added).
236 Id. (emphases added).
Bowering “a damned Fascist.”237 This insult was uttered in intimate proximity between the two men because Chaplinsky was being arrested by Marshal Bowering; there was little time for Bowering to cool off if he were provoked.238 Moreover, back in 1941, calling someone “a damned Fascist” was horribly insulting because World War II was ongoing. Fascists were killing American soldiers and threatening the nation’s survival. For someone to call another a “damned Fascist” may have easily qualified as fighting words.239 It merits stressing that Murphy never condemned Chaplinsky for his political opinion. The former permitted the latter to express his criticism of organized religion, fascists, or anything else as long as the criticism did not amount to fighting words. Justice Murphy only forbade fighting words—a category of speech which was unduly violative of the community’s norms of civility and respect for individual dignity.

B. Obscenity and Child Pornography

Fighting words are not the only instance in which the Supreme Court has crafted a jurisprudence that respected the right of the community to regulate highly offensive speech. In what was one of the last iterations on the Court of a jurisprudence of community in relation to the right of speech, the Court in Miller v. California defined obscenity in 1973 in a way that honored the right of the community to object to highly offensive speech.240 In Miller, the Court declared that “obscene” materials would not be entitled to constitutional protection.241 The Miller Court quoted the following passage from an earlier case, Roth v. United States, from 1957:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgement expressed by this Court in Chaplinsky v. New Hampshire.242

The Miller Court, by quoting the above passage from Roth, reaffirmed the priority of the community. The Roth Court had asserted that the right of speech should be

237 Id. at 569.
238 See id. at 570.
239 Writing during World War II, the New Hampshire Supreme Court aptly observed of Chaplinsky’s fighting words: “If the time may ever come when the words ‘damned Fascist’ will cease to be generally regarded as ‘fighting words’ when applied face-to-face to an average American, this is not the time.” State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941).
241 See id.
242 Id. at 20 (quoting Roth v. United States, 354 U.S. 476, 485 (1957)).
solemnly protected, but that there could exist “more important interests” that could trump the right of speech.\textsuperscript{243} The \textit{Roth} Court alluded in two ways to what such interests might be. First, the Court declared that there existed things that were a matter of “social importance” to the community and that obscenity, which was devoid such importance, was without value.\textsuperscript{244} Second, the Court cited Justice Murphy’s opinion in \textit{Chaplinsky}, which held that speech deemed worthless in the eyes of the community should not be protected.

Eventually, the \textit{Miller} Court, building on its opinion in \textit{Roth}, defined the unprotected category of obscenity as based on the following:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to 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 as a whole, lacks serious literary, artistic, political, or scientific value.\textsuperscript{245}

With this definition, the \textit{Miller} Court protected the right of speech but also permitted the community to exercise meaningful control over whether the speech should be protected. \textit{Miller} left to the jury and the legislature to determine substantially what would count as obscenity.

Child pornography is another area in which the Court has prioritized the claims of the community over the individual’s right of speech. In \textit{Ferber v. New York}, the Court upheld a New York statute that prohibited persons from distributing materials which depict sexual performances by children under the age of sixteen.\textsuperscript{246} While a repudiation of First Amendment fetishism, \textit{Ferber}—like \textit{Miller}—proved to be an isolated anomaly in the arc of the Court’s jurisprudence. Authoring the Court’s opinion in \textit{Ferber}, Justice White quoted Justice Murphy in \textit{Chaplinsky}:

\begin{quote}
There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.\textsuperscript{247}
\end{quote}

By quoting Murphy’s words in \textit{Ferber}, White sought to remind the public that the community’s interest in “order and morality” could serve as a counterweight against an individual’s right of speech. White then commenced in \textit{Ferber} to argue why child

\begin{footnotesize}
\textsuperscript{244} \textit{Id}.
\textsuperscript{245} Miller, 413 U.S. at 24 (citations omitted).
\textsuperscript{247} \textit{Id.} at 754 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).
\end{footnotesize}
pornography, like fighting words in *Chaplinsky*, should not be entitled to constitutional protection.

White stressed that the community’s interest in protecting the welfare of children was “compelling.” Whether New York’s statute had *significantly* furthered the task of protecting children was beside the point for White. He sought to respect the wishes of the community to guard its children: “We shall not second-guess this legislative judgment.”

White stressed that the community, understood in national terms, had expressed its urgent desire to protect its children. “Suffice it to say,” he commented, “virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating ‘child pornography.’” According to White, “[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child.” For White, “[t]hat judgment, we think, easily passes muster under the First Amendment.

Next, in justifying his decision to deny child pornography constitutional protection, White argued that the distribution of “photographs and films depicting sexual activity by juveniles is *intrinsically related* to the sexual abuse of children in at least two ways.” “[T]he materials,” he stated, “produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.” Further, White insisted that “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.” White saw the New York statute as a means to further that end.

Finally, White noted that, in the eyes of the community, “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*.” According to White, it is “unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.”

Like Johnny C. Wilson in *Gooding*, the speaker in *Ferber* challenged the statute in his case in terms of substantial overbreadth. But unlike Justice Brennan in *Gooding*, Justice White in *Ferber* rejected the claim. The latter stated, “The

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248 See id. at 756–57.
249 Id. at 758.
250 Id.
251 Id.
252 Id. at 758.
253 Id. at 759 (emphasis added).
254 Id.
255 Id.
256 See id. at 759–60.
257 Id. at 762.
258 Id. at 762–63.
259 See id. at 773–74.
traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.\textsuperscript{260} White noted that this rule reflects the premise that it would “indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.”\textsuperscript{261} The practical upshot of Justice White’s argument was that the community, in the form of the legislature, should be permitted a good deal of leeway in determining how to punish speech which was pernicious to that community.

The approach adopted by White in\textit{Ferber} affords us a glimpse into an alternate future of what the Supreme Court could have embraced in lieu of First Amendment fetishism. To say this, however, is not to bemoan something that never came to pass. It is to gather the insights provided by cases like\textit{Ferber, Miller}, and\textit{Chaplinsky} to critically assess the Supreme Court’s unmindful foray into First Amendment fetishism. Such critical assessment will be provided in the ensuing Part.

\section*{IV. Modern Day Fetishism}

\subsection*{A. Flag Burning}

The Court’s efforts to reign in First Amendment fetishism, while promising, did not endure. Over the decades since the early 1970s, the Supreme Court’s protection for severely offensive speech has grown to fetishistic proportions.\textit{Texas v. Johnson} is one of the bleak legacies of\textit{Cohen}. In 1984, Dallas hosted the Republican National Convention.\textsuperscript{262} A group of people organized a protest against the Convention and, more broadly, against the government.\textsuperscript{263} Among other things, the protestors spray-painted the walls of buildings and overturned potted plants.\textsuperscript{264} A protestor stole an American flag from one of the targeted buildings and gave it to Gregory Lee Johnson, a fellow protestor.\textsuperscript{265} In front of Dallas City Hall, Johnson, a self-described Communist,\textsuperscript{266} “unfurled the American flag, doused it with kerosene, and set it on fire.”\textsuperscript{267} While the flag burned, the protestors near Johnson chanted: “America, the red, white, and blue, we spit on you.”\textsuperscript{268} No one was hurt, but “several witnesses testified that they had been seriously offended by the flag burning.”\textsuperscript{269}  

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{260} \textit{Id.} at 767 (emphasis added).
\item \textsuperscript{261} \textit{Id.} at 768 (emphasis added) (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953)).
\item \textsuperscript{262} \textit{See} Texas v. Johnson, 491 U.S. 397, 399 (1989).
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} \textit{Id.; see also id.} at 431 (Rehnquist, J., dissenting) (“he proceeded to burn publicly an American flag stolen from its rightful owner”).
\item \textsuperscript{266} Hermann & Demkovich, supra note 3.
\item \textsuperscript{267} \textit{Johnson}, 491 U.S. at 399 (majority opinion).
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} \textit{Id.}
\end{itemize}
\end{footnotesize}
Texas charged Johnson with the desecration of the flag. After trial, the jury convicted him, but the Supreme Court overturned the jury’s verdict and declared the state law unconstitutional.

The author of the Court’s opinion was Justice Brennan. He was the same justice who had composed the Court’s opinion in Gooding v. Wilson. In Gooding, Brennan’s opinion was unusual for, among other things, omitting any mention of the racist threats made by a Black arrestee, Johnny C. Wilson, against a White police officer. What Brennan had wrought in Gooding in 1972 was an early instantiation of First Amendment fetishism. What he wrought in the Court’s opinion in Johnson in 1989 was an extension and concretization of said fetishism. In Johnson, Texas had argued that its prohibition against flag burning was prompted by the state’s view of the American flag as a symbol of “national unity.”

This rationale was unacceptable to Brennan. He argued that Johnson’s flag burning, while not “speech” in the literal sense, was nonetheless protected as a form of expressive conduct. Brennan then addressed Texas’s argument that the flag was a symbol of national unity. He cited West Virginia v. Barnette from 1942. Brennan, quoting from Barnette, endeavored to underscore two points. First, he stressed that “a government cannot mandate by fiat a feeling of unity in its citizens” and, second, that the “government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.” For good measure, Brennan also quoted this statement from Barnette: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”

According to Brennan in Johnson, “We have not recognized an exception to this principle even where our flag has been involved.” Therefore, Brennan, for the Johnson Court, declared that Texas’s statute was violative of Johnson’s right to “political expression” under the First Amendment.

Unwilling to express even a glimmer of sympathy for the community of Texans whose law he overturned, Brennan concluded his opinion in Johnson with words of self-righteous vindication, something that is consonant with the tropes of First Amendment fetishism. “We are tempted to say,” he declared, “that the flag’s deservedly cherished place in our community will be strengthened, not weakened,

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270 See id. at 400.
271 Id. at 400, 420.
273 See cases cited supra notes 47–52 and accompanying text; see also CRIME: They Color It Black, EL MALCRIOADO, Mar. 15, 1967, at 2, 15.
274 Johnson, 491 U.S. at 413.
275 Id. at 404.
276 Id. at 401 (citing W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624 (1943)).
277 Id.
278 Id. at 414.
279 Id.
280 Id. at 420.
by our holding today.” Brennan continued, “Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength.”

Organized by the self-serving logic of First Amendment fetishism, Brennan’s statements are pregnant with irony. Rather than underwriting his position, his statements operated as an expression of contempt for the very community which they were ostensibly enlisted to bolster. Brennan announced with a confident unselfconsciousness that “the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today.” But the cavalier reference to community was disconcerting. For it was clear that the invocation of “community” by Brennan was in fact a rhetorical ploy that was meant to undermine the rights of the actual community of Texans that had sought to protect the flag as a nearly sacred object of nationhood. In a posture emblematic of First Amendment fetishism, Brennan, on behalf of five unelected federal judges, overturned a law passed by the citizens of Texas because he believed that doing so would “strengthen” the flag for some cryptic “community” that existed mainly in his own mind. Rather than strengthening community as he promised to do, Brennan’s decision had the effect of eviscerating the efforts by the community of Texans to protect the special meaning of the flag. Such was the ironic conception of community by First Amendment fetishism.

Captivated by First Amendment fetishism, Brennan failed to appreciate the extraordinary place that the American flag occupies as a cultural emblem for the community of Americans in Texas and throughout the nation. The powerful cultural role played by the American flag was not lost on Chief Justice Rehnquist, however. Dissenting, he articulated why Texas’s statute did not violate Johnson’s right of speech. The Chief Justice announced that “the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.” For example, the “flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad.” The flag “symbolizes the Nation in peace as well as in war.” And the flag “signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country.” So too Rehnquist poignantly observed, “The flag is traditionally placed

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281 Id. at 419.
282 Id.
283 Id. (emphasis added).
284 See id. at 434 (Rehnquist, C.J., dissenting) (noting Brennan’s opinion amounted to a “patronizing civics lecture”).
285 Id. at 421–22.
286 Johnson, 491 U.S. at 421–22.
287 Id.
288 Id. at 426.
289 Id.
on the casket of deceased members of the Armed Forces, and it is later given to the deceased’s family.”

Moreover, “Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials ‘as a mark of respect to their memory.’”

For Rehnquist, the flag was the highest cultural expression of national unity by the community that was America. “No other American symbol,” he noted, “has been as universally honored as the flag.”

In forceful language, Rehnquist proclaimed that “[t]he flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas.”

Unlike Brennan who contrived some imagined “community” for the subversive purpose of undermining the genuinely extant community of Texas, Rehnquist reminded the public of the basic fact that “[m]illions and millions of Americans regard [the flag] with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have.”

Given the special place that the flag holds for America as a community, the Communist Gregory Lee Johnson did not need to burn the flag in order to express his hatred for everything that he thought the flag represented. Indeed, for Rehnquist, burning the flag fell into the same category as fighting words. He argued that “the public burning of the American flag by Johnson was no essential part of any exposition of ideas . . . .”

As Rehnquist pointed out, Johnson was permitted by law to publicly burn other symbols of government or the effigies of political leaders like President Ronald Reagan. In short, for Rehnquist, there were countless alternative means for Johnson to express his hostility towards the United States: “The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy.”

Permitting Johnson to maliciously burn the American flag, a symbol of reverence for conservative Americans as well as progressive Americans, did not “strengthen” the community as Justice Brennan had asserted. But it is a testament to the openminded character of the community of Texans in the 1980s that they were steadfastly willing to permit Johnson—the self-proclaimed Communist—to burn the Texas flag, to burn an effigy of the President, and to deliver a hate-filled speech that denounced the entire idea of America itself. That Brennan with the barest trappings of justification ignored the availability of these alternatives for Johnson implied that Brennan was, in spite of his representations to the contrary, more dedicated to the

290 Id. at 427.
291 Id. (quoting 36 U.S.C. § 175(m)).
292 Id.
293 Id. at 429.
294 Id.
295 See id. at 430.
296 Id.
297 Id. at 431.
298 Id. at 432 (emphasis added).
cause of First Amendment fetishism than his professed desire to “strengthen” the “community.” In Brennan’s fetishistic notion of the right of speech, the Communist Johnson did not exist as a speaker who took reckless delight in hurting the community. Instead, for Brennan, Johnson was welcomed as a catalyst who expressed assault on something that the community of Americans held with exceptional affection and pride was commended with unselfconscious irony as an ameliorative means for the same community to reaffirm its collective identity.

In his majority opinion, Brennan cited a long litany of cases for the thesis that the Supreme Court’s precedent supported flag burning under the right of speech. None of the actions in those cases, however, were remotely analogous to the act of burning the American flag, an indication of how far afield from the logic of precedent was the Court’s holding in Johnson. The following cases were cited by Brennan in Johnson. Hustler Magazine v. Falwell involved the right to publish a parody that mocked a singularly powerful religious leader.299 City Council of Los Angeles v. Taxpayers for Vincent concerned the right to post signs on utility poles that were owned by the government.300 Bolger v. Youngs Drugs Products Corp. was about the right to publish in newspapers the prices of prescription drugs.301 Carey v. Brown was about residential picketing by labor organizers who sought to protest against their employer.302 Buckley v. Valeo was about the right to donate money to a political campaign.303 None of these cases involved anything broaching flag desecration.

Even the cases Brennan cited which dealt with the American flag did not involve flag desecration, let alone flag burning. Brennan cited Street v. New York.304 In that case, the speaker did burn the American flag as a form of protest, but the Court never reached the question of whether the burning was protected speech.305 The speaker had been convicted for uttering words critical of the flag, and the Court overturned the conviction on this ground alone.306 So too in West Virginia v. Barnette, another case employed by Brennan, the Court never protected the right to burn the flag.307 Believing them apposite to the facts of Johnson, Brennan shared these elegant words from the Barnette Court: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”308 While memorable, the words were employed by the Barnette Court to protect the right of Jehovah’s

299 Id. at 414 (majority opinion) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 at 55–56 (1988)).
300 Id. (citing City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).
301 Id. (citing Bolger v. Youngs Drugs Prods. Corp. 463 U.S. 60, 65 (1983)).
302 Id. (citing Carey v. Brown, 447 U.S. 455, 462–63 (1980)).
304 Johnson, 491 U.S. at 414.
306 Id. at 576, 594.
308 Johnson, 491 U.S at 415 (quoting Barnette, 319 U.S. at 642).
Witness children who, owing to their religion, refused to pledge allegiance to the flag in their schoolhouse.\textsuperscript{309} The right at issue in \textit{Barnette} thus differed fundamentally from the right to burn the flag in \textit{Johnson}. \textit{Spence v. Washington} involved a person who displayed the American flag with the peace sign affixed over it.\textsuperscript{310} While this gesture may offend some, it, contrary to Brennan’s arguments, scarcely resembled the hurtful spectacle of lighting the flag on fire in front of the many Texans in \textit{Johnson} who loved their country and may have had family members dedicate their lives in the service of protecting the ideals it stands for.

\textbf{B. Menacing Speech by a White Supremacist}

\textit{Johnson} had involved the public burning of a symbol that was uniquely precious to Americans as a symbol of unity and national faith. Three years after the Court decided \textit{Johnson} in 1989, the Court decided another case, \textit{R.A.V. v. St. Paul}.\textsuperscript{311} \textit{R.A.V.} also involved the burning of a revered symbol, but unlike in \textit{Johnson}, the speaker in \textit{R.A.V.} did not seek to upset an entire nation. Rather, he sought to terrorize a family of three in his neighborhood.

The facts of \textit{R.A.V.}, like those of \textit{Chaplinsky}, also involved Jehovah’s Witnesses, but there were crucial differences.\textsuperscript{312} Most notably, the Jehovah’s Witnesses in \textit{R.A.V.} were not exercising their right of speech but were the victims of speech that was horrifying. Russ and Laura Jones were the Witnesses, and the lone Black family on the block in an overwhelmingly White, working-class part of east St. Paul, Minnesota.\textsuperscript{313} They had moved into the neighborhood in March 1990.\textsuperscript{314} A few weeks later, the Joneses found their tires slashed.\textsuperscript{315} Then the window in the Jones’s station wagon was shattered.\textsuperscript{316} Another day, a “combat boot-wearing teenager” called the Jones’s nine-year-old son a “n**ger” when the family was leaving the house for their church meeting.\textsuperscript{317} The nine-year-old had never heard this epithet before, and his Jehovah’s Witness parents endured the terrible pain of having to explain to him what it meant.\textsuperscript{318}

On June 21, 1990 at 2:30 a.m., the Joneses saw “a glow outside their bedroom window.”\textsuperscript{319} They saw a homemade wooden cross that was planted in their front

\textsuperscript{309} \textit{Barnette}, 319 U.S. at 629–30.
\textsuperscript{311} 505 U.S. 377, 377 (1992).
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.}
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} \textit{Id.}
\textsuperscript{317} \textit{Id.}
\textsuperscript{318} \textit{Id.}
\textsuperscript{319} \textit{Id.}
yard and set ablaze.\textsuperscript{320} The culprit who was responsible was the same person who had hurled the N-word against the Jones’s little boy: a seventeen-year-old White supremacist named Robert Viktora—the erstwhile R.A.V.\textsuperscript{321} Viktora asked a group of White friends “if they wanted to cause some skinhead trouble” and “burn some n**gers.”\textsuperscript{322} For the cross burning, Viktora and his fellow skinheads were charged with a 1982 St. Paul ordinance that forbade speech which “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .”\textsuperscript{323} Viktora argued that the ordinance violated his First Amendment rights.\textsuperscript{324} Specifically, he argued that the burning cross, while not verbalized expression, was conduct that communicates, and hence protected under the First Amendment.\textsuperscript{325} However, the Minnesota Supreme Court construed the St. Paul ordinance as prohibiting fighting words, and thus prohibiting a category of words which, in accordance with Chaplinsky’s holding, was not protected by the First Amendment.\textsuperscript{326}

Losing in the state courts, Viktora appealed his case to the U.S. Supreme Court. The latter overturned St. Paul’s ordinance.\textsuperscript{327} Authoring the Court’s opinion, Justice Scalia addressed the meaning of the statute. The Minnesota Supreme Court had interpreted the ordinance as a prohibition on fighting words alone.\textsuperscript{328} Scalia acknowledged that, under the principles of federalism, the U.S. Supreme Court was bound by the Minnesota Supreme Court’s interpretation.\textsuperscript{329} Notwithstanding this deference, Scalia then argued that the St. Paul ordinance was nevertheless unconstitutional on its face because it prohibited speech on the basis of “viewpoint discrimination.”\textsuperscript{330}

For someone who prided himself as an originalist,\textsuperscript{331} Scalia, inexplicably, made no allusions to the original understanding of the right of speech. As explained by this Article, an originalist understanding of the right of speech would honor the community’s opposing right to regulate speech which violated the community’s norms.\textsuperscript{332} But the purportedly conservative—and self-professed originalist—Scalia in \textit{R.A.V.} indulged the same fetishistic approach to the First Amendment as his outspokenly liberal predecessor Justice Harlan had done in \textit{Cohen} and the even more

\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{324} \textit{See In re Welfare of R.A.V.}, 464 N.W.2d. 507, 511 (Minn. 1991).
\textsuperscript{325} See id.
\textsuperscript{326} \textit{R.A.V.}, 505 U.S. at 381.
\textsuperscript{327} Id. at 396.
\textsuperscript{328} Id. at 381.
\textsuperscript{329} Id.
\textsuperscript{330} Id. at 391.
\textsuperscript{332} \textit{See supra} Part II.D.
liberal predecessor Justice Brennan had done in *Gooding*. What Justices Brennan and Harlan had wrought in the early 1970s was very much alive in 1992 in Justice Scalia’s majority opinion for *R.A.V.*. Like his liberal brethren before him, the unelected Scalia, impelled by First Amendment fetishism, overturned a reasonable law passed by the community of St. Paul.

Reflecting another facet of First Amendment fetishism, Scalia lit upon a series of arguments which, unsurprisingly, failed to support the logically untenable position to which said fetishism had committed him. Consider the substance of Scalia’s position. He was arguing that the government may not prohibit fighting words, a species of speech which was—by the Court’s own definition—unprotected. If the government attempted to prohibit such “unprotected” speech, the government, Scalia argued, could not do so in a manner that was content based. Specifically, according to Scalia, St. Paul could not prohibit fighting words on the basis of viewpoint:

Displays containing some words—odious racial epithets, for example—would be prohibited [by St. Paul] to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspreations upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.

For Scalia, St. Paul’s attempt to permit such fighting words and not others was a violation of the First Amendment. This difference in treatment was intolerable for Scalia. “One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten,” he argued, “but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’” “St. Paul,” Scalia pronounced, “has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”

Reflect on the cause of Scalia’s grievance. He did not object to the prospect of St. Paul passing a wholesale prohibition on fighting words. What he objected to was the government’s effort to select *certain* fighting words for punishment. Why was this selective ordering objectionable? The response provided by Scalia bristled with fetishism for the First Amendment. He argued that *any* effort by the government to discriminate against fighting words on the basis of viewpoint would amount to

333 *R.A.V.*, 505 U.S. at 391.
334 Id. at 396.
336 *R.A.V.*, 505 U.S. at 391.
337 Id. (emphasis added).
338 Id. at 391–92.
339 Id. at 392.
“censorship of ideas.”

Justice Scalia’s reference to “censorship” raised more questions than answered them.

Most immediately, there were questions of definition. St. Paul’s ordinance—by Scalia’s own admission—prohibited only fighting words, and, hence, a category of speech which a person did not have the right to say. How, then, was St. Paul’s effort to prohibit speech which a person did not have a right to say an act of “censorship”? Scalia explained:

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression . . . That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government. . . . Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.

The passage exudes an unearned self-confidence. Scalia asserted that “[o]ur cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression . . . .” As we have seen from Chaplinsky, however, the Court had never placed any restrictions on the government’s efforts to regulate speech like Viktora’s fighting words which was not protected.

If anything, the Court supported such regulations. In Chaplinsky, Justice Murphy had said the following of fighting words and other categories of unprotected speech: “‘There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’” Murphy’s words clearly support the proposition that “the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression.” Murphy’s statement for the Chaplinsky Court was the very thing which Scalia claimed in R.A.V. that the Court had disavowed. Other parts of Murphy’s opinion in Chaplinsky also undermine Scalia’s interpretation of legal precedent. Murphy had said of fighting words like the burning cross in R.A.V.: “It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Murphy never qualified that fighting words like Viktora’s are “clearly outweighed” by the social interest in order and morality as long as the government does not engage in content discrimination. The premise that any benefit derived from a given category of words—by virtue of their

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340 Id. at 393.
341 Id. at 384.
342 Id. (emphasis added).
344 R.A.V., 505 U.S. at 384.
345 Chaplinsky, 315 U.S. at 572 (emphases added).
pernicious content—is *clearly outweighed* by the social interest in order and morality is logically incompatible with Scalia’s insistence created out of whole cloth that such words are entitled to protection from the First Amendment. Bereft evidence from precedent and logic, Scalia’s opinion, with its pugnacious hostility toward the rights of the community, exists as an exemplar of First Amendment fetishism.

Scalia could have taken an approach that was more rooted in a jurisprudence of community in relation to the right of speech. Such an approach would entail drawing from the logic of Murphy’s opinion in *Chaplinsky*. In *R.A.V.*, Viktora’s burning cross was not simply the expression of some abstract racial ideology; if it were, it would have been protected. Viktora’s burning cross was a bespoke effort by a self-professed skinhead to terrorize the lone Black family in the St. Paul neighborhood. Therefore, to enlist Murphy’s words from *Chaplinsky*, the burning cross was not “essential” to the “exposition of ideas.” It is more accurate to say that Viktora’s message—to the extent that the message of White Supremacy could have any value to society—was of “slight social value.” Accordingly, it was entirely appropriate for St. Paul to believe that its right to protect the basic dignity of its members “clearly outweighed” Viktora’s racist urge to traumatize the Black family. Scalia bewailed that “[s]uch a simplistic, all-or-nothing-at-all approach to First Amendment protection [by St. Paul] is at odds with common sense and with our jurisprudence as well.” In fact, the approach commended by Murphy was wholly consonant with “common sense and with our jurisprudence.”

It was actually Scalia’s method which was “simplistic” and “all-or-nothing.” For Scalia had refused to consult the factual circumstances of the case as one involving a deliberate effort by a White supremacist to induce racial terror on the part of an innocent Black family. In an unyielding example of First Amendment fetishism, Scalia indiscriminately lumped together Viktora’s fighting words with legitimate political speech. Scalia recognized no gradations between protected political expression and fighting words. If Viktora, for example, had placed the burning cross on his own property and a good distance from a Black family, the cross burning could very well have been deemed protected. So too the First Amendment would have protected Viktora if he had delivered a racist speech in a public park and if there was no evidence that he had intended to intimidate a particular person.

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347 *Chaplinsky*, 315 U.S. at 572.
348 *Id.*
349 *Id.*
351 *Id.*
352 *Id.*
353 See *id.* at 416, 436 (arguing that a person may burn a cross as an expression of White Supremacy if the action is not directed at an individual such as to inflict injury on that person) (Stevens, J., concurring).
354 See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting racist speech by the Ku Klux Klan that did not amount to a clear and present danger).
Neither hypothetical would have amounted to fighting words. In this sense, Scalia’s fetishistic approach toward the right of speech failed to consider the availability of meaningful alternatives for the menacing Robert Viktora, something that the jurisprudence from community would regard as paramount. The former did not place the burden on Viktora to show why he could not avail himself of alternative means of expressing his hatred for Blacks and his celebration of White Supremacy. Instead, Justice Scalia, following Justice Harlan in Cohen, was eager to protect the right of a speaker who wanted to publicly express his vulgar message as a matter of “taste and style.”

C. Videos of Tortured Animals

Hate speech, like that in R.A.V., was not the only place in which the Supreme Court fetishized the First Amendment. In United States v. Stevens, the Court invalidated a congressional law that established a criminal penalty for anyone who knowingly “creates, sells, or possesses a depiction of animal cruelty,” if done “for commercial gain” in interstate or foreign commerce. “Animal cruelty” was defined as conduct “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” if that conduct violates federal or state law where “the creation, sale, or possession takes place.” The law contained an “exceptions clause.” This clause exempted from prohibition any depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” The principal aim of the law was to prohibit “crush videos.” Crush videos “feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters.”

Stevens, however, involved an application of the law to depictions of dogfighting. Robert J. Stevens ran a business, called ‘Dogs of Velvet and Steel,’ and an associated website that sold videos of pit bulls engaging in dogfights and attacking other animals. He was indicted for violating the federal law. Like Johnny C. Wilson from Gooding, Stevens argued at trial that the law was substantially overbroad. That is, he argued that the law forbade speech than what

358 Id. § 48(b).
359 Id.
360 Stevens, 559 U.S. at 465.
361 Id.
362 See id. at 466.
363 Id.
364 Id.
365 See id. at 467.
366 Id.
the First Amendment permitted. The trial court rejected Stevens’s argument because the law permitted numerous depictions of animal cruelty as long as the depictions had “serious religious, political, scientific, journalistic, or artistic value.” Sitting en banc, the Third Circuit, over three dissents, overturned the trial court’s decision.

The Supreme Court accepted the case on appeal. There, the government argued that the category of speech created by the federal statute should be treated as a class that was “categorically unprotected by the First Amendment.” The Court refused to do so. Writing for the majority, Chief Justice Roberts acknowledged that the First Amendment has “permitted restrictions upon the content of speech in a few limited areas . . . .” However, he stressed that the Court “never ‘include[d] a freedom to disregard these traditional limitations.’” On its face, there was nothing wrong with this statement. But how Roberts interpreted the meaning of “traditional limitations” evinced a fetishism for the right of speech. He declared that the Court had recognized only a few categories of unprotected speech. These included “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”

It is true that the Court had exempted certain categories of speech from First Amendment protection, but the Court, contrary to Roberts’s implication, never limited such categories to those which it had already established. Roberts warned that videos depicting animal cruelty should not be added to the roster of unprotected speech. To justify his position, he put aside the burdens of analytic rigor in favor of something that was more compatible with First Amendment fetishism: alarmist rhetoric. Roberts insisted that denying constitutional protection for videos depicting animal cruelty was a serious threat to the First Amendment. What vexed him was that the government furnished nothing but “a simple balancing test.” Roberts quoted the government’s brief about what this test involved: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

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367 See id. (“It went on to hold that § 48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications.”); 18 U.S.C. § 48(b) (2009).
368 Stevens, 559 U.S. at 461.
370 Stevens, 559 U.S. at 467.
371 Id. at 468 (internal quotation marks omitted) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992)).
372 Id. (alteration in the original) (quoting R.A.V., 505 U.S. at 382–83).
373 Id. at 468–69.
374 Id. at 468 (citations omitted).
375 See id. at 470.
376 Id.
377 Id. (citation omitted).
Roberts emphatically warned that “[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous.” But this was basically the same test that the Court had adopted in *Chaplinsky*. Even a casual review of Justice Murphy’s opinion from *Chaplinsky* reveals that it was based on a balancing test between the value of the speech and the societal costs. In denying fighting words constitutional protection, Murphy wrote:

> It has been well observed that such utterances [like Chaplinsky’s] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Justice Murphy relied more or less on what Chief Justice Roberts in *Stevens* derogatorily called “a simple balancing test.” Murphy did not want to hamstring the community’s yearning for order and morality because doing so might be inconsistent with what Roberts dubbed “traditional limitations.” Murphy wanted to empower said yearning by the community. After all, he had stated that speech which formed “no essential part of any exposition of ideas” was “clearly outweighed by the social interest in order and morality.

If we apply Murphy’s jurisprudence of community (what Roberts appears to call a “balancing test”), it is plain that the federal statute in *Stevens* would prevail. On one side of the scale, Stevens’s videos of pit bulls attacking each other, and other animals were “no essential part of any exposition of ideas.” Stevens’s depiction of pit bulls viciously attacking each other in blood sport was not an attempt to make an argument about the propriety of animal cruelty. Stevens’s videos were not—by any stretch of the imagination—contributing to an “exposition of ideas.” Stevens could have made a vigorous speech about the merits of dog fighting. He could have produced an impassioned article or podcast about the same. By refusing to require Stevens to find viable alternatives to express his support for dogfighting, Chief Justice Roberts succumbed to an aspect of First Amendment fetishism. Like his liberal brethren in *Cohen* and *Gooding*, the conservative Roberts embraced the position that Stevens may adopt his preferred means of expression—as a matter of “taste and style”—to celebrate violence against dogs.

Against Stevens’s speech, with its meritless content, there was the community’s moral aspiration to protect animals against cruelty. Roberts worried that balancing the societal value of an individual’s speech against the community’s right to restrict it amounted to “a free-floating test for First Amendment coverage” that was...

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378 Id.
380 Id. at 572.
381 Id. (emphasis added).
382 Id. One should remember that the statute in *Stevens* provided copious exceptions for videos that depicted violence against animals if there was “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. § 48(b) (2009).
“startling and dangerous.” Yet there was nothing “free-floating” about the government’s arguments for wanting to prohibit videos that afforded monetary incentives for the depiction of animal cruelty. Stevens’s video of dog fighting was depicting something that was outlawed by all fifty states and the federal government. That is, all fifty states and the federal government had passed laws which deemed the sport of dog fighting to be intolerable to the morals of the community. The report of the House of Representatives remarked that “the great majority of Americans believe that all animals, even those used for mere utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering.” Put in the parlance of Murphy’s Chaplinsky opinion, the torture of animals depicted by Stevens was “clearly outweighed by the social interest in order and morality,” as those interests were conceived by the national community of Americans. Given these observations, there was an irresponsibly alarmist quality to Roberts’s suggestion in Stevens that the balancing test introduced by the government was “startling and dangerous.”

In Stevens, Roberts substituted the balancing test favored by Murphy in favor of a different test that was designed to produce an outcome that was animated by a fetishistic appreciation for the First Amendment. In essence, Roberts changed the Court’s paradigm from what it was in Chaplinsky. Eschewing any meditation on the worth, if any, of Stevens’s videos as evaluated by the community, Roberts argued that Stevens’s videos should be afforded protection because they differed from the unprotected category of child pornography. Child pornography, the Chief Justice explained, was unprotected, not because it was the product of “a simple balancing test,” but because “[t]he market for child pornography was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.”

Note what Roberts was doing. He was searching for a near literal analogy between child pornography and animal cruelty as if this endeavored comparison promised to solve the question of whether the community could prohibit Stevens from profiting from the creation of videos which celebrated the spectacle of animal cruelty. In this manner, the conservative Roberts relied on the same woeful reasoning that was on offer by the liberal Justice Harlan in Cohen. It is true that the latter, unlike the former, had scarcely invested himself in Cohen in the business of case precedent. But the distinction was more distraction than difference. For Roberts’s fixation on trying to justify his conclusion by looking for a case whose facts were nearly identical to those in Stevens was not reflective of intellectual sophistication. It was reflective of an exercise in comparison whose principal aim was not to weigh the moral reasonableness of the statute under review in Stevens, but to ensure that the statute would not survive constitutional muster. While Roberts

384 Stevens, 559 U.S. at 470.
385 Id. at 494 (Alito, J., dissenting).
386 See id. at 497.
388 See Stevens, 559 U.S. at 471–72.
389 Id. at 471 (citing New York v. Ferber, 458 U.S. 747, 759, 761 (1982)).
appears preoccupied with analysis, he was in effect closing himself off from the sensible weighing of the community’s values that had characterized Murphy’s opinion in Chaplinsky. Impelled by a fetishistic attitude toward the First Amendment, the Chief Justice had no interest in even examining the concerns by the community in wanting to prevent animal cruelty; the prospect of doing so struck him as “startling” and “dangerous.” All that he cared about—for reasons that he chalked up to a solemn respect for the First Amendment—were whether the circumstances surrounding cruelty to animals were sufficiently analogous to circumstances surrounding cruelty to children, as if the case hinged on this analogy. Even on Roberts’s own terms, however, Stevens’s videos, contrary to the Chief Justice’s characterization, were intrinsically related to the underlying abuse. Stevens’s videos were not Photoshopped; they were not computer-generated images. His videos of animal cruelty involved actual animals being tortured for entertainment. The abuse of animals in Stevens’s videos were “an integral part of the production of such materials . . . .”

Because he treated as protected Stevens’s video of animal cruelty, Roberts next turned his attention to overturning the federal statute under which Stevens was prosecuted. Roberts, for the Court, held the statute to be substantially overbroad because it prohibited substantially more speech than what the First Amendment permitted. Indeed, he characterized the statute as having created “a criminal prohibition of alarming breadth.” This characterization was—like his characterization of the balancing test as “startling” and “dangerous”—unwarranted.

Then-Solicitor General Elena Kagan, on behalf of the government, made a series of shrewd arguments in Stevens to show that the law was intended to solve the particular problem of animal cruelty. General Kagan argued that the federal law was not substantially overbroad in that the law “poses no threat to the arts, to educational objectives, or even to the views of dogfighting aficionados (of whom respondent is unquestionably one).” “The legislation merely requires individuals to refrain from trafficking in depictions of illegal cruelty perpetrated against live animals in order to prevent the injury inflicted in the manufacture of those depictions.” Specifically, General Kagan argued that videos of animal cruelty were akin to the unprotected category of child pornography. The rationale for why the latter was unprotected was because the Court in Ferber sought to protect children who were exploited during the production process. That is, “[t]o the extent there

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390 See id. at 470.
391 Ferber, 458 U.S. at 761.
392 Stevens, 559 U.S. at 482.
393 Id. at 474.
395 Id. at *1.
396 Id. at *1–2 (emphasis added).
397 See id. at *2–3.
398 Id. at *3 (citing Ashcroft v. Free Speech Coals., 535 U.S. 234, 240 (2002)).
was any doubt about the statute’s intent, the absence of any prohibition on simulated images resolved it.”  

General Kagan underscored that the law at issue did not present the same problems of content discrimination as in R.A.V. “Congress’s interest in this case therefore is wholly unrelated to respondent’s message or viewpoint” argued General Kagan.400 According to her, Stevens “is free to extol the virtues of pit bull fighting all he wants, and he may even use simulated depictions of such killings in his videos.”401 “The only thing” General Kagan continued, “he cannot do is use certain depictions of actual cruelty to actual animals in his footage.”402 Reflecting a jurisprudence of community, General Kagan emphasized the availability of meaningful alternatives for extremely offensive speech. General Kagan thereby gave voice to the wishes of the community that entertainment videos which required cruelty toward animals for their production were not entitled to First Amendment protection.

D. Violent Video Games

The Supreme Court persisted in its fetishistic support for the First Amendment in Brown v. Entertainment Merchants in 2011.403 California had passed a law that prohibited the sale or rental of “violent video games” to minors and required their packaging to be labeled “18.”404 The Court described the law as follows:

The Act covered games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors” and that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”

As one can discern, California’s statute was clearly modeled after the Supreme Court’s definition of obscenity in Miller v. California.406

Before anything further is said about California’s statute, it bears repeating what the statute did and did not do. It did not forbid minors from playing—as often

399 Id. (citing New York v. Ferber, 458 U.S. 747, 763 (1982)).
401 Id. at *3–4.
402 Id. at *4.
404 Id. at 789 (citation omitted), invalidated by Brown v. Ent. Merchs. Ass’n, 564 U.S. 786 (2011)).
405 Id. at 789 (quoting CAL. CIV. CODE ANN. §1746(d)(1)(A)).
as they wanted—the ultraviolent and gleefully misogynistic video games. Nor did California prohibit anyone who was at least eighteen from buying or playing the games. All that California required was that a minor (someone under eighteen years) obtain an adult’s permission to purchase the games. Reflect on the de minimis nature of this requirement. At issue in Entertainment Merchants were video games in which, say, a thirteen-year-old boy assumed the identity of a gangster avatar who, at the thirteen-year-old’s direction, committed murder, violently robbed people, and raped women. California, to repeat, did not prevent the thirteen-year-old from playing such games. California only required the child to obtain an adult’s permission before purchasing the games.

Notwithstanding this nominal limitation, the Supreme Court in Entertainment Merchants overturned California’s statute. Writing for the Court, Justice Scalia began by declaring that video games as a category were protected by the First Amendment. “The Free Speech Clause,” he announced, “exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.” This contrived posture of uncertainty did not elicit any elaboration from Scalia, although it would have been useful had it done so. But the conceit of uncertainty fashioned by Scalia was never meant to illuminate the First Amendment issues at hand. It was meant to instill fear in the public, and thus to prepare the public to accept the necessity for an overly zealous, fetishistic approach toward the First Amendment. After all, according to the logic of Scalia’s implication, if the government could require a thirteen-year-old boy to obtain adult permission before purchasing violent video games that enabled him to “sexually assaul[t]” a woman, then the same government was liberated to punish an adult for criticizing the President’s foreign policy. The fear mongering on display by Scalia in Entertainment Merchants resembled his fear mongering in R.A.V. Any reasonably intelligent person could argue that a violent video game that permits the minor to engage in “killing, maiming, dismembering, or sexually assaulting an image of a human being” is fundamentally different from speech which is rightfully protected. The latter includes speech delivered in public to protest racism in the local police department, to support greater funding for public school teachers, or to advocate for stronger gun control—examples of what Scalia called “discourse on public matters.” Moreover, and to state the obvious, the issue of punishing such speech was not before the Court in Entertainment Merchants.

What was at issue in Entertainment Merchants were violent video games that were being played by children. In this context, could not the people of California have made a defensible argument that violent video games should be treated as unprotected speech like obscenity or fighting words? Not according to Scalia.

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407 See Brown, 564 U.S. at 786, 802.
408 Id.
409 See generally id.
410 Id. at 805.
411 See id. at 790.
412 Id.
413 Id.
Following the example of Chief Justice Roberts in *Stevens*, Scalia eschewed any desire to address the concerns of the community. Regrettably, Scalia in *Entertainment Merchants*, like Roberts in *Stevens*, devoted himself to a literal-minded exercise in comparison and contrast of case facts. “Because speech about violence is not obscene,” Justice Scalia explained, “it is of no consequence that California’s statute mimics the New York statute regulating obscenity for minors that we upheld in *Ginsberg v. New York*. . . .”

Scalia further explained, “That case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child.”

The latter italicization was Justice Scalia’s, a fact that accentuates the degree to which he was invested in the narrowly conceived task of comparing whether violent video games contained enough sexually explicit content to qualify as obscenity.

If Scalia refused to analogize between violent video games and obscenity, he was more than eager to analogize between violent video games and, improbably, the canon of classic Western literature. “High-school reading lists are full of similar fare” as violent video games, he reassured. In an unintended exercise in absurdism, Scalia declared without irony that, like the violent video games being regulated by California, “Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. . . . And [in William] Golding’s *Lord of the Flies* . . . a schoolboy called Piggy is savagely murdered by other children while marooned on an island.” Such was the intensity of Scalia’s fetishism for the First Amendment that he ignored how his proffered examples were manifestly incomparable to the violent video games being regulated by California. California’s statute had clearly qualified that violent video games would be exempted from the statute if they contained “serious literary, artistic, political, or scientific value for minors . . .”

If the violent video games at issue—with their celebration of murder and rape—had amounted to the stuff of “Homer’s *Odyssey*” or “Golding’s *Lord of the Flies*,” the games would not have required an adult to purchase the game for the minor. Indeed, the games might very well have edified the players and instilled in them the virtues of loyalty, courage, and, in the case of Golding’s work, empathy and moral epiphany.

Even putting aside Scalia’s farfetched attempts at analogy, there existed other objections to his opinion, objections that derive from the right of the community to determine what is in the best interest of minors. This objection is rooted in how the community in *Entertainment Merchants* has sought to empower parents to raise their minor children in morally consonant ways. As the brief for California declared, “[s]ociety is best served by an interpretation of the Constitution that leaves the responsibility of directing the development and upbringing of minors with the parents, not one that allows the profits of video game manufacturers and retailers to

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414 Id. at 793 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).
415 Id. at 793.
416 Id. at 796.
417 Id.
take precedence.”\textsuperscript{419} California also argued that “there are fundamental differences between juvenile and adult minds.”\textsuperscript{420} Unfortunately, Scalia did not express a desire to even deliberate the impact of “unsupervised consumption of offensively violent media . . . on a minor’s developing mind.”\textsuperscript{421} Scalia offered instead the unexamined assertion that a thirteen-year-old boy playing hours and hours of unsupervised violent games was akin to the same boy reading hours and hours of Homer’s \emph{Odyssey}. The undiscerning conflation failed to appreciate the community’s interest in protecting the minor, but it did manage to demonstrate Justice Scalia’s inexorably fetishistic attitude toward the right of speech.

\textbf{CONCLUSION}

This Article has not argued for the propriety of restricting speech as a good in its own right. Rather, it argues the Supreme Court has gone too far in protecting the right of highly offensive speech. Instead of weighing the value of such speech in relation to its harms on the community, the Court has eagerly embraced a fetishistic attitude toward the right of speech. This Article has suggested, however, that said fetishism is inconsistent with the original understanding of the right of speech. This Article culled the insights provided by the original understanding of the right of speech and then endeavored to fashion them into a jurisprudence that respected the rights of the community. Specifically, this Article has suggested that under the community rights approach to the right of speech that a given law should be upheld if the speaker has reasonable alternatives to express his objectionable speech.

\textsuperscript{419} \textit{Id.} at *11.
\textsuperscript{420} \textit{Id.} at *14.
\textsuperscript{421} \textit{Id.}