objectives

AFTER COMPLETING THIS LESSON, YOU WILL BE ABLE TO:

- Discuss historical Supreme Court cases that set the precedent for hate crime laws;
- Understand the civil liberties granted to U.S. citizens through the First and Fourteenth amendments;
- Understand and discuss, through studying pertinent precedent cases, how the First and Fourteenth amendments are often at odds with one another;
- Describe the types of boundaries and limitations the U.S. Supreme Court has imposed on the First amendment; and
- Discuss the Constitutional criticisms of hate crime laws and how the courts have interpreted these.

Please do the following required reading for Lesson Ten:

- *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, by Scott Phillips and Ryken Grattet.
- *R.A.V. v. City of St. Paul, 505 U.S. 377*
- *Wisconsin v. Mitchell, 508 U.S. 476*

How can we think about constitutional challenges to hate crime law?

Since hate crime laws have emerged, concerns about their constitutionality have been put forth by civil libertarians, scholars, activists, and members of the judiciary. Specifically, people have been concerned that hate crime laws violate constitutional rights.

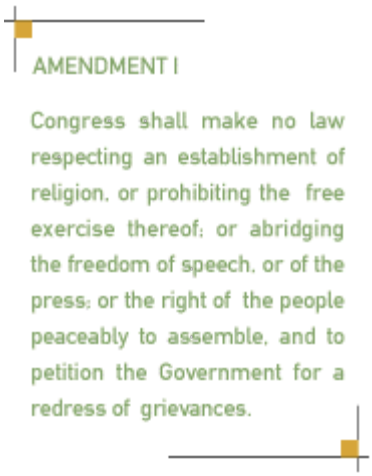
We can begin to understand these concerns by reviewing the U.S. Constitution's First and Fourteenth amendments. Then we will direct our attention to the ways in which the Court has decided key cases around freedom of expression and equal protection under the law. Finally, we will look at how the constitutionality of hate crime law has been contested and ultimately resolved.

Page 1 of the U.S Constitution

Free speech was enshrined in the First Amendment in 1791:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It is important to note that "speech" is generally used as shorthand for all forms of communication, verbal and nonverbal.



As constitutional scholar Samuel Walker explains, "The first amendment is one of the glories of American society. It is celebrated as the protector of the most precious liberty of all: the right to express oneself and to participate in the democratic process; free speech is the cornerstone of democracy; its essential element is the people's right to criticize the government" (1995:1).

As Justice Brennan put it: the central meaning of the First Amendment is that debate on public issues should be "uninhibited, robust, and wide-open" (Walker 1995).

Justice Brennan, right, shakes hands with President Eisenhower at the White House in 1956. Eisenhower had just selected Brennan to be a Supreme Court Justice.
(AP File Photo)

Interestingly, the Fourteenth Amendment and the First Amendment often provide different directions for resolve on social issues.

Click here for the full text of the Fourteenth Amendment

Before the 1920s, prevailing understandings of the First Amendment permitted the suppression of offensive forms of expression, either by statute or by executive action, under the "bad tendency" test. Anything that might have the tendency to cause social harm could be suppressed. This included criticism of the government during wartime, discussion of birth control, and any literature with sexual content.

In the 1920s, however, there was a decided shift in the Court's reaction to the "reach of free speech." Consider, for example, the case of Henry Ford.

The German ambassador (left) presents Henry Ford (center) with a Nazi medal

Ford, a rich and famous anti-Semite, was best known as the creator of the fabled Model T and the modern automobile assembly line. He was responsible for the production of the inexpensive, mass-produced automobile, which ultimately revolutionized American life.

Ford had the financial resources to disseminate his anti-Semitic views widely. His personal newspaper, the *Dearborn Independent,* had a circulation of over 600,000, and he required Ford automobile dealers to sell it as an official company product. Anti-Semitism was one of the main features of the paper, which contained long articles on the evils of Jewish people. At some point, Ford reprinted the first 80 of these articles as a book, *The International Jew: The World's Foremost Problem,* which sold over 500,000 copies.


The Ford International Weekly

THE DEARBORN INDEPENDENT

And Now Leprosy Is Yielding to Science

Fountain Lake, the Home of John Muir

Fighting the Devil in Modern Babylon

Jewish Jazz—Moron Music—Becomes Our National Music

The Chief Justices of the Supreme Court

Teaching the Deaf to Hear With Their Eyes

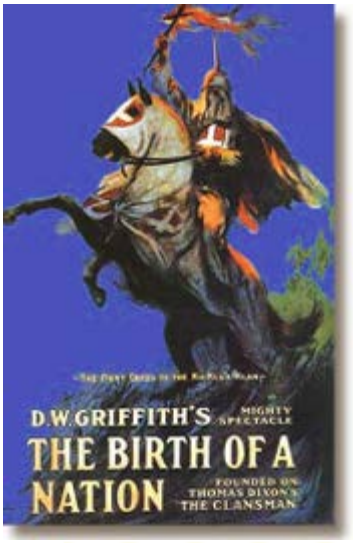
Many By-Products From Sweet Potatoes

In the 1920s, open hostility toward Jewish people was a fairly accepted practice, and there was little opposition to this kind of assault on a group of citizens. When there was opposition, however, the American Civil Liberties Union (ACLU) defended Ford successfully. Condemning Ford's "ignorant and hateful propaganda toward the Jews," the ACLU nonetheless argued that "every view, no matter how ignorant or harmful we may regard it, has the right to be heard."

In 1921, the National Association for the Advancement of Colored People (NAACP) asked the U.S. Postmaster to ban Ku Klux Klan (KKK) literature from the mail. There was ample precedent for doing so: The U.S. Postal Service had suppressed virtually all anti-war periodicals during WWI.

Although closely allied with the NAACP on civil rights issues at the time, the ACLU took issue with it on this question. Declaring that "we are as firmly convinced as you are of the iniquity of the KKK, we do not think that it is ever a good policy for an organization interested in human liberty to invoke repressive measures against any of its antagonists. It would simply create a precedent against itself."

The NAACP also attempted to have D. W. Griffith's film *A Birth of a Nation* banned in local communities because of its racist content. Gaining community support, but not legislative support, the NAACP was somewhat successful on this count, despite opposition from the ACLU.



Although *The Birth of a Nation* played into racist fears of the time (and arguably encouraged violence against blacks), it is considered one of the most influential films in terms of its cinematic qualities. Film schools across the country still use this film as the model for movie making.

What do you think about the implications of the movie at the time? Presently? Do you feel that it's appropriate to use this film as a model for other films? Why?

From Ford’s time onward, much has remained unclear about how the First Amendment applies to abusive remarks. Nonetheless, courts have steadily assumed that restriction is permissible if the danger of responsive violence is great. In the following topics, we will consider a number of cases in which this idea has been tested.

The leading case, *Chaplinksy v. New Hampshire,* was decided over half a century ago. It held that "fighting words" were not protected by the First Amendment.

As Greenwalt (1995:50) has explained:

"Chaplinksy, a Jehovah's Witness, was annoying some people with his proselytizing [near City Hall in Rochester, New Hampshire]. A city marshall warned him to 'go slow.' Chaplinksy replied that the marshall was 'a God damned racketeer' and 'a damned Fascist,' and that the whole government of Rochester was comprised of Fascists. He was convicted under a statute that forbade addressing 'any offensive, derisive or annoying word to any other person . . . [or] call[ing] him by any offensive or derisive name.' Despite the political nature of Chaplinksy's remarks and the fact that they were addressed to an official whose job presumably required a measure of self-restraint, the Supreme Court upheld the conviction."

In this case, in a decision delivered by Justice Murphy (pictured here), the Supreme Court affirmed the standing of "fighting words" in law when it found that "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. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (cited in Greenwalt 1950-51).

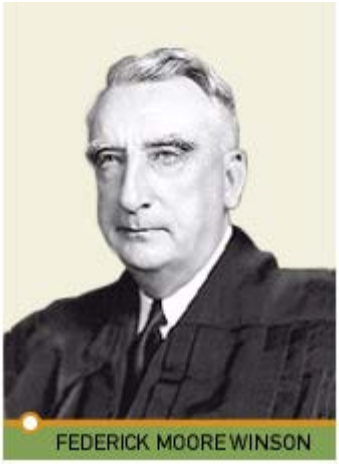

FRANK MURPHY

Reasoning that the state court had construed the statute only to cover words that “men of common intelligence would understand [to be] likely to cause an average addressee to fight,” the Supreme Court decided that the statute was neither too vague nor an undue impairment of liberty.

After *Chaplinksy,* the case of *Beauharnais v. Illinois* emerged to define the limits of freedom of expression again. Here is how it was described by constitutional scholar Samuel Walker:

"Joseph Beauharnais was the president of the White Circle League of America, which he organized in January 1950 to fight racial integration. His literature was viciously racist, calling on the mayor and city council of Chicago to 'halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro.'"

"'Whites,' it continued, were in danger of being 'mongrelized by the negro' and were in imminent danger from the 'rapes, robberies, knives, guns and marijuana of the negro.' This literature did not call for or even hint at violent resistance. On its face, it asked people to petition government officials to change public policy - actions that were clearly protected by the First Amendment. The material did fit some of the terms of the Illinois law, however. It portrayed 'criminality' in a way that held African Americans up to contempt or derision. More difficult to determine, although clearly uppermost in everyone's mind, was the other section of the law: whether the material might cause a breach of the peace. Given the immediate context of racial violence in Chicago at that time, a case could be made that any inflammatory material might trigger violence" (Walker 1995:95).



In this case, the Supreme Court upheld Beauharnais's conviction and sustained the constitutionality of the law in a sharply divided five to four decision.

The majority opinion assimilated this speech to group libel - instances in which something defamatory is said about a small group in such a way that the damaging remark falls on members of the group. The Court mentioned the danger of racial riots, which a legislature might reasonably think was made more likely by racist speech.

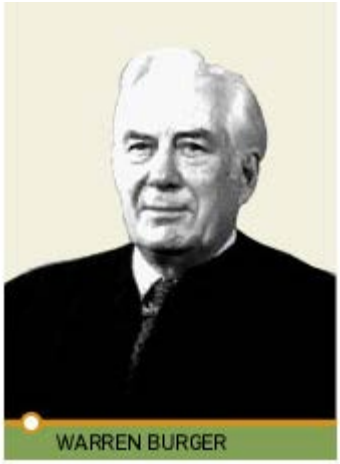
According to Walker, in this famous case "Justice William O. Douglas delivered what proved to be a prophetic opinion. He warned that allowing legislative majorities to determine which kinds of speech might be harmful to the pubic welfare opened the door to arbitrary enforcement: 'Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive [housing] covenants.' The danger was that "tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms." The decision was "a warning to every minority" (1995:97).

After reviewing these two cases, what are your thoughts about the direction of legislative control and the interpretive restrictions of the Supreme Court? What other factors of the time may have influenced such sentiment?

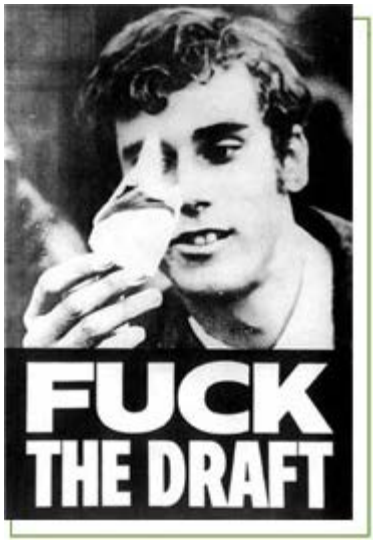
If you're unsure, search the web for examples.

To participate in the discussion, select OUTLINE from the TOOLS menu. Once you are back at the OUTLINE, select the appropriate FORUM from this lecture.

Following *Beauharnais v. Illinois,* the Court heard the case of *Cohen v. California.* In essence, this case affirmed the limits of the "fighting words" doctrine to words that were so insulting as to threaten a breach of peace.


WARREN BURGER

As Lawrence (1999:101) describes:



"In Cohen v. California, for example, the Court upheld the right of Paul Robert Cohen to wear his now-famous "Fuck the Draft" jacket in a Los Angeles courthouse. Cohen had been convicted under a California breach-of-the-peace statue for 'offensive conduct' that was defined as 'behavior which has a tendency to provoke others to acts of violence or in turn disturb the peace.' Though the Court reasserted its holding in Chaplinsky, thus allowing states 'to ban the simple use, without demonstration of additional justifying circumstances, of so-called "fighting words"' and also recognized that the phrase used by Cohen 'is not uncommonly employed in a personally provocative manner,' the Court nonetheless refused to uphold the defendant's conviction for use of fighting words. The Court held that to be guilty of using fighting words, an individual must direct 'personally abusive epithets' at a specific individual."

In essence, in *Cohen v. California,* the Supreme Court overturned the conviction of a young man who wore a jacket saying "FUCK THE DRAFT" by stressing the emotive elements of communication and their constitutional protection. From the Court's point of view, not all remarks that amount to fighting words could simply be dismissed as lacking any expressive value. More importantly, the Court imposed the "clear and present danger" test. In this case, the Court noted, no one was present who would have regarded Cohen's speech as a direct insult, nor was there any danger of reactive violence.

In 1978 conflict erupted when the American Nazi Party attempted to march in Skokie, Illinois - a community where many Holocaust survivors now live.

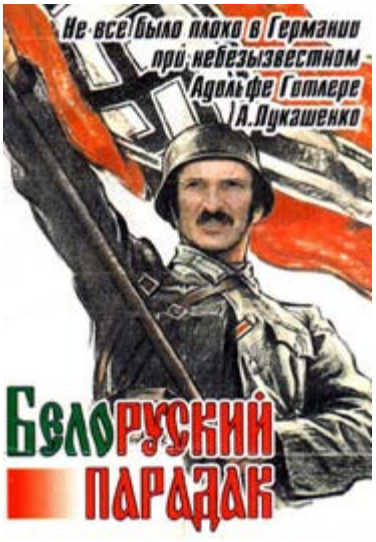
Frank Collin, leader of the National Socialist Party of America - also known as the American Nazi Party - sought permits to stage demonstrations to advertise the Nazis' platform in and around Chicago. To prevent the Nazis' plan to march in the midst of their largely Jewish community, the Village of Skokie passed an ordinance requiring the Nazis to obtain a $330,000 insurance policy before the rally.

Collin said it was impossible for him to raise that much money and that the Village's demand, in effect, banned him from speaking. Collin then wrote to the Village of Skokie informing them that he and the American Nazis would demonstrate against the insurance requirement. He said there would be no speeches nor distribution of literature aimed at any ethnic or racial groups, but that the Nazis would carry signs proclaiming "Free Speech for Whites," wear Nazi uniforms, and display the swastika emblem.

The Village Council, contending that the march would inevitably lead to violence between residents and the Nazis, went to court to prevent - the legal term is enjoin - the march scheduled for May 1, 1978. Collin asked the ACLU to represent him at the court hearing.

The lower court ordered the Nazis not to march. Collin, represented by the ACLU, then appealed to two higher courts, which postponed the hearings indefinitely. The Supreme Court of the United States held that the Illinois courts had to hear the case and decide whether the injunction to prevent the demonstration should hold. The Illinois Supreme Court removed the injunction, and Collin was free to demonstrate in Skokie.

Faced with heavy community opposition in Skokie, Collin's band chose instead to demonstrate in downtown Chicago, where there was heavy police protection to prevent violent clashes with protesting groups.



The court ruled that "Nazi symbols and their implied advocacy of genocide did not constitute fighting words as defined in *Chaplinksy.*" According to the Court, the primary reason Nazi symbols and their implied advocacy of genocide did not constitute "fighting words" was because no face-to-face confrontations were planned, and the village of Skokie conceded there was no threat of responsive violence.

To illustrate the various perspectives involved in the Skokie event, let's consider the words of various key players.

Nazi leader Frank Collin said:

"We will use the right to free speech to gain political power, through the legal means, hopefully. Then we will define citizenship as belonging only to Aryan Americans."

In contrast, a German concentration camp survivor said: "Does a man really have a right to come to my front door and say he is going to kill me? This is the way Hitler started in Germany, with a small band."

The American Civil Liberties Union stated:

"The issue is not *who* is speaking or what they are saying. The issue is that in a free society anyone can say anything."

And African-American leader Reverend Jesse Jackson said:

"The threat of the Nazis on the Jews is real - they have killed before. The threat of the Klan on the Blacks is real - they have killed before. We have a moral obligation to resist the spread of evil."

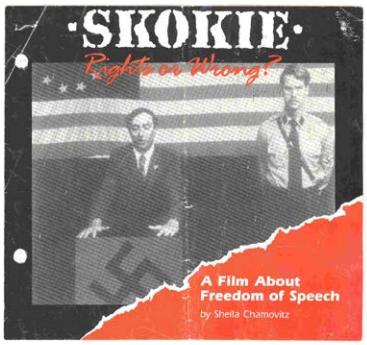
Clearly, the events in Skokie presented a collision of two strongly held values: a Constitutional guarantee of unrestricted freedom of speech and a deep moral aversion to and fear of Nazism.

At first, it is easy to sympathize with the concentration camp survivors and other minority groups. It seems wrong to expose them to the hatred and pain the march would cause. After all, Hitler began by making speeches in the streets and many dismissed him as a lunatic with little chance of gaining real power. Perhaps it COULD happen here.

What do you see as the major differences between these two cases and the earlier cases? Begin to think about how the *Cohen* and *Skokie* decisions affect what we now know as hate crime laws. Would these cases be in potential conflict with hate crime statutes if they occurred today?

To participate in the discussion, select OUTLINE from the TOOLS menu. Once you are back at the OUTLINE, select the appropriate FORUM from this lecture.

Yet, there is a dilemma. The First Amendment guarantees free speech and assembly. This applies to everyone, including Nazis, the Ku Klux Klan, the NAACP, Communists, and any individuals who want to place political signs on their own private property.



Please debate the following questions:

- Is it potentially dangerous to defend the freedom of speech of those who, if they had the power, would surely deny the same freedoms to others?
- If we deny freedom of speech to any group, however abhorrent, will it set a dangerous precedent?
- By allowing the Nazis to march and speak, are we relinquishing our moral duty to resist the spread of evil?

To participate in the discussion, select OUTLINE from the TOOLS menu. Once you are back at the OUTLINE, select the appropriate FORUM from this lecture.

Finally, consider the case of *R.A.V. v City of St. Paul.*

The St. Paul City Ordinance makes it a misdemeanor to place "on public or private property a symbol, object, appellation, characterization, or graffiti that arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." The ordinance specifically mentioned the "burning of a cross or Nazi swastika as examples of such symbols or objects."

The law extended very broadly, covering the mere display of symbols, with no requirement that they be directed toward a specific individual, be intended to harass that person, or be likely to incite a breach of the peace. The prohibition of displays on private property clearly limited what people could do in their own front yards.

According to Samuel Walker (1994:155-157):

“There was considerable uncertainty among court watchers about how the justices would rule. The St. Paul case itself involved a relatively low level of violence. A group of teenagers, including Robert Viktora, put together a crudely made cross and burned it on the front lawn of a black family who lived across the street. In some respects the incident was a run-of-the-mill juvenile prank. But there was no mistaking the meaning of the burning cross, the traditional symbol of the Ku Klux Klan It was a racist incident and, in the context of similar incidents across the country, a matter to be taken seriously. Viktora was charged in juvenile court under the Bias-Motivated Crimes Ordinance. Because he was a juvenile at the time of the original action, he was referred to as R.A.V. – hence the name of the ultimate court case.”

Consider the language of the St. Paul ordinance. With much of the current opposition to big corporations (and major corporate scandals), can you think of some previously innocuous symbols that would be considered offensive and fall in violation of St. Paul's statute? Some jurisdictions, for example, have recently considered banning the Starbucks logo.

To participate in the discussion, select OUTLINE from the TOOLS menu. Once you are back at the OUTLINE, select the appropriate FORUM from this lecture.

In what many regarded as a surprising decision, the Supreme Court declared the St. Paul ordinance unconstitutional.

The law represented a prohibition on expression based on its content, and Justice Scalia wrote, "That is precisely what the First Amendment forbids." The decision was unanimous, but the justices disagreed sharply over the rationale.

The most surprising aspect of the division of opinion was that the more conservation justices were in the majority, striking down the ordinance on broader grounds than the more moderate justices. Scalia, widely regarded as the most conservative of all, wrote the majority opinion.

JUSTICE ANTONIN SCALIA

The St. Paul ordinance was unconstitutional on its face because it prohibited only certain kinds of speech based on their content. It covered fighting words related to race, color, creed, religion, or gender but not similar words related to, for example, "political affiliation, union membership, or homosexuality." Even worse, Scalia argued, the ordinance discriminated among particular viewpoints. The advocate of racial or religious tolerance could use many forms of invective, but that speaker's opponents could not.

Four justices agreed that the ordinance was unconstitutional, but for different reasons. Justices White, O'Connor, Blackmun, and Stevens were generally regarded as the more moderate members of the Rehnquist Court. They argued that the law was unconstitutional because of its breadth. This particular ordinance went too far, they argued, but a prohibition on fighting words that did not involve the exchange of ideas and were used only "to provoke violence or to inflict injury" was compatible with the First Amendment.

Based on your review of other cases, what do you think about the Constitutionality of the St. Paul ordinance? Based on history (for example, the atrocities in Nazi Germany being attribute to a lack of intervention), what do you think of the ordinance?

To participate in the discussion, select OUTLINE from the TOOLS menu. Once you are back at the OUTLINE, select the appropriate FORUM from this lecture.

Moving beyond the single case of *R.A.V. v. St. Paul,* in the early 1990s, hate crime laws ignited a vigorous constitutional debate. Phillips and Grattet (2000) have inventoried and analyzed appellate cases that have considered the constitutionality of hate crime laws occurred between 1991 and 1995.

Phillips, Scott and Ryken Grattet (2000) "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." Law & Society Review, 34, 567-606.

According to Phillips and Grattet, a commentary published in a *U.C.L.A. Law Review* article by Susan Gellman (the leading critic of the laws) exemplifies the controversy surrounding hate crime laws during this period:

“The debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, when either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents’ point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on both sides at once” (1991: 334).

In *State v. Mitchell,* the Wisconsin Supreme Court echoed Gellman's sentiments: "This case presents an issue which has spawned a growing debate in this county: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crime statutes and some vigorously in opposition. Individuals and organizations traditionally allied behind the same agenda have separated on the issue of the legitimacy of hate crime statutes" (1992: 160).

According to Philips and Grattet, at the heart of such contestation are several First Amendment and Fourteenth Amendment constitutional questions.

Three First Amendment challenges have been raised: punishment of speech, overbreadth, and content discrimination.

Punishment of speech challenges suggest that hate crime laws punish speech rather than action. Because the underlying offense, such as assault, is already punishable, the penalty enhancement must be directed at the actor's bias motive. Bias-motivation, in turn, is inextricably tied to beliefs and opinions (c.f., *State v. Mitchell 1992).*

Overbreadth challenges have a similar focus, contending that the sweeping language of hate crime statutes encompasses legitimate forms of expression, and may have a "chilling effect" on constitutionally protected speech (c.f., *State v. Mitchell* 1991).

Content discrimination challenges argue that hate crime laws regulate speech based on the subject being addressed. While entire forms of expression such as "fighting words" are proscribable, statutes cannot further regulate particular fighting words (c.f., *R.A.V. v. St. Paul* 1992). For example, a statute cannot punish fighting words related to racial animus more than fighting words related to hatred of the adversary's family.

In addition, two Fourteenth Amendment questions have been raised: equal protection and vagueness.

Equal protection claims suggest that hate crime laws give preferential treatment to those with certain status characteristics (c.f., *State v. Beebe 1984*).

Vagueness claims suggest that hate crime laws violate due process because they are so nebulous that the average person cannot predict what behavior will violate the statute (c.f., *In re M.S.* 1995). The central constitutional issues regarding speech, due process, and equal protection presented perplexing questions upon which reasonable people could, and did, disagree. Yet such questions have now been largely resolved. In recent years, a consensus has emerged among jurists that hate crime laws - or at least some form of hate crime laws - are indeed constitutional.

In response to vagueness challenges (claim: vagueness), jurists often note that hate crime statutes have a plain meaning that can be interpreted by ordinary people (argument: plain meaning). Frequently, judges bring multiple arguments to bear on a particular claim.

For example, in response to the claim that hate crime laws punish speech (claim: punishment of speech), judges may argue that the state has a compelling interest in curbing hate crimes that outweighs any incidental regulation of speech (argument: compelling interest); or that hate crime laws punish the action of selecting a particular victim (argument: hate crime laws only punish action).

Phillips, Scott and Ryken Grattet (2000) "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." Law & Society Review, 34, 567-606.

After analyzing the arguments for and against the constitutionality of hate crime law in the United States, Phillips and Grattet (2000) concluded:

“The findings presented here are relevant for the political and legal controversies that surround the concept of hate crime, not because they point to particular forms of hate crime law that are better or 'more effective' than others but because they help to temper the dominant critique of the laws. For example, in their recent criticism of hate crime laws Jacob and Potter (1998) argue that the concept is so amorphous and unfamiliar to judges, prosecutors, and law enforcement that it results in resource waste and selective enforcement as these actors strain to determine when to use the law and when not. But part of what makes a legal concept 'useful' to officials is whether or not they share a 'fixed' sense of what it means. Our research shows that the property of 'fixedness' results from a temporal process involving the institutionalization of the category and the rhetorical practices that surround it. To critique a concept because it appears ambiguous to officials within the criminal justice system amounts to a critique of the concept’s 'newness.' As they have done with other innovative crime concepts like domestic violence and stalking, judges and prosecutors are quite clearly converging around what hate crime means.”

The bottom line is clear: Appellate courts, including the U.S. Supreme Court, have upheld the constitutionality of (some) hate crime laws. Now, they are part and parcel of the “law of the land.”

summary

IN THIS LESSON YOU LEARNED:

- Several landmark cases have paved the way for hate crime laws. *Chaplinksy, Beauharnais, Cohen v. California, Skokie, R.A.V. v. St. Paul,* and *Wisconsin v. Mitchell* (and others) deal specifically with issues related to the First and Fourteenth Amendments, which sometimes impede one another.
- The First Amendment deals not only with speech but with gestures, symbols, and other forms of expression. The Supreme Court has always placed limitations or qualifiers on the right to free speech. The cases included here demonstrate how these qualifiers have evolved over the last century.
- Further, the states routinely introduce legislation that is held in conflict with these rulings - Fourteenth Amendment implications.
- The courts have interpreted Constitutional criticisms against hate crime laws as either too vague or too broad.
- Pendulum shifts regarding constitutionality and hate crime laws in the high courts continue as time goes on.