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# Balancing A Burning Cross: The Court and Virginia v. Black, 38 J. Marshall L. Rev. 1205 (2005)

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# BALANCING A BURNING CROSS: THE COURT AND *VIRGINIA v. BLACK*

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## I. INTRODUCTION

I have never seen a cross-burning in person. I do not know what it is like to wake up in the middle of the night to see the blazing cross light up the night sky, to see the fire so close to my house. I do not know what it is like to have to gather my family together, call the police and fire department, and make sure everything is okay. I do not know what it is like to know that everything is not okay, that the next thing that could be burned is my house. I do not know what it is like to receive a threat in this manner, that means either you leave, or the next thing that burns is your house with your children inside. I do not know what any of this is like. But, what I do know is that this crime of hate and violence should be regulated – it cannot, nor should not, go unpunished. Yet, can this be done in light of the First Amendment? We may have received an answer – if we look hard enough.

*Virginia v. Black*,[1] handed down by the Supreme Court on April 7, 2003, finally cleared up the debate over the constitutionality of cross-burning laws that was launched in the aftermath of *R.A.V. v. St. Paul*.[2] Or did it? *Black* is an extremely complex decision, one that the New York Times Editorial Board[3] got wrong in their first attempt to analyze it.[4] With that taken into consideration, maybe it is correct to say that, *at first*, *Black* did not clear up the confusion, but rather, created more confusion for the states and municipalities seeking to ban cross-burning.

It is also possible that the heavily-fractured Court in *Black* not only clarified its holding in *R.A.V.*, but also laid the groundwork for a

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1. 538 U.S. 343 (2003).
2. 505 U.S. 377 (1992).
3. *A Decision on Cross Burning*, N.Y. TIMES, Apr. 8, 2003, at A22.
4. *See* David Tell, *Soon to be a Major New York Times Correction: A New York Times Editorial gets a Supreme Court Decision Exactly Wrong*, THE WEEKLY STANDARD, Apr. 9, 2003, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/002/520igsbz.asp (last visited Sept. 3, 2005) (stating that the "[N.Y.] Times editorial – page version of this screw-up is by far the most spectacular" even though an accurate article regarding the *Black* opinion appeared in the N.Y. Times also that day).

fundamentally sound doctrine on cross-burning bans. This paper argues exactly that. For all of its shortcomings, the majority in *Black* did get it right, and delivered a thoughtful and fair opinion. Most importantly to Civil Rights activists[5] is the fact that, unlike in *R.A.V.*, the Court recognized the long and terror-filled history of cross-burning, and accorded it a special place in our history.

In Part I, this article explores the similarities of the early-1990 decisions of *Texas v. Johnson*[6] and *R.A.V.*, as well as their inherent differences that should have led the Supreme Court to reject a blanket treatment of flag burning and cross burning. An important note at the outset is that there were some, myself included, that may have agreed with the basic holding of *R.A.V.*, yet strongly disagreed with Justice Antonin Scalia's dicta in rendering the Court's decision.

Next, Part II explains and analyzes the *Black* decision. Because *Black* is still a relatively recent opinion, its holding and multiple opinions have not yet been fully explored, and this paper seeks to do exactly that. The concurring and dissenting opinions provide an important look into the split on the Court with regard to First Amendment jurisprudence. Special note will be made of Justice Clarence Thomas' dissenting opinion[7] and his uncharacteristic questioning during oral arguments.

Part III explores the soundness of the Court's opinion and explains the possible ramifications in light of today's watch-what-you-say society.[8] For example, if cross burning holds a significant place in our society, which is in part why it is proscribable, does displaying a picture of Osama Bin Laden also hold such a place? In this Part, I engage in my own original analysis due to the relatively new situation we all find ourselves in. I conclude Part IV by summarizing the state of the law, post-*Black*, and offer final thoughts and insights into the case.

## II. SYMBOLS OF EXPRESSION

In a pair of decisions, the Supreme Court made a strong statement for the protection of the most extreme and revolting "symbols."[9] *Johnson*,[10] decided in 1989, addressed laws that prohibited flag burning. *R.A.V.*, decided in 1992, seemed to equate flag burning laws with those seeking to ban cross burning. In both cases, the Court held that all of these laws violated the First Amendment. In order to understand *Black* and the current

5. Mari J. Matsuda & Charles R. Lawrence III, *Epilogue* to MARI J. MATSUDA ET. AL'S WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 133 (1993).

6. 491 U.S. 397 (1989).

7. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

8. *See* Press Release, Ari Fleischer, Office of the Press Secretary, The White House, (Sept. 26, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html (stating that the public should curtail certain speech in light of the 9-11 attacks). Disapproval of Mr. Fleischer's statements could be the subject of another article.

9. I use quotes around 'symbols' to signify that those who agreed with the Court's decision looked at the objects in question as symbols.

10. 491 U.S. at 400.

doctrine expounded by the Court, it is important to grasp the basics of *Johnson* and the opinion and ramifications of *R.A.V.*

### *A.* Texas v. Johnson *and Free Expression*

In describing the flag burning incident in *Johnson*, Justice William Brennan, writing for a five justice majority,[11] stated that "[n]o one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag-burning."[12] This statement sums up the complaint of those who would like to see flag burning prohibitions – they believe that burning a flag is *so* offensive to their senses that it should rise to the level of proscribable expression.[13] The Court rejected this course of action in a methodical fashion. The Court first looked at whether the State of Texas' regulation was "related to the suppression of expression."[14] Using the test expounded upon in *Brandenburg v. Ohio*,[15] the Court found that burning a flag was not "directed to inciting or producing imminent lawless action,"[16] and was also not "likely to incite or to produce such an action."[17] In fact, the Court stated that to accept the argument that flag burning meets this standard would be to "eviscerate our holding in *Brandenburg*. This we decline to do."[18]

The Court next drew on *Chaplinsky v. New Hampshire*, and held that flag burning does not fall within the proscribable class of "fighting words," such that would be "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[19] As the Court stated, burning a flag as a protest against the Federal Government cannot be regarded by a reasonable onlooker as a personal insult or a challenge to a fight.[20] Therefore, the Court rejected Texas' misguided interest in preserving the peace by using *Brandenburg* and *Chaplinsky*.

In rejecting the state's arguments, the Court found that Texas was regulating flag-burning because of what the conduct itself symbolized. The Court stated that "Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the

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11. The majority consisted of Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy (who also signed a concurring opinion). Chief Justice Rehnquist and Justices White and O'Connor dissented, as did Stevens, who filed a separate dissenting opinion.

12. *Johnson*, 491 U.S. at 399.

13. *Compare to* Am. Civil Liberties Union, *Talking Points on Opposing the Flag Desecration Amendment*, (Mar. 4, 2004), *available at* http://www.aclu.org/news/NewsPrint.cfm?ID=12177&c=50 (last visited Sept. 3, 2005).

14. *Johnson*, 491 U.S. at 403.

15. 395 U.S. 444 (1969).

16. *Johnson*, 491 U.S. at 409 (quoting *Brandenburg*, 395 U.S. at 447).

17. *Id.*

18. *Id.*

19. *Johnson*, 491 U.S. at 409 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

20. *Id.*

flag to the 'most exacting scrutiny.'"[21] The Court subjected the Texas law to strict scrutiny, and held that, while there may be a state interest in protecting the flag, it does not rise to the level of criminal punishment.[22] Put simply, the majority of the Court believed that Texas was singling out a political belief and punishing people's expression of that belief:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting a flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial.[23]

In essence, the Court expounded upon the maxim of fighting speech with more speech, rather than curtailing the original speech. This is a fundamentally sound argument against content-based or viewpoint-based regulation, which would stifle the "marketplace of ideas."[24] It is difficult to believe that those burning a flag are making anything other than a political statement. There are those that may find it revolting, but it is hardly threatening or inciting. There is no connection between burning an American flag and those flag burners going on to overthrow the government.[25] Burning a flag is a political statement, not a threat. This makes it inherently different from some cross-burnings, yet the Court in *R.A.V.* declined to agree.

### *B.* R.A.V. v. St. Paul *and the Hate Speech Doctrine Expounded. . .Sort of*

Justice Scalia, who signed onto the majority opinion in *Texas v. Johnson*, wrote the majority opinion for the Court in *R.A.V. v. St. Paul.* At issue was a St. Paul ordinance that stated:

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21. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

22. *Id.* at 416-18.

23. *Id.* at 419-20.

24. Steven Shiffrin, *The First Amendment and the Meaning of America, in* IDENTITIES, POLITICS, AND RIGHTS 318 (Austin Sarat & Thomas R. Kearns eds., 1995).

> The flag-burning prohibition is a naked attempt to smother dissent. If we must have a 'central meaning' of the First Amendment, we should recognize that the dissenters – those who attack existing customs, habits, traditions and authorities – stand at the center of the First Amendment and not at its periphery.

*Id.* After *Johnson*, Congress passed the Flag Protection Act of 1989. This was a federal attempt to criminalize flag-burning or any other mutilation of a flag. In *United States v. Eichman*, the Court struck down the law and stated "the Government's asserted *interest* in protecting the "physical integrity" of a privately owned flag . . . is related to the suppression, and concerned with the content, of free expression." 496 U.S. 310 (1990).

25. Some may bring up the fact that burning American flags in foreign countries, which has been happening more frequently, illustrates that there are those who burn flags in the U.S. with similar views of utter hatred and disgust towards our system of government and that they are "un-American." However, as the Court stated in *Johnson*, flag burning is a political view of dissent, and should not be regulated solely because its content is disapproved by many. 491 U.S. at 418.

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi Swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[26]

The ordinance was held to be facially unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[27]

The Court started its analysis by saying "[c]ontent-based regulations are presumptively invalid."[28] This applies even within those categories of speech that are constitutionally proscribable.[29] For instance, and directly relevant here, while fighting words can be regulated under the First Amendment, specific types of fighting words cannot be banned solely because of their content or because of the ideas they express.

Even though content-based discrimination is presumptively invalid, the Court recognized that in situations when the "basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[30] This exception provided the most confusion. Was the Court saying that if the St. Paul ordinance banning cross burning caused alarm or resentment based on any category, then it could fall into this exception? Or, is the Court saying that if the St. Paul ordinance banned the burning of any symbol that could cause alarm and resentment, then it would fall under the exception? We learn in *Black* that the Court meant the former, rather than the latter. However, the *R.A.V.* opinion created much confusion.[31]

Further, the *R.A.V.* opinion generated anger amongst many for its nonexistent discussion of the harms of cross burning. Justice Scalia placed this "speech" in the fighting words category, yet provided no direct analysis as to why this would not be considered a true threat. Granted, this could be because of the structure of the statute – "arouses anger, alarm or resentment" – yet it was never explored in depth. Because of that, many scholars overlooked the actual reasoning for the holding and focused on what seemed

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26. St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990) (*quoted in R.A.V.*, 505 U.S. at 380).

27. *R.A.V.*, 505 U.S. at 381.

28. *Id.* at 382.

29. *See* examples and cases listed *infra* notes 71-74.

30. *R.A.V.*, 505 U.S. at 388.

31. *See, e.g.*, Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS. L. REV. 553 (1996)(stating the many exceptions to the courts holding "invite[d] confusion as to their scope and application"); Jonathan M. Holdowsky, *Out of the Ashes of the Cross: The Legacy of R.A.V. v. City of St. Paul*, 30 NEW ENG. L. REV. 1115 (1996)(noting that *R.A.V.* "confused the landscape of first amendment jurisprudence").

to be an inefficient discussion of the harms and true threats of cross burning.[32]

## II. NOTHING LIKE 'CLARITY' TO CONFUSE THE MATTER: *VIRGINIA v. BLACK* EXPLAINED

### *A. Procedural and Factual History*

As stated in the Introduction, *Virginia v. Black* at first appeared as if it would not provide clarity or guidance to the *R.A.V.* decision. Major news organizations did not even understand the holding,[33] and the differing opinions, combined with the bifurcated structure of the statute, further created confusion. The Virginia statute at issue stated:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[34]

For purposes of deciding the case, and because they inherently presented different constitutional issues, the Court divided up the statute into two different parts. First is the "intent of intimidating" clause of the statute, and second is the "prima facie evidence" clause.

Next, the facts of the case should be considered (keeping in mind that this is actually a consolidation of three separate challenges to the Virginia statute) because each case implicates a different constitutional question created by the statute. Barry Black, Richard Elliot, and Jonathan O'Mara were all convicted under the Virginia statute, yet under different circumstances. Black was the leader of a Ku Klux Klan rally in which twenty-five to thirty people attended. The rally occurred on private property with the permission of the owner, and consisted of Klan members expressing their beliefs and discussing "what they [Klan members] were."[35] The end of the rally consisted of the Klan members gathering around a twenty-five to thirty foot cross that was lit ablaze and could be seen up to 350 yards away.[36] A sheriff, who was knowledgeable about the cross burning statute, observed the rally. He approached the Klan members and asked them to identify their leader.[37] When Black responded that he was the leader, the sheriff stated that

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32. Judith Butler, *Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199 (1996); Michele M. SimmsParris, Comment, *What Does it Mean to See a Black Church Burning? Understanding the Significance of Constitutionalizing Hate Speech*, 1 U. PA. J. CONST. L. 127 (1998).

33. *See supra* notes 3-5 and accompanying text.

34. VA. CODE ANN. § 18.2-423 (Michie 1996) (*quoted in Black*, 538 U.S. at 348).

35. *Black*, 538 U.S. at 348.

36. *Id.* at 349.

37. *Id.*

"[t]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this."[38]

Black was then charged with "burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423."[39] At his trial, the jury was instructed, which is extremely important to note, that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[40] This statement was an interpretation of the prima facie clause of the statute, and was "taken straight out of the [Virginia] Model Instructions."[41] The jury found Black guilty and the Court of Appeals affirmed his conviction.

Elliot and O'Mara, who were *not* members of the Klan,[42] burned a cross in the front yard of the Jubilee family. The Jubilees were an African-American family who lived next door to Elliot. They claimed that Elliot had shot a firearm into their yard. Shortly thereafter, during the night of May 2, Elliot and O'Mara drove a pickup truck onto the Jubilees' property, planted a cross in their front yard, and set the cross ablaze.[43] The Court stated that, "[t]heir apparent motive was to 'get back' at Jubilee for complaining about the shooting in the backyard."[44] Both O'Mara and Elliot were charged with attempted cross-burning and conspiracy to commit cross-burning. O'Mara plead guilty, yet reserved the right to challenge the constitutionality of the statute.[45] Elliot, on the other hand, was tried and convicted for the attempted cross-burning. At his trial, the court told the jury that Virginia had to prove "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons."[46] The court did not instruct the jury on the prima facie evidence provision or on the definition of the word "intimidate."[47] The Court of Appeals affirmed both O'Mara and Elliot's convictions.

The Virginia Supreme Court consolidated the three cases and held that the statute was unconstitutional on its face.[48] As noted in the court's majority opinion, the majority in the Virginia Supreme Court believed that the Virginia statute was "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*," and still amounted to content-based discrimination because it sought to proscribe the specific message that

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 349-50.
42. This is important because some opponents of cross-burning prohibitions believe that the statute solely targets the Klan. This is proof that other individuals – those not in the Klan – burn crosses with the intent to intimidate, and – as I will go on to explain – do not necessarily burn crosses because of the target's race.
43. *Black*, 538 U.S. at 350.
44. *Id.*
45. *Id.* at 350.
46. *Id.* at 351.
47. *Id.*
48. *Id.*

burning a cross conveys.[49] As a final note, the Virginia Supreme Court held that the prima facie provision was overbroad, thereby creating a possibility that speech could be chilled.[50]

### *B. The United States Supreme Court Opinions*

With that procedural background laid out, it is now possible to begin to analyze the different opinions that the Justices presented. The majority of the Supreme Court found that the "intent to intimidate" provision in the Virginia statute was constitutional. The majority consisted of Chief Justice Rehnquist and Justices O'Connor, who penned the opinion, Stevens, Scalia, and Breyer; an interesting mix of Justices, to say the least. Justice Thomas, in a separate opinion, also found this provision to be constitutional, but for different reasons. The three Justices that believed this provision was constitutionally unacceptable were Souter, Ginsburg, and Kennedy. They believed that, in *all cases*, bans on cross burning are content-based discrimination.

However, the fact that a majority of Justices found that the "intent to intimidate" provision was constitutional, did not render a belief that the *statute as a whole* was constitutional. In fact, the majority of the Court held the Virginia statute to be *unconstitutional* and remanded it back to the Virginia Supreme Court because of the constitutional problems with the prima facie provision of the statute. Only Justices Scalia and Thomas believed that this provision was constitutional. In the opinion of Justices Souter, Ginsburg, and Kennedy, the whole statute (both provisions) was unconstitutional. The plurality opinion written by O'Connor (which became a plurality opinion in regards to the prima facie provision because Scalia did not sign on to these parts of the opinion, and rather, wrote separately) found constitutional problems with this provision and thereby held the entire statute unconstitutional and remanded back to Virginia for further proceedings.[51]

In sum, the statute was held unconstitutional because of the prima facie provision, yet bans on cross-burning (such as the one seen by the "intent to intimidate" provision) do not pose constitutional questions of content-based discrimination. This was how the Court reconciled the *Black* opinion with *R.A.V.* In *R.A.V.*, the statute banned cross-burning when used to create "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,"[52] whereas the Virginia statute did not provide categories on the basis of resentment.[53] An illustration may provide a clear example: If a cross is burned in Virginia with the intent to intimidate someone because he is a Democrat, that would violate the law. However, under the St. Paul ordinance, this would not be a crime because political affiliation was not one of the grounds stated. This is why the Court held that content-based discrimination existed in *R.A.V.*, yet did not hold the same in *Black*.

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49. *Id.*
50. *Id.*
51. The discussion of the *Black* case on remand is included in the following sections.
52. ST. PAUL, MINN., LEGIS. CODE § 292.02 (*quoted in R.A.V.*, 505 U.S. at 380).
53. VA. CODE ANN. § 18.2-423 (*quoted in Black*, 538 U.S. at 348).

### *1. O'Connor's Opinion*[54]

Justice O'Connor's opinion is the controlling authority in *Virginia v. Black*. It is divided into five parts and can be generally classified as follows: I) Procedural history; II) History of cross-burning and its impact on the African-American community; III.A) General doctrines of proscribable speech; III.B) Consideration of *R.A.V.* as applied to the "intent to intimidate" provision; IV) Overbreadth analysis of the prima facie provision; and V) Result and disposition. Parts I-III represent a majority of the Court, while Parts IV and V represent a plurality of four Justices.

Unlike in *R.A.V.*, the Court in *Black* considered the history of cross-burning in America and its special psychological impact upon society.[55] The Court explored the origins of cross-burning and its rise as a tool of the Klan.[56] Also, the Court discussed the intertwined history of the Klan, and specifically discussed the rise of the second Klan in 1915 after popular culture films like "A Birth of a Nation", which glorified the Klan, gained notoriety.[57] In assessing the point of cross burning, the Court stated: "From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology."[58] This distinction is important, for the Court refers back to this history in order to support its beliefs that only cross-burnings with the "intent to intimidate" could be banned.

For the first possible message of cross-burning – the threat of violence – the Court invoked the idea that the burning of a cross was used and widely known "as a tool of intimidation and a threat of impending violence,"[59] and that cross-burnings "embodied threats to people whom the Klan deemed antithetical to its goals,"[60] regardless of race, religion, or ethnicity. The Court also made a statement that many wished it would have made in *R.A.V.*: "[T]he history of violence associated with the Klan shows that the possibility of injury or death [after a cross-burning] is not just hypothetical."[61] From the history cited, the Court concluded that in some cases, burning a cross is a threat of imminent danger – with no other message. Furthermore, the effect of a cross-burning reverberates through the community, and when a cross is burned on a front lawn, the message is extremely clear: get out or the next object that burns is your house.

The Court then embarked on a discussion of the other possible messages for a cross-burning – shared ideas among a group of like-minded

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54. I do not include a separate section for Justice Stevens concurring opinion because of its brevity. However, Stevens signs on to O'Connor's opinion, which is explained above.

55. *Black*, 538 U.S. at 352-57. It is a matter of time to see whether the concerns expressed *supra* notes 33-34 will be satisfied by the narrative of the Court in Part II of its opinion.

56. *Id.* at 352-55.

57. *Id.* at 353-54.

58. *Id.* at 354.

59. *Id.*

60. *Id.* at 355.

61. *Id.* at 357.

individuals.[62] Recognizing that the burning cross became a symbol of the Klan, the Court explained how a burning cross can be the climatic conclusion of a rally in which political, social, and cultural views were expressed.[63] Furthermore, and much to Justice Thomas' disapproval,[64] the Court noted that the burning cross can be used as a sign of protest and even a political statement.[65]

Summing up the historical findings, the Court stated:

> To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." . . . And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed.[66]

Therefore, the majority opinion set up the dichotomy between burning a cross for intimidating purposes, and for any other purpose. This is a distinction that angered Justice Thomas and allowed the Court to sidestep the issue of suppressing political speech. Because the Virginia statute only banned cross-burning done with an intent to intimidate, the Court was able to walk that fine line in upholding the ban. Yet, as can be seen in the discussion of the prima facie provision, once cross-burning is banned because it falls in the second category (hateful message), it becomes non-proscribable speech and, therefore, may be an unconstitutional ban. This will become clearer as the specific parts of the opinion, and therefore, the provisions, are addressed.

In Part III of the *Black* opinion, the majority makes its impact on First Amendment doctrine and clarifies aspects of *R.A.V.* that had confounded scholars for eleven years. The majority began its discussion of prior First Amendment decisions by quoting Justice Oliver Wendell Holmes from his dissent in *Abrams v. United States*, reaffirming the idea that free speech is to allow "'free trade of ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[67] In what could be looked at as its preemptive strike against being considered discriminatory toward an unpopular position, the Court then turned to the *Johnson* opinion.[68] This was important to establish that the Court was not allowing content-based discrimination in this case.

After the introduction, the Court recognized that the First Amendment is not an absolute blanket protection for all speech and expression, and outlined the four major categories that present proscribable speech situations:

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62. *Id.* at 356.

63. *Id.* (stating how two individuals were married under a blazing cross).

64. *Id.* at 388 (Thomas, J., dissenting).

65. *Id.* at 357.

66. *Id.* (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).

67. *Black*, 538 U.S. at 358 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919)).

68. *Id.* (quoting *Johnson*, 491 U.S. at 414 (1989)).

1) words that inflict injury;[69] 2) fighting words;[70] 3) incitement to lawlessness;[71] and 4) "true threats."[72] According to the majority, cross-burning with the intent to intimidate falls into the fourth category. The Court then defined a true threat as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[73] Intimidation, according to the Court, "is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[74] To complete the application, the Court, relying on its Part II historical review, stated, "cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[75]

The fact that the Court placed cross burning with the intent to intimidate under the "true threat" category is very note worthy. In essence, the Court is speaking louder with its actions than with the simple words in Part II. For it would be one thing to talk about the history of violence associated with cross-burning and then apply the fighting words analysis, as was done in *R.A.V.*, yet another thing to recognize cross-burning as a threat. Unlike *R.A.V.*, the *Black* Court applied the "true threat" analysis.[76] The Court followed the position of many scholars, activists, and victims: that cross-burning can be nothing more than a threat. It is not a provocation, but rather a statement that violence will follow.

The Court then addressed whether or not the Virginia Supreme Court was correct in holding that the statute amounted to content and/or viewpoint discrimination. In rejecting that position, the Court distinguished the ordinance in *R.A.V.* from the Virginia statute. The St. Paul ordinance only targeted content that would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[77] Because there were specific subjects listed, it thereby affected certain viewpoints of the cross burner. For instance, the ordinance covered those that expressed racist or anti-Semitic views, but did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas – to express hostility, for example, on

69. *Black*, 538 U.S. at 359; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are proscribable).

70. *Black*, 538 U.S. at 359; *see also* Cohen v. California, 403 U.S. 15, 20 (1971) (noting that words are proscribable "when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").

71. *Black*, 358 U.S. at 359; *see also Brandenburg*, 395 U.S. at 447 (per curium) (stating that words are proscribable "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

72. *Black*, 358 U.S. at 359 (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curium)).

73. *Black*, 538 U.S. at 359.

74. *Id.* at 360.

75. *Id.*

76. *Id.* at 359.

77. ST. PAUL, MINN., LEGIS. CODE § 292.02.

the basis of political affiliation, union membership, or homosexuality."[78] Meanwhile, as noted above, the Virginia statute made no such distinctions that would weigh one viewpoint over another. However, the next question that was raised was with regard to the regulation of the burning of a cross *itself*: Is banning cross-burning, while not banning any other type of symbolic burning, content-based discrimination?

In short, the Court said no, it is not. Turning back to *R.A.V.*, the Court found exceptions to the content-based-discrimination-is-unconstitutional rule. Utilizing the "particularly virulent" exception, the Court held that banning cross-burning is not unconstitutional content-based discrimination.[79] In essence, this is a way of getting around content or viewpoint based discrimination by recognizing the severity of the harm created by the speech or expression. The Court provided two examples that may clear this up. First, threats against the President are criminalized. In and of itself, a threat against the President is so severe that it falls under one of the proscribable categories.[80] However, if the law were to criminalize only threats made against the President that resulted from a specific position or action that the President has taken, then that would be content-based discrimination.[81] Similarly, offensive obscenity as a whole can be banned, but obscenity only dealing with political undertones cannot be banned.[82]

In regards to cross-burning, it is okay to ban cross-burning with the intent to intimidate, as a whole and for all reasons;[83] however, it is *unconstitutional* and content-based discrimination to ban those categories of cross-burning that are committed because of racist and prejudiced motives *only*.[84] According to the Court, it should not matter why the intimidation occurs, and to weigh one reason over another would be to engage in content or viewpoint-based discrimination. Cross-burning, as seen in history, creates a true threat, and thus, may be regulated and criminalized. As opposed to burning a circle or star, a burning cross signifies violence, and is "particularly virulent" in and of itself. That is why, according to the Court, it

78. *R.A.V.*, 505 U.S. at 391.

79. *Id.* at 388.

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

*Id.*

80. *Id.* at 388.

81. For example, it would be content-based discrimination if the only threats that were banned were those based on the President's position against affirmative action. This would be discrimination against those who are in favor of affirmative action, while those who made the same threat, but were of a different viewpoint, would not be punished.

82. *Black*, 538 U.S. at 362.

83. VA. CODE ANN. § 18.2-423.

84. ST. PAUL, MINN., LEGIS. CODE § 292.02.

is not necessary to include the burning of other shapes – they do not signify violence.[85]

It is important to recognize that burning a cross is a threat of violence, and does not necessarily apply only to white supremacist perpetrators and African-American victims. In fact, as stated above, and included in the Court's reasoning, "it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities."[86] Because of this, the Court held that:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[87]

However, when it comes to other types of cross-burning (i.e. at a political rally), in which there may be no intent to intimidate, that conduct is protected by the First Amendment. Ultimately, what is defined as an intent to intimidate is a question for the jury, and that question implicates the prima facie provision, which Justice O'Connor discusses in Part IV of the opinion.

In Part IV, Justice Scalia did not join Justice O'Connor's opinion, thereby making it a plurality opinion rather than a majority opinion. However, Justices Souter, Ginsburg, and Kennedy agreed with O'Connor's disposition, so the result and judgment is controlling. The Court ultimately ruled that the Virginia statute is unconstitutionally overbroad because of the prima facie provision.[88] The prima facie provision suggested that the act of burning a cross, in and of itself, is evidence of an intent to intimidate.[89] Immediately, one should recognize that this philosophy cuts at the heart of the distinction Justice O'Connor laid out in Part II – separating cross-burnings done with political intent from those done with threatening intent. It should also be immediately recognized that the prima facie provision has the ability to remove all cross-burning under the statute from the proscribable category of true threats: if cross burning that is not a threat can be covered by the statute, then it will be considered to be constitutionally overbroad.

In its analysis, the plurality looks at the facts of each of the three cases to see which of the defendants were implicated by the prima facie provision. While O'Mara plead guilty, Elliot's jury did not receive a jury instruction on the prima facie provision, therefore, it did not work to his disadvantage at trial.[90] Black's jury, on the other hand, did receive an instruction that stated, "The burning of a cross, by itself, is sufficient evidence from which you may

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85. *See Black*, 538 U.S. at 391 (explaining that an individual would probably call the fire department, rather than the local police, if a circle was burning in his front lawn).

86. *Id.*

87. *Id.* at 363.

88. *Id.* at 366-67.

89. *Id.* at 364 (citing Black v. Commonwealth, 553 S.E.2d 738, 746 (Va. 2001).

90. *Id.* at 351, 364.

infer the required intent."[91] According to the Court, the prima facie provision "renders the statute unconstitutional" because it allows for jury instructions that remove the required intent needed from the first part of the statute.[92] What results from the prima facie provision is a statute resembling strict liability, in which someone can be convicted based on an incontrovertible fact. In other words, a prosecutor need not prove intent to intimidate because the actual act of burning a cross is, by itself, sufficient enough evidence of intent to intimidate. The Court correctly held that this circular reasoning strips the statute of its constitutionality because it regulates a much wider category of speech than just "true threats."[93]

The effect of the prima facie provision, according to the Court, would be to chill speech that could be considered "core political speech."[94] The Court referred back to the history it laid out in Part II of the opinion, where it distinguished between the types of cross burning and stated that "[t]he prima facie provision makes no effort to distinguish among these different types of cross burnings."[95] Furthermore, in recognizing that a "sense of anger or hatred is not sufficient to ban all cross burnings,"[96] the Court recognized that the prima facie provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak."[97] This "shortcut"[98] is not allowed by the First Amendment and cannot withstand judicial scrutiny. Because the Virginia Supreme Court never authoritatively interpreted the meaning of the statute, the Court remanded the statute back to that court so that it could either interpret it in a constitutionally sound manner consistent with the opinion, or sever the provision from the otherwise-constitutional statute.[99]

Part V then affirmed the decision of the Virginia Supreme Court with regard to the defendant, Black, and allowed his conviction to be thrown out because it was effectively tainted by the jury instructions based on the unconstitutional prima facie provision.[100] For Elliot and O'Mara, their judgments were vacated and remanded back to the Supreme Court of Virginia, since technically they were convicted under an unconstitutional statute (even though the prima facie provision did not directly affect them).[101]

### 2. *Scalia's Opinion*

Justice Scalia agreed with Parts I-III of the Court's opinion and agreed that cross-burning with the intent to intimidate can be regulated without

91. *Id.* (quoting VA. MODEL JURY INSTRUCTIONS, CRIM., No. 10.250 (2001)).
92. *Id.* at 364-65.
93. *Id.*
94. *Id.* at 365-66.
95. *Id.* at 366.
96. *Id.*
97. *Id.* at 366 (quoting *id.* at 385)(Souter, J., concurring in part).
98. *Id.* at 367.
99. *Id.* at 367-68.
100. *Id.*
101. *Id.*

infringing upon the First Amendment.[102] He also believed that the decision of the Virginia Supreme Court should be vacated and the statute remanded so that the court could construe, in an authoritative fashion, the meaning of the prima facie provision.[103] However, Justice Scalia departed from the opinion of the Court when it invalidated the prima facie provision on its face.[104] Whereas the opinion of the Court held that the prima facie provision amounted to an irrubuttable presumption, Justice Scalia argued that the prima facie provision is a *rebuttable presumption*, and should not have been automatically interpreted otherwise by the Court.[105] He raised the specter of possibility that a prima facie provision could comply with constitutional standards, contrary to the Court's view that the prima facie provision, on its face, is invalid.

Looking into canonical understandings of *prima facie* evidence, Justice Scalia concluded that it could be rebutted, and because the majority assumed otherwise, they made an interpretative mistake. He turned to Black's Law Dictionary,[106] Virginia case law,[107] and hornbooks[108] to support this decision. Justice Scalia would allow the Virginia Supreme Court to interpret this provision as it stands, with the possibility that it is in fact constitutional, and does not raise the questions that the Court's opinion suggests.

With that said, Justice Scalia then engaged in a test of the provision's constitutionality. He sharply attacked the Virginia Supreme Court's overbreadth analysis and stated that the Court has "never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad."[109] Instead, it is the threat of a *conviction* that could make the statute overbroad, and he argued that the majority did engage in this proper analysis, but just came to the wrong conclusion.[110] The Court believed that the prima facie provision would lead to the conviction of individuals that had not met the intent to intimidate standard; Scalia simply believed it would not.[111] Furthermore, while the plurality stated that this justified invalidation pending an interpretation, Justice Scalia wanted to take the prima facie provision's effects on a case-by-case basis, meaning the Court of Appeals would review the associated jury instruction if it were challenged.

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102. *Id.* at 368.

103. *Black*, 538 U.S. at 368 (Scalia, J., concurring in part).

104. *Id.*

105. *Id.* at 369-70.

106. *Id.* at 369 ("if not rebutted or contradicted, will remain sufficient") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)).

107. *Id.* ("cuts off no defense") (quoting Nance v. Commonwealth, 124 S.E.2d 900, 903 (Va. 1962)); *id.* ("unless rebutted") (quoting Babbitt v. Miller, 64 S.E.2d 718, 722 (Va. 1951)).

108. *Id.* at 370 ("if not rebutted") (quoting 7B MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA § 32 (1998)).

109. *Id.* at 371.

110. *Id.* at 371-72.

111. *Id.* at 372.

Justice Scalia then proceeded to state that the prima facie provision would not reach a "substantial amount of constitutionally protected conduct,"[112] and "includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense."[113] He concluded that the number of individuals that fall into this category would be extremely limited and, therefore, the provision was not unconstitutionally overbroad.[114] Justice Scalia further found it unprecedented that the Court invalidated the statute based on what he believed to be an ambiguous jury instruction and nothing more.[115]

In sum, Justice Scalia would not have invalidated the provision on its face, but rather, would have remanded it to the Virginia Supreme Court for interpretation (which he seems to conclude will be sound regardless of its interpretation). He concurred with the Court's decision to vacate and remand with respect to Elliot and O'Mara, yet would have allowed Virginia to retry Black, rather than strike his conviction.[116]

*3. Souter's Opinion*

Justice Souter, joined by Justices Ginsberg and Kennedy, found both provisions of the statute unconstitutional and went one step further. It was their opinion that all cross-burning statutes amount to content-based discrimination in violation of the First Amendment. Justice Souter believed that "the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate."[117] He associated white supremacy with cross-burning and believed that the selection of a burning cross, and only a burning cross, is shunning that particular viewpoint. While the majority uses a "particularly virulent" exception to content-based discrimination, Justice Souter did not find that this statute fit into that exception, as first expounded upon in *R.A.V.* He believed that the majority loosened the doctrine set out in *R.A.V.* to the point of including constitutionally protected conduct.[118]

The opinion then rebutted the examples of conduct that the majority used to support the "particularly virulent" exception: presidential threats and obscenity. According to Justice Souter's opinion, cross-burning is not comparable to these cases because cross-burning is a statement of white supremacy and a regulation that picks a subclass of conduct that the majority thought it was avoiding.[119] Surprisingly, the opinion of Justice Souter seemed to disregard the specific and historically threatening nature of

112. *Id.* at 373 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)).
113. *Id.* at 374.
114. *Id.* at 374-75.
115. *Id.* at 376.
116. *Id.* at 379-80.
117. *Id.* at 381 (Souter, J., dissenting).
118. *Id.* at 382-83.
119. *Id.* at 383.

cross-burning by saying "threats of violence are not an integral feature of any one subject or viewpoint as distinct from others."[120]

In an interesting analytical move, Justice Souter stated that due to the tainting of the cases by the prima facie provision, it is impossible to find out whether there was a high probability that "official suppression of ideas is afoot."[121] As cited by the plurality, the prima facie provision would "skew" juries towards conviction[122] and draw non-threatening ideological expression into suppression.[123] The proper mode of analysis, according to the Souter opinion is as follows: rather than looking at the overbreadth of the prima facie provision, the Court should look at whether suppression of ideas is afoot. After finding that ideas were suppressed, Justice Souter argued that the statute failed strict scrutiny.[124] He, along with Justices Kennedy and Ginsberg, found that all cross-burning statutes were unconstitutional content-based discrimination and, more specifically, would have affirmed the Virginia Supreme Court and ordered the dismissal of all three respondents' indictments.[125]

*4. Thomas' Opinion*

Justice Thomas' opinion in this case seemed to be one of the most eagerly anticipated opinions in recent memory. This is due to his uncharacteristic questioning – even advocating – during oral arguments.[126] While technically a dissent, Justice Thomas upheld the constitutionality of the statute as a whole.[127] In a remarkable move, Justice Thomas did not find the statute to be constitutional on First Amendment grounds, but rather found that cross-burning was conduct and referred to its shameful place in American history.[128]

Moving through his opinion, he first cited Rehnquist's dissent in *Texas v. Johnson*[129] to make the argument that cross-burning holds a unique place in history.[130] He called the Klan a "terrorist organization,"[131] and stated that cross-burning is "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan."[132] In a lengthy and well documented footnote, Justice Thomas expounded upon the evident link between cross burning and violence.[133]

120. *Id.* at 384.
121. *Id.* at 384 (quoting *R.A.V.*, 503 U.S. at 390).
122. *Id.* at 385.
123. *Id.* at 386.
124. *Id.* at 387.
125. *Id.*
126. Charles Lane, *High Court Hears Thomas on KKK Rite*, WASH. POST, Dec. 12, 2002, at A01.
127. *Black,* 538 U.S. at 400.
128. *Id.* at 388-94.
129. 491 U.S. 397, 422-29.
130. *Black*, 538 U.S. at 388.
131. *Id.* at 388-89.
132. *Id.* at 389 (quoting *Capitol Square Review*, 515 U.S. at 770).
133. *Id.* at 390 n.1.

Justice Thomas' opinion also explained the fear and intimidation associated with cross-burning[134] that is not just limited to the reactions of African-Americans, but includes other groups as well.[135] He stated: "In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims a well-grounded fear of physical violence."[136] Justice Thomas then moved from the place of cross-burning in American history to its place in Virginia history.[137]

Justice Thomas described cross-burning as the "Siamese twin" of violent and terrorist conduct,[138] and thereby should be treated as such. In a bold statement, he exclaimed that "this statute prohibits only conduct, not expression."[139] He continued:

> [J]ust as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.[140]

Even if, however, there was expression to be considered here, Justice Thomas believed that no constitutional problems were presented, as a jury could "draw an inference of intent to intimidate from the cross burning itself."[141] Moving one step further than Justice Scalia, Justice Thomas defined the prima facie provision as just an "inference" rather than an irrebuttable presumption that the plurality defines it as.[142]

However, this distinction is academic, for he believed that there should be a presumption that all cross-burnings are done for intimidating purposes. In fact, he stated that "*not* making a connection between cross burning and intimidation would be irrational."[143] Herein lies another large distinction between Justice Thomas and the other members of the Court: Justice Thomas believed that cross burning, in every instance, is a tool of intimidation and violence. To him, burning a cross cannot be for core political expression because of its history in American life and its effects on certain individuals, in particular, African-Americans.[144] Burning a cross contains no message

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134. *Id.* at 390-91.

135. *See id.* at 391 (stating that the Klan expanded its enemy list to include Jews, Catholics, and immigrants).

136. *Id.*

137. *Id.* at 391-95.

138. *Id.* at 394.

139. *Id.*

140. *Id.* at 394-95.

141. *Id.* at 395.

142. *Id.* at 395-96.

143. *Id.* at 397 (emphasis in original).

144. *Id.* at 399-400.

> [T]he plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience . . . to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality.

and is only an act of violence and intimidation. According to Justice Thomas, if there is a message to be conveyed by burning a cross, it is so tainted by violence that it is unworthy of protection.

## IV. ANALYSIS: THE DIFFICULTY OF BALANCING A BURNING CROSS

Part of the analysis that needed to be accomplished was actually figuring out the meaning of *Virginia v. Black.* This complex opinion, as a sequel to another complex opinion,[145] presented a challenge for many to decipher where the Court placed the Virginia Statute in its pattern of jurisprudence. With that said, the Court made the right decision and correctly balanced the threatening nature of cross burning with protected First Amendment rights to political expression. *R.A.V.* was significantly lacking in its understanding, discussion, and consideration of cross burning. While that decision may have complied with First Amendment jurisprudence, what was not said spoke greater volumes than the constitutional analysis. *Black* fills in the void left by Justice Scalia's opinion in *R.A.V.*, yet does not go so far as to abridge political expression.

The Court provided a much needed history of cross burning in the country, and more specifically, for Virginia. In order to understand the meaning of cross-burning, its practical effects, and its philosophical implications, the Court needed Part II. This history fully divulges what many scholars, activists, and academics have argued for eleven years: cross-burning is inherently different and unique in American society and throughout American history. Its significance goes far beyond a symbol of expression. It has been used as a threat, and as a warning, and like other hate crimes, has very real effects on the sociological structure of the community.[146] When an African-American family, for example, has a cross burned on their lawn, it is a message to get out; it is a warning that violence will follow. And violence does follow, as the Court very deservingly noted and considered.[147]

*R.A.V.* almost completely ignored this phenomenon and seemed to equate the burning of a cross to a provocation to fight, rather than a threat of imminent violence. Cross burning does not, as the *R.A.V.* Court indirectly implies, provoke a fighting mentality in its victims. Rather, it provokes fear,

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Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

*Id.* (citation omitted).

145. *R.A.V.*, 505 U.S. at 377.

146. *See generally* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999); Lesley C. Barlow, *Schoolyard Cross-Burning: Free Speech or Felony?*, 30 MCGEORGE L. REV. 499 (1999); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994); Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2001) (reviewing STEPHEN G. MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR; SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS (2000)).

147. *See Black*, 538 U.S. at 352-57 (discussing the relationship between cross-burning and violence).

intimidation, and shock.[148] Because cross-burning with an intent to intimidate is a threat, and is solely intended to be a threat, it should be constitutionally proscribable speech under the true threat analysis. Does burning a cross send a message? Yes. But that message, like other threats, does not always receive constitutional protection. Furthermore, the significance of a burning cross and its designation that *there will be violence*, is proof that it is a threat. This is a threat that has credibility, unlike other threats that are constitutional to ban. In other words, if threats of less credibility and severity are banned under the "true threat" analysis, surely cross-burning can be as well.

The Court also correctly decided that content-based discrimination does not occur here. Unlike the categories listed in the St. Paul ordinance, the Virginia statute makes no such value judgment. Furthermore, the selection of a burning cross, rather than all burning objects, is not content-based discrimination. Justice Souter over-characterized the political message of white supremacy in the burning of a cross. The cross is burned as a threat, and the reality is that no other symbols are burned that accomplish the goal of threatening its recipients. It would be silly to say that you must ban the burning of a sphere in order to ban the burning of a cross. A burning sphere (other than that it is unheard of) does not amount to a threat. Because of its usage in history, burning crosses amounts to a threat, and furthermore, is a situation where the action and speech is "particularly virulent" and therefore, fits into the exception to content-based discrimination.

However, Justice Thomas is extreme in his analysis of a burning cross. Based on his background and history, I believe that his constitutional analysis is flawed. To say that burning a cross is solely conduct and contains no message is a very scary proposition. Yes, burning a cross is an act, but then again, so is speaking. So is burning a flag. Everything we do can be considered conduct, but with some conduct there are messages that accompany it. Justice Thomas falls into the trap of wanting to ban speech that he finds reprehensible and without redeeming value. Yes, burning a cross has no redeeming value, but in some cases it is a political statement, and in others it is speech – while it is a threat, it is still speech. That is deserving of First Amendment analysis.

There are those that may use that exact argument to criticize the majority's and my analysis that would allow for the banning of a burning cross with the intent to intimidate. However, the lynchpins of the *Black* decision and of the statute that hold it up amongst First Amendment jurisprudence are the distinctions that are drawn. In the statute, there is a distinction drawn between cross burning and cross burning with the intent to intimidate. This was expounded upon by the Court and documented fully in the historical analysis. A burning cross can in fact have a message deserving of protection. Granted, it may not be deserving of respect, let alone value, but it is deserving of protection. The Klan has the ability to march through Skokie, Illinois. A neo-Nazi has the right to wear a swastika on an arm band.

148. *Id.*

An individual can wear a shirt with a picture of Osama Bin Laden on it. Are all of these statements deserving of value? Of course not – they are hate-filled and are revolting. However, our society is one that is founded upon dissent and the marketplace of ideas. If we do not protect those messages which we hate, then we open the door for those that hate *us*, to one day ban *our* messages.

A hate-filled message does not rise to the level of a threat solely because it is hateful. There must be more that accompanies the hate; a true and real threat to an individual or group of individuals. This is why a burning cross can be banned, but a swastika cannot. The sociological and historical meanings of a burning cross symbolize a threat when done in a particular fashion – burnt with intent to intimidate. These threats can and should be banned – but only those that are *threats*. This is where the Court draws an effective line and where Justice Thomas fails in his analysis. As much as we dislike it, a burning cross, on its face, is not a threat, and because of the prima facie provision, the Court correctly decided that it opened the door for implicating hateful, but non-threatening messages.

To accept Justice Thomas' approach would be going too far in regulating speech. Earlier, this article posed the question of whether a burning cross can ever have a message other than a threat, and I believe it can. It is always a *symbol of hate*, but sometimes, when done amongst those of similar hateful philosophies, it is a symbol that is correctly protected. I do raise the specter that a burning cross at a Klan rally may, because of the history cited, create an incitement of violence. While I agree with the final result and disposition in *Brandenburg v. Ohio*, that the statute at issue was constitutionally faulty, I disagree with the analysis that under a perfectly sound statute, waving a loaded gun at a Klan rally and exclaiming "[b]ury the niggers" and "[s]end the Jews back to Israel"[149] is not incitement. Arguing that something is incitement may open a Pandora's box that would be impossible to close, and value judgments may work its way to a fatal point in the analysis. For instance, can it be argued that a picture of Osama Bin Laden, or an audio tape of his speech can be banned because it will incite his followers to violence? This is a dark road that, if embarked upon, would not bode well for dissenting speech.

With that aside, cross-burning can in fact be a symbolic expression of political opinions, and the prima facie provision of the statute effectively strips the specificity required by the First Amendment. It is a Catch-22. You cannot burn a cross with the intent to intimidate; however, if you burn a cross, that by itself is an intent to intimidate, and thus, is criminal. Even though Justices Scalia and Thomas get into the specifics of what *prima facie* means, I believe the plurality, joined by Justices Souter, Ginsberg, and Kennedy, is correct in invalidating that provision on its face. There is no need for that provision and it ruins the statute's distinction between unprotected cross-burning and protected cross-burning. The proper course of action on remand was for the Virginia Supreme Court to sever the provision

149. *Brandenburg*, 395 U.S. at 446 n.1.

and, in the severance order, guide lower court judges as to the meaning of intimidation.[150] Justice Scalia's assertion that this should be handled on a case-by-case basis is an amazingly inefficient and unrealistic proposal.

I feel no sympathy for Klan members, yet to criminalize protected speech, and to penalize anyone who engages in what is uniformly considered by the Court as protected speech is unsound practice and procedure. By facially invalidating the provision, the Court avoided this problem and is implicitly suggesting to the Virginia Supreme Court to find a way to sever the provision and save the statute.

## V. CONCLUSION

*Virginia v. Black* was a victory for both civil rights and civil liberties. The Court drew an effective and an efficient line between threats deserving of no protection, and hateful expression deserving of protection. Of course, there will be civil liberties advocates that side with the approach of Justices Souter, Ginsberg and Kennedy. They may say that the Court went too far in its holding that cross burning can be constitutionally banned if done with the intent to intimidate. There will also be civil rights activists who believe that a burning a cross is always threatening and thereby deserving of no protection. The situation, however, is not as clear as either side would like it to be. It was imperative for the Court to recognize the unique harms of burning a cross in American society and in history – that it sometimes can be nothing more and nothing less than a threat of imminent, severe violence. This discussion was lacking in *R.A.V.*, and is part of the larger "color-blind" debate among the Supreme Court justices and in American society. Certain ills must be recognized and classified for what they are. For any individual of any skin color, any religion, anything – a burning cross in one's front lawn is a threat – not an invitation for dialogue, and therefore, must be treated as a threat. However, we cannot go so far as to ban cross-burning in all situations, especially when it is not done with the intent to intimidate a victim (this therefore reflects my belief that a cross can be burned without intent to intimidate a victim). To do so would then open the door to banning all hateful symbols.

With the *Black* opinion, the Court rightfully struck down a statute because of a provision that went too far. But in doing so, it justly recognized, and inherently held, that a state could ban cross-burning. Those statutes send a message to those filled with hate that violence and threats of violence will not be tolerated in society anymore. Yes, even hate-mongers have the right to express their views, but no one has the right to threaten another with violence and harm.

150. On remand, the Virginia Supreme Court, in *Elliot v. Commonwealth*, severed the prima facie provision, thus affirming defendants' conviction. 593 S.E. 2d 263 (Va. 2004).