Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment *Virginia v. Black*

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Americans love to speak not only through their words, but through expressive conduct, often called symbolic speech. In the twentieth century, people have expressed themselves by displaying the red flag as a symbol of international revolution,[1] by incorporating the Confederate stars and bars battle flag into the official flags of several southern states to symbolize opposition to desegregation,[2] by pledging allegiance to the national flag of the United States—or by refusing to,[3] by defacing the national flag,[4] by wearing clothing[5] and armbands[6] to protest the Vietnam War, by sit-ins, marches, and even by sleeping in Lafayette Park in sight of the White House.[7] Indeed, one can hardly think of the civil rights or anti-Vietnam War movements without visualizing the memorable acts that symbolized them.

Of all mediums of symbolic expression, Americans have displayed an especial affection for fire. Throughout our history we have burned things to communicate a message. Hanging and burning in effigy one's enemies was a traditional, albeit alarming, form of American political protest, particularly in the eighteenth and nineteenth centuries. In 1794, when John Jay returned to the United States after

[1]Stromberg v. California, 283 U.S. 359 (1931).

[2]For a discussion of the revival of the Confederate flag, *see* GEORGE SCHEDLER, RACIST SYMBOLS AND REPARATIONS (1998).

[3]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[4]Spence v. Washington, 418 U.S. 405 (1974) (per curiam); Smith v. Goguen, 415 U.S. 566 (1974).

[5]Schact v. United States, 398 U.S. 58 (1970).

[6]Tinker v. Des Moines School District, 393 U.S. 503 (1969).

[7]Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

negotiating the unpopular treaty that bears his name, he was so vilified that he said that he could find his way home in the dark from the number of burning effigies that illuminated the roads. In the nineteenth century John Brown, William Lloyd Garrison, and Abraham Lincoln were hanged or burned in effigy as hated enemies of slavery. In the presidential campaign of 1860, clubs of young men called ''Wide-Awakes'' marched at night carrying blazing torches atop tall poles in support of their candidate Abraham Lincoln. Five years later Washington, D.C. celebrated victory in the Civil War with a ''grand illuminination'' of the city created by thousands of torches, flares, and explosions.[8] More recently Americans protested another war by burning draft cards[9] and flags,[10] and feminists demonstrated for equal rights by burning bras. After President Kennedy's assassination his grave was marked by fire—an eternal flame. Americans have used fire to communicate a multitude of ideas: political support or protest, military victory, remembrance, shared ideology, dissent, patriotism, joy, inspiration—and hate. Of all the fiery symbols in American history, one stands out as the most notorious and the most feared—the burning cross.

For the past eighty-eight years, ever since the first recorded cross burning in the United States in 1915, that flaming object has been the trademark of one group—the Ku Klux Klan.[11] To the members of the Klan, that symbol represents an ideology of white supremacy and racial solidarity. To African Americans, the burning cross symbolizes a sinister history of toxic racism reaching back to the Civil War.[12] To this audience, a cross aflame also symbolizes danger: threats, arson, violence, robed night riders, lynchings, and murder.[13]

[8] JAMES L. SWANSON & DANIEL R. WEINBERG, LINCOLN'S ASSASSINS: THEIR TRIAL AND EXECUTION (2001).

[9] United States v. O'Brien, 391 U.S. 367 (1968).

[10] *See, e.g., State v. Royal*, 113 N.H. 224 (1973); *State v. Waterman*, 190 N.W. 2d 809 (1971); *State v. Mitchell*, 32 Ohio App. 2d 16 (1972). For a flag burning to protest the murder of civil rights figure James Meredith, *see Street v. New York*, 394 U.S. 576 (1969).

[11] American cross burning has a fictional origin. Thomas Dixon's 1905 novel, THE CLANSMAN: AN HISTORICAL ROMANCE, fantasized a cross burning Ku Klux Klan. The 1915 film ''Birth of a Nation,'' which was based on the novel, depicted a fictional cross burning, and that imagery inspired the real Klan to adopt the ritual.

[12] Although the Klan did not burn its first cross until 1915, fifty years after the Civil War ended, the symbol became so powerful that it came to represent in the popular mind a reign of terror that began shortly after the end of the war.

[13] For a history of these crimes, *see* STETSON KENNEDY, SOUTHERN EXPOSURE (1946); RICHARD KLUGER, SIMPLE JUSTICE (1975); WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA (1988); NANCY K. MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN (1994).

From the outset, the image of rampaging, cross burning Klansmen was considered potentially explosive. D. W. Griffith's 1915 motion picture *Birth of a Nation*, an adaptation of Thomas Dixon's 1905 novel, *The Clansman*, provoked several jurisdictions to censor the film, fearing that screenings would incite race riots.[14] In time a number of states banned cross burnings, including Virginia, which passed a statute against it.[15]

In 2003, the Supreme Court of the United States ruled on the constitutionality of that statute. In *Virginia v. Black*,[16] the Court struggled with how much one can suppress conduct without banning expression. We have a long history of protecting speech that we hate, even when that speech comes close to causing real harm. There is no question that a burning cross is a combination of speech and conduct, and that the symbol can convey ideas and intimidation. In *Virginia v. Black* the Court found burning a cross to be sufficiently different to allow restrictions that would otherwise be prohibited by the First Amendment. In so doing, the Court applied an unsatisfactory ad hoc test that might lead to the suppression of not only intimidation, but ideas. It was a hard question to balance, and the best answer might be to ban not just cross burning, but *all* intimidation. That solution will serve the interests of the First Amendment best.

Background

Virginia v. Black arose from two separate incidents that resulted in convictions under Virginia's cross burning statute, which provides

[14] *See* EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES CENSORS AND THE FIRST AMENDMENT 3–6, 180–183 (1982). Fearing that the film would be suppressed, Dixon screened the film at the White House for his old friend, President Woodrow Wilson, and members of the Cabinet. ''It is like history written with lightning,'' said Wilson. The next day Dixon prevailed upon Chief Justice Edward Douglass White, a former Klan member, to view the film that night at the Raleigh Hotel in Washington. White, the justices, and members of Congress attended the screening.

[15] Brief of Amici Curiae of the States New Jersey, Arizona, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, Utah, and Vermont, Virginia v. Black, 123 S. Ct. 1536 (2003) (No. 01-1107).

[16] Virginia v. Black, 123 S. Ct. 1536 (2003).

> 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.[17]

In the first incident, on the night of May 2, 1998, Richard Elliott, Jonathan O'Mara and David Targee attempted to burn a small, hastily constructed cross in the front yard of Elliott's neighbor, James Jubilee, an African American. Elliott wanted to ''get back'' at Jubilee for complaining to Elliott's mother about gunshots being fired in the Elliott backyard target range. The cross burning trio entered Jubilee's property, erected the cross, splashed it with lighter fluid and set it ablaze. Jubilee did not witness the burning cross, but the next morning he noticed a partially burned cross about 20 feet from his house. Jubilee seized the cross, secured it in his garage, and summoned the police. Elliott and O'Mara were arrested and charged with cross burning and conspiracy to commit cross burning. Although they were not connected to the Ku Klux Klan, Elliott and O'Mara did, prior to the cross burning, refer to Jubilee's race. O'Mara pleaded guilty to both counts but reserved the right to challenge the constitutionality of the statute. He was sentenced to 90 days in jail (of which 45 were suspended) and fined $2,500.00 (which was reduced to $1,500.00). Elliott was tried, convicted and sentenced to 90 days in jail and a $2,500.00 fine. The Court of Appeals of Virginia affirmed both convictions.[18]

In the second incident, which occurred on August 22, 1998, the fact pattern was quite different than in the first. Barry Black led a Ku Klux Klan rally not in a targeted victim's yard, but on private property with the permission—indeed the participation—of the owner. That property was a semi-secluded open field near a state highway, with eight to ten houses in the area. Twenty-five to thirty people participated in the rally, which included Klan members speaking to each other about their beliefs, about their dislike of

[17] *Id.* at 1541, 1542 (O'Connor, J.).

[18] *Id.* at 1543.

blacks and Mexicans, about Bill and Hillary Clinton, and about how their tax money goes to black people.[19]

At the rally's climax the Klan members formed a circle around a 25-to 30-foot-tall cross, set it on fire, and played a recording of *Amazing Grace*. At that point the local sheriff, who had observed the cross burning from the state highway 300 to 350 yards away, entered the property. Black was charged under the Virginia statute with burning a cross to intimidate a person or group of persons. At trial the jury was instructed that ''intent to intimidate means the motivation to intentionally put a person or group of people in bodily fear of harm,'' and also that ''the burning of a cross by itself'' is sufficient evidence to infer the required intent.[20] Black was found guilty, fined $2,500.00, and his conviction was confirmed by the state Court of Appeals.

On appeal the Supreme Court of Virginia consolidated the cases and held that the cross burning statute was ''facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad.''[21] The Virginia Supreme Court reasoned that the statute was ''analytically indistinguishable'' from the ordinance that the Supreme Court of the United States found unconstitutional several years earlier in another cross burning case, *R.A.V. v. St. Paul*[22]; that the statute engaged in improper content-and-viewpoint based discrimination because it ''selectively chooses only cross burning because of its distinctive message''[23]; and because the statute's prima facie evidence provision condemns it as overbroad because ''the enhanced probability of prosecution under the statute chills the expression of protected speech.''[24]

The U.S. Supreme Court granted certiorari and heard oral argument on December 11, 2002.

Oral Argument

As soon as the U.S. Supreme Court granted certiorari, *Virginia v. Black* became one of the most eagerly anticipated cases of October

[19] *Id.* at 1542.

[20] *Id.*

[21] Black v. Commonwealth, 262 Va. 764, 768 (2001) (Lemons, J.).

[22] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[23] *Virginia v. Black*, 123 S. Ct. at 1543 (citations omitted).

[24] *Id.* (citations omitted).

Term 2002.[25] Although the Court hears several First Amendment cases each term, seldom does the subject matter of any case command as much widespread public attention as *Virginia v. Black*.[26] Court watchers expected a classic duel pitting the right to engage in unpopular speech against the desire to suppress it, and many assumed the Court would extend the principles of *Texas v. Johnson*[27] and *R.A.V. v. St. Paul*[28] and hold that the Virginia cross burning statute, like the regulations in the aforementioned cases, was impermissible, content-based discrimination against unpopular speech, and unconstitutional.

In one of the most unusual oral arguments of the term (for both what was said and how the press reported it) the justices surprised Court watchers by telegraphing that *Virginia v. Black* might not be an easy win for the First Amendment.[29] Given the recent precedents of *Texas v. Johnson* and *R.A.V. v. St. Paul*, plus a core collection of historic free speech cases, it was assumed by many that the Court would simply affirm the principle that the First Amendment requires us to tolerate even the speech that we hate, in order to safeguard

[25] *See, e.g.*, Linda Greenhouse, *Supreme Court Roundup: Free Speech or Hate Speech? Court Weighs Cross Burning*, N.Y. TIMES, May 29, 2002, at A18.

[26] It is easier for the public to grasp the idea of a burning cross than the more abstract ideas of library internet filtering in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), or the political speech of non-profit organizations in *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), two other significant First Amendment cases in October Term 2002.

[27] Texas v. Johnson, 491 U.S. 397 (1989).

[28] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[29] *See e.g.*, Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross Burning*, N.Y. TIMES, December 12, 2002, at A1; Charles Lane, *High Court Hears Thomas on KKK Rite; Justice Weighs in on Virginia Cross-Burning Ban*, WASH. POST, December 12, 2002; Joan Biskupic, *Cross-Burning Case Agitates Thomas*, USA TODAY, December 12, 2002, at 3A; Jan Crawford Greenburg, *Emotional Court Weighs Cross Burning: Thomas Speaks Against ''Terror,''* CHICAGO TRIBUNE, December 12, 2002, at 10; David G. Savage, *Thomas Assails Cross Burning as Terror Tactic*, L.A. TIMES, December 12, 2002, at 41; Lyle Denniston, *Thomas Breaks Silence to Denounce Klan: Court Weighs Cross Burning*, BOSTON GLOBE, December 12, 2002, at A2; Dahlia Lithwick, *Personal Truths and Legal Fictions*, N.Y. TIMES, December 17, 2002, at A35. The fact that Justice Thomas spoke during oral argument so transfixed some commentators that they lost sight of the case. In a bizarre, and false, account Dahlia Lithwick asserted that in a ''stunning'' episode of ''emotional outburst,'' Justice Thomas indulged in a ''personal narrative'' that she claimed might be ''unforgivable.'' In fact there was no outburst. Instead Justice Thomas spoke quietly and courteously. Furthermore he related no personal narrative or experience.

the speech that we love. But several justices, led by Clarence Thomas, suggested through their questioning that the message of a burning cross was uniquely threatening, and might therefore qualify for unique treatment by the Court.

Justice Thomas, in an exchange with Michael Drebeen, deputy solicitor general arguing on behalf of the United States, as amicus curiae supporting the State of Virginia, suggested that Drebeen could make an even stronger case in support of the statute. ''[M]y fear is . . . that you're actually understating the symbolism of . . . the burning cross.''[30] Recalling nearly a century of lynchings Thomas argued that ''this was a reign of terror and the cross was a symbol of that reign of terror,'' then asked, ''isn't that significantly greater than intimidation or a threat?''[31] The burning cross, concluded Thomas, ''is unlike any other symbol in our society,''[32] and it was used ''to terrorize a population.''[33]

Justice O'Connor asked Rodney Smolla, arguing on behalf of the respondents, ''why isn't this just a regulation of a particularly virulent form of intimidation? And why can't the State regulate such things?''[34] Smolla responded that cross burning is not a particularly virulent form of intimidation. That prompted an instantaneous rejoinder from O'Connor: ''Well, it *is* for the very reasons we've explored this morning. What if I think it is?''[35]

Justice Scalia suggested that a burning cross was more intimidating than a loaded gun. ''If you were a black man at night, you'd rather see a man with a rifle than see a burning cross on your front lawn.''[36]

Of course it is always perilous—and potentially embarrassing—to read the tea leaves of a Supreme Court oral argument. Justices often play the devil's advocate, and can appear by their questions to be hostile to their true position in the case. But the oral argument

[30] In the Supreme Court of the United States, Virginia v. Black, No. 01-1107, transcript of oral argument, Dec. 11, 2002, at 23. (Hereinafter cited as ''Transcript.'')

[31] *Id.*

[32] *Id.*

[33] *Id.* at 24.

[34] *Id.* at 31.

[35] *Id.*

[36] *Id.* at 30.

in *Virginia v. Black* proved, in retrospect, to be remarkably accurate by suggesting that the case could go either way; by revealing that some members of the Court questioned not only whether cross burning was protected speech, but whether it was speech at all; and by hinting that the Court found hate speech and threatening speech to be a troublesome area in which it had reached no consensus or general theory.

The Opinion

Reflecting the diversity of views that they expressed at oral argument, 5 justices wrote separately in *Virginia v. Black* and decided discreet issues in the case by votes of 6 to 3, 7 to 2, and 8 to 1. In the main holding, the Court held 6 to 3, with Justice O'Connor writing for the majority, and Chief Justice Rehnquist and Justices Scalia, Breyer, Stevens, and Thomas in agreement, that cross burning was ''a particularly virulent form of expression'' that could be singled out by the state for regulation.[37] Three justices, Souter, Ginsburg, and Kennedy dissented. At the same time, 7 justices—O'Connor, Rehnquist, Breyer, Stevens, Souter, Ginsburg and Kennedy—agreed that the Virginia cross burning statute was unconstitutional. The first four justices so holding because its prima facie evidence provision failed to exempt those circumstances when cross burning was done *not* to intimidate and *could* qualify as protected speech, and the last three justices so holding because the statute was unconstitutional anyway, even without taking the prima facie provision into account. Justices Scalia and Thomas disagreed with the majority on this issue and concluded that the statutory inference of intent was constitutional. Eight justices agreed that, regardless of whether cross burning was symbolic speech protected by the First Amendment, there was no doubt that at least it was speech, and that any attempt to regulate it triggered First Amendment scrutiny of some kind. Only Justice Thomas disagreed: ''[T]hose 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.''[38]

[37] Virginia v. Black, 123 S. Ct. 1536, 1549 (2003).

[38] *Id.* at 1566.

The multiple writings, shifting coalitions, and partial dissents that comprised the opinion were confusing enough to prompt seasoned *New York Times* Supreme Court correspondent Linda Greenhouse to observe that *Virginia v. Black* ''produced a range of opinions more amenable to a chart than to a verbal description.''[39]

Justice O'Connor's opinion has three central themes. First, cross burning does not enjoy a per se First Amendment immunity from state regulation. Second, although cross burning can be regulated, not all cross burning can be prohibited. Third, although cross burning enjoys some First Amendment protection, there is something unique about cross burning that justifies treating it as a true threat, different from any other form of speech.

Justice O'Connor wrote that not all cross burnings are the same, and she catalogued three types with three different purposes: to communicate a shared ''group identity and ideology''[40] among members of the Klan; to anger other people; or to serve as a ''message of intimidation, designed to inspire in the victim a fear of bodily harm.''[41]

Regarding the first type, O'Connor characterized cross burning as, for members of the Klan, ''a sign of celebration and ceremony . . . a symbol of Klan ideology and Klan unity.''[42] She stated that ''a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself.''[43] In support of her position that this type of cross burning can qualify as core political speech, she quoted Justice White's comment in *R.A.V. v. St. Paul* that ''burning a cross at a political rally would almost certainly be protected expression.''[44]

Regarding the second type of cross burning, one that angers others, Justice O'Connor wrote, ''It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the

[39] Linda Greenhouse, *Justices Allow Bans on Cross Burnings Intended as Threats*, N.Y. Times, April 8, 2003, at A1.

[40] *Virginia v. Black*, 123 S. Ct. at 1546.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1551.

[44] *Id.*

vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings.''[45] True, concedes Justice O'Connor, there remains the so-called ''fighting words'' doctrine from the vintage case *Chaplinsky v. New Hampshire*,[46] which purports that speech likely to provoke a violent response may be proscribed under the First Amendment. But later precedents diluted the authority of *Chaplinsky* and, while the Court has never overruled it, *Chaplinsky* has certainly been marginalized and might be viewed today as an ill-advised endorsement of the ''heckler's veto.''[47]

It is the third type of cross burning, done to intimidate others, that troubles Justice O'Connor. In a concise history of the practice, she recounts the violence of the Klan and how cross burning became intimately associated with ''bombings, beatings, shootings, stabbings, and mutilations.''[48] The cross is a symbol of hate, ''designed to inspire in the victim a fear of bodily harm . . . the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical . . . often the cross burner intends that the recipients of the message fear for their lives.''[49] Indeed, concludes Justice O'Connor, ''when a cross burning is used to intimidate, few if any messages are more powerful.''[50]

Given this history, Justice O'Connor concluded that ''the First Amendment permits Virginia to outlaw cross burnings with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.''[51] The Constitution does not require Virginia to choose between prohibiting all intimidating messages or none at all. Instead, ''a state may choose to prohibit only those forms of intimidation that are likely to inspire fear of bodily harm.''[52] Therefore, ''Virginia may choose to regulate this subset of intimidating

[45] *Id.*

[46] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[47] *Chaplinsky* has since been narrowed by several important cases, including *Cohen v. California*, 403 U.S. 15 (1971).

[48] *Virginia v. Black*, 123 S. Ct. at 1545.

[49] *Id.* at 1546, 1547.

[50] *Id.* at 1547.

[51] *Id.* at 1549.

[52] *Id.* at 1549, 1550.

messages in light of cross burning's long and pernicious history as a signal of impending violence.''[53]

But Virginia went too far by including in the statute a ''prima facie evidence'' provision that permits a jury to convict in every cross burning case, ''based solely on the fact of cross burning itself.''[54] The prima facie clause made cross burning into a kind of strict liability crime that made the statute unconstitutional on its face. As Justice O'Connor stated

> The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. . . The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.[55]

As a result, the U.S. Supreme Court affirmed the judgment of the Supreme Court of Virginia that the cross burning statute was unconstitutional.

The Dissents

Justice Thomas—The First Amendment Need Not Apply

Although Justice Thomas agreed with the majority that it is constitutional to ban cross burning with the intent to intimidate, he argued that the majority failed to go far enough. He would have upheld the statute and, beyond that, would have allowed Virginia to ban all cross burning, with or without intent. ''[T]he majority errs in imparting an expressive component to the activity in question. . . .

[53] *Id.* at 1549.

[54] *Id.* at 1551.

[55] *Id.*

In my view, whatever expressive value cross burning has, the legislature simple wrote it out by banning only intimidating conduct undertaken by a particular means.''[56]

Thomas argued that the Ku Klux Klan is a ''terrorist organization,'' that there exists a ''connection between cross burning and violence,'' and that a burning cross is ''now widely viewed as a signal of impending terror and lawlessness.''[57] He concluded that the Virginia statute prohibited merely conduct, not constitutionally protected expression, and reasoned that ''just 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.''[58]

Thomas was untroubled by the prima facie evidence provision, which he and Justice Scalia treated as a mere presumption, rebuttable at trial. Still, Thomas admonished the plurality for ''lament[ing] the fate of an innocent cross burner, who burns a cross, but does so without an intent to intimidate.''[59] He noted that the Virginia General Assembly had already resolved that issue. ''The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.''[60]

Thomas suggests that the Court could have easily upheld the Virginia statute by analyzing cross burning as a case of ''unwanted communication'' of the sort that the Court dealt with in the abortion clinic case *Hill v. Colorado*.[61] There the Court upheld as narrowly tailored a restriction that protected patients in ''vulnerable physical and emotional conditions'' from ''unwanted advice'' and ''unwanted communication''[62] from anti-abortion protestors.

[56] *Virginia v. Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting).

[57] *Id.* at 1563, 1564.

[58] *Id.* at 1566.

[59] *Id.* at 1568.

[60] *Id.*

[61] Hill v. Colorado, 530 U.S. 703 (2000).

[62] *Virginia v. Black*, 123 S. Ct. at 1568, 1569.

Thomas concludes his dissent with a paradox. ''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. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.''[63]

Justice Scalia—The First Amendment, to a Degree

Justice Scalia agreed with the Court that, under *R.A.V. v. St. Paul*, a state may prohibit cross burning carried out with the intent to intimidate. But he disagreed that Virginia's statute was facially invalid and, in a partial dissent, argued that ''the prima facie evidence provision in Virginia's cross burning statute is constitutionally unproblematic.''[64] Scalia criticizes the court for engaging in ''unprecedented'' overbreadth analysis. ''We have 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. Rather, our jurisprudence has consistently focused on whether the *prohibitory terms* of a particular statute extend to protected conduct.''[65] Scalia concedes that the plurality is correct that cross burning done without the intent to intimidate can be protected speech, but that, under the statute, such a cross burner might nonetheless be arrested, prosecuted, and convicted. ''[S]ome individuals who engage in protected speech, may, because of the prima-facie-evidence provision, be subject to conviction.''[66] But the appropriate response, says Scalia, is not for the Supreme Court to declare the statute facially invalid. Rather, ''[s]uch convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis.''[67]

Justice Souter—The First Amendment, Unabashed

Justice Souter, joined by justices Kennedy and Ginsburg, agreed with the judgment of the Court that the Virginia statute was unconstitutional, but went beyond Justice O'Connor's opinion and said

[63] *Id.* at 1569.

[64] *Id.* at 1558 (Scalia, J.).

[65] *Id.* at 1554.

[66] *Id.*

[67] *Id.*

that the statute was unconstitutional even without the prima facie evidence provision. Souter, Kennedy, and Ginsburg dissented from the majority's view that cross burning with the intent to intimidate could be banned. Instead, the dissenters argued that cross burning is protected speech, that the statute engaged in content-based discrimination that failed to qualify for an exception under *R.A.V.*, and that no ''exception should save Virginia's law from unconstitutionality under the holding of *R.A.V.* or any acceptable variation of it.''[68] According to Justice Souter, ''the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all possible expression meant to intimidate.''[69] Although Souter concedes that content can include an intimidating message of possible physical harm, and he acknowledges the historical association of cross burning with arson, beating, and lynching, he insists that cross burning also contains an ideological message from which it cannot be divorced. ''But even when the symbolic act is meant to terrify, a burning cross may carry a further ideological message of white Protestant supremacy.''[70]

Souter applies an *R.A.V.* analysis to test whether the statute falls under *R.A.V.*'s ''general condemnation of limited content-based proscription within a broader category of expression proscribable generally.''[71] *R.A.V.* recognizes that certain types of speech are not protected by the First Amendment and that even within those categories of speech a state may engage in content discrimination only so long as such discrimination ''consists entirely of the very reason the entire class of speech at issue is proscribable.''[72] According to Souter, *R.A.V.* recognizes as constitutional those content-based subclasses of proscribable expression when the prohibition by subcategory ''is made 'entirely' on the 'basis' of 'the very reason' that 'the entire class of speech at issue is proscribable' at all.''[73]

According to Justice Souter, when Virginia rejected ''a general prohibition of intimidation . . . in favor of a distinct proscription of

[68] *Virginia v. Black*, 123 S. Ct. at 1559 (Souter, J.).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1560.

intimidation by cross burning,'' that indicated discrimination on the basis of the message conveyed.[74] ''The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment.''[75]

Discussion

To summarize, in *Virginia v. Black* a divided Court overturned a state statute that outlawed cross burning. The Court concluded that sometimes the First Amendment protects cross burning, but when done to intimidate others, cross burning is a ''particularly virulent'' form of indimidation that can be banned. The Court was right to affirm that the First Amendment protects symbolic speech, cross burning is a type of such speech, and the Virginia statute that banned it was unconstitutional. But in holding that cross burning with the intent to intimidate can be proscribed, the Court failed to draw a sufficiently clear line between protected and unprotected speech. Moreover, the Court condoned content-based discrimination and chilled protected expression.

The opinion was a confusing combination of majority and plurality votes, concurrences in the judgment, partial and full dissents, and arguments about whether cross burning was speech in the first place. The justices achieved consensus on but one issue: that the burning of a cross merits unique treatment by the Court. That view might restrain the Court from proscribing other forms of offensive or threatening speech. But even if thus limited, *Virginia v. Black* raises profound questions about the very purpose of the First Amendment and the circumstances under which individuals can be protected from offensive or threatening expression.

The Legitimacy of Symbolic Speech

The idea that expressive conduct can qualify as speech, once a novel concept in American law, is today so well accepted that Justice O'Connor did not feel it necessary in her opinion to argue in support

[74] *Id.*

[75] *Id.*

of the concept. And no justice questioned the doctrine at oral argument or in the opinions. As Justice Brennan stated in *Texas v. Johnson*, ''[t]he First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.''[76] Before determining whether a type of conduct merits First Amendment protection, the Court will, according to Brennan, apply a threshold test. ''We have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'''[77] Under this test the Court has recognized a number of acts as symbolic speech, including ''the expressive nature of students wearing black armbands to protest American military involvement in Vietnam . . . of a sit-in by blacks in a 'whites only' area to protest segregation . . . of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam . . . of picketing about a wide variety of causes . . . [of] attaching a peace sign to the flag . . . refusing to salute the flag . . . and displaying a red flag.''[78]

Cross burning easily satisfies both prongs of the test set forth by Brennan and is, therefore, expressive conduct. Indeed, the argument of those who seek to ban the practice is that at least part of the message is understood all too well by those who view it.

Expressive Conduct Not Necessarily Protected Expression

Just because conduct can be expressive does not mean, of course, that all forms of symbolic speech are immunized by the First Amendment. Otherwise, as Judge Posner pointed out, a political assassin like John Wilkes Booth could claim that murdering Abraham Lincoln was protected ''speech.''[79] Similarly, as Justice Stevens argued, vandals could deface the Lincoln Memorial or Washington Monument, or extinguish the eternal flame at John F. Kennedy's grave, and claim that their crimes were acts of protected political speech.[80]

[76] *Texas v. Johnson*, 491 U.S. at 404 (Brennan, J.).

[77] *Id.*, quoting Spence v. Washington, 418 U.S. 405, at 410–411.

[78] *Texas v. Johnson* at 404 (Brennan, J.) (citations omitted).

[79] United States v. Soderna, 82 F. 3d 1370, 1375 (7th Cir. 1996) (''[K]illing a political opponent invades a right of personal liberty at the same time that it makes a political statement, as in the case of John Wilkes Booth's killing of Abraham Lincoln. The distinction is engraved in the case law interpreting the First Amendment.'').

[80] *Texas v. Johnson*, 491 U.S. at 437–439 (Stevens, J., dissenting).

In the draft card burning case, *United States v. O'Brien*,[81] Chief Justice Earl Warren wrote that ''we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.''[82] To evaluate conduct that combines ''speech'' and ''nonspeech'' elements, and to decide when ''a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,''[83] the Court announced what became known as the ''O'Brien test.'' The Court held that a government regulation is sufficiently justified

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[84]

Because the O'Brien test could, if applied improperly, suppress protected expression, the Court noted in *Texas v. Johnson* that ''we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'''[85] Therefore, in order to decide whether the *O'Brien* test should apply to cross burning, it becomes necessary to know whether a ban on cross burning is unrelated to the suppression of expression. If the interest in banning cross burning is related to expression, then we are outside of the *O'Brien* test and ''under a more demanding standard.''[86] The Court was right in *Virginia v. Black* to conclude that the statute was inextricably involved in suppressing expression and was correct, therefore, to refrain from invoking the O'Brien test to uphold the statute. Virginia had not banned cross burning for a nonspeech purpose of preventing forest fires, fighting global warming, or conserving scarce wood and fuel.

[81] United States v. O'Brien, 391 U.S. 367 (1968).

[82] *Id.* at 376 (Warren, C.J.).

[83] *Id.*

[84] *Id.* at 377.

[85] *Texas v. Johnson*, 491 U.S. at 397.

[86] *Id.* at 403.

On the contrary, Virginia sought to suppress the powerful message that cross burning expressed.

An Unconstitutional Statute

The Court was right to declare the Virginia statute unconstitutional. Indeed, it had to. The statute had announced that *only* cross burnings done with the intent to intimidate others were felonies. But then the statute declared that *all* cross burnings were prima facie evidence of that intent. The language of the statute implied the existence of a larger universe of cross burnings in which those carried out with the intent to intimidate were but one subcategory. Nevertheless, the statute went on to say that all categories of cross burning could be prosecuted. Once Justice O'Connor divided the universe of cross burnings into three categories 1) those that expressed ideology and group solidarity, 2) those that offended or angered people, and 3) those that put people in fear of bodily harm, and once she announced that the first two categories were protected by the First Amendment, it was obvious that the statute punished protected expression and was, thus, overbroad. At that point the Court had no choice but to, under its own well established precedents, declare the statute unconstitutional. That result is unremarkable. What is remarkable, however, is what the Court did next.

A Limited Holding

The Court was quick to limit its holding. Just because this particular statute was unconstitutional did not mean that it was open season for cross burners to pursue their hobby. Once Justice O'Connor's opinion overturned the statute, it announced a second holding: cross burning can still be banned. ''The First Amendment permits Virginia to outlaw cross burnings with the intent to intimidate because burning a cross is a virulent form of intimidation.''[87] But what exactly did ''intimidate'' mean?

The Court had the option of turning to at least three doctrines—fighting words, incitement, and true threats—to support that holding. Justice O'Connor gave short shrift to the first two. Having already despatched the *O'Brien* test, she did the same to the *Chaplinsky*[88] fighting words test and the *Brandenburg*[89] incitement test by

[87] *Virginia v. Black*, 123 S. Ct. at 1549 (O'Connor, J.).

[88] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[89] Brandenburg v. Ohio, 395 U.S. 444 (1968).

citing them and moving on. Under *Chaplinsky*, speech directed at a particular individual with the intention to ''incite an immediate breach of the peace'' can be proscribed as fighting words.[90] This doctrine does not apply to cross burning. The intent of cross burners might be to awe their victims into submission and fear, but it is certainly not to provoke them to come out and fight. And certainly the intent of the Virginia Assembly when it passed the cross burning statute was not to prevent breaches of the peace by viewers of the cross. Moreover, ''words and symbols do not become fighting words merely because the speaker deeply offends the listeners.''[91]

Under *Brandenburg*, expression cannot be proscribed unless the speaker incites imminent lawless action, which explains why the Court reversed the conviction of a Ku Klux Klan leader who advocated possible violence at some future time.[92] In an incitement case, the imminence element is strict, and speech cannot be suppressed unless it threatens to incite violence at that moment, or almost immediately. A cross burning alone, without the existence of additional factors (such as a cross burner screaming to a mob of his followers ''let's get them now!'') does not rise to this level of incitement. Indeed, at oral argument counsel for Virginia conceded the distance between *Brandenburg* and cross burning by stating that a long period of time might elapse between a cross burning and violence.[93]

So, after moving past fighting words and incitement, Justice O'Connor rested her holding on the last of the three doctrines, ''true threat.'' As she stated in her opinion, '''True threats' encompass 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.''[94] More precisely, Justice O'Connor explained

[90] *Chaplinsky*, 315 U.S. at 572.

[91] Ronald D. Rotunda, *A Brief Comment on Politically Incorrect Speech in the Wake of R.A.V.*, 47 SMU LAW REVIEW 9, 15 (1993).

[92] In *Brandenburg*, a Klan leader invited a television station to film a Klan rally at a farm. In a speech that was filmed and shown later, the speaker said ''[w]e're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken.'' 395 U.S. at 446.

[93] Transcript at 10.

[94] *Virginia v. Black*, 123 S. Ct. at 1548 (O'Connor, J.).

> Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so . . . the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.[95]

An Imprecise Rule?

The result in *Virginia v. Black* is the product of one of Justice O'Connor's trademark methods of constitutional analysis, which is to focus on the particular facts and circumstances of each case, much in the manner of a common law judge. Rather than seeking opportunities to make sweeping pronouncements, she prefers to approach issues on a case by case basis, scrutinizing the facts and context. Thus, one must not ignore ''all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.''[96] She used that as a limiting principle to proscribe as little cross burning as necessary to protect people from fear of injury or death.

But the ''true threat'' rule is susceptible to expansive interpretation that might chill protected expression. What evidence shall be deemed sufficient proof of an intent to intimidate? Cross burners are unlikely to furnish self-incriminating testimony about their hateful plans. Absent that, is intent proved whenever any witness to a cross burning testifies that he or she was afraid? Or, should we presume intent if a ''reasonable man'' would have known that a cross burning was likely to intimidate people? Does burning a cross in any place that African Americans can see it demonstrate intent to intimidate? The Virginia statute suggested so. Recall that the statute covered cross burnings ''on the property of another, a highway or other public place.'' At oral argument, counsel for Virginia explained that ''public place'' meant any place from which a burning cross could be seen, including the private property of the cross burner. After *Virginia v. Black*, a careful cross burner who seeks to express an ideology but not

[95] *Id.*

[96] *Id.* at 1551.

to intimidate others, and who wishes to avoid prosecution, would be wise to burn a cross in a remote and secret place far from any accidental witnesses. One effect of *Virginia v. Black* might be to chill expression by driving all cross burning underground and out of the public square. That may be good social policy, but it is not good constitutional law.

If the Court's holding does not provide all the answers, neither does First Amendment extremism that would advocate the right to unfettered cross burning any time and any place and would pervert the ''freedom of speech'' into a weapon of true intimidation. But no one can agree that the Constitution allows members of the Ku Klux Klan to trespass upon an African American family's property, stand in front of their home, and ignite a cross in their front yard.

And what of Justice Thomas, in lone dissent arguing that cross burning is not expression and should not, therefore, be analyzed under any First Amendment test? Much of his dissent rings true. It *was* a reign of terror, even more hateful, violent, and monstrous than his dissent, Justice O'Connor's opinion, the briefs of the parties, or the oral argument suggested.[97] The robe, the noose, and the flaming cross will remain eternal symbols of the century-long journey from slavery to freedom that began at the end of the Civil War. Thomas is right that there is no more explosive symbol in America today, and he is right to conclude that racial supremacists must not be allowed to with impunity burn crosses that place people in fear of life and limb. But denying that the burning cross has symbolic, expressive meaning is mistaken, and not necessary to protect people from intimidation and true threats. Recognizing that cross burning is expressive conduct does not mean that it will *always* be protected, but likewise it means that it will not *never* be protected.

When, as in *Virginia v. Black*, so many justices write in a case, and speak in multiple voices concurring in the judgment, or in only part of the opinion, or dissenting in part, or in full, along with all other

[97]For the most shocking history of the reign of terror ever published, see JAMES ALLEN (Ed.), WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000). White mobs often burned African Americans alive, then distributed their bones among men, women, and even children as souvenirs of the festive occasion. Several thousand lynchings are known to have taken place, not counting many of which there is no record.

variants thereof, it often reflects that the Court is struggling to understand the core issues of the case, or cannot even agree on basic premises.

If that is true in *Virginia v. Black*, it is so because the Court, by singling out the cross for special treatment and proscription, engaged in content-based discrimination. In *R.A.V.* the Court overturned a cross burning ordinance that, in contrast to Virginia's statute, did ''not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'''[98] In other words, the inference of an intent to intimidate did not depend on the victim's race, gender, religion, political affiliation, union membership, homosexuality, or anything else. In other words, Virginia's statute passes constitutional muster because it is regarded as content-neutral. But therein lies the fatal logical trap. The history of cross burning proves that it served two predominant purposes: to express racial supremacy, and to terrorize African Americans.[99] *That* is why we single out cross burning as unique; that is what a cross aflame conjures up in the mind; and that is why Virginia banned it. But the content discrimination is not in *who* you hate, but the *fact* of your hatred, and by which symbol you use to express it.

By banning some types of cross burning, *Virginia v. Black* might serve as incentive to those who seek to ban other hated symbols and offensive words. The Supreme Court has singled out from the universe of all hated symbols one symbol, the burning cross, for unique treatment because it is a ''particularly virulent'' form of intimidation. Establishing one exception to the First Amendment sets the stage for the next. Isn't the Nazi swastika equally or even more virulent than the Klan's cross? The swastika remains a symbol of death to all Jews, and a totalitarian abomination to everyone else. It is hard to argue that the swastika is any less virulent a form of intimidation than the burning cross. How would the Supreme Court

[98] *Virginia v. Black*, 123 S. Ct. at 1549 (O'Connor, J.) (citation omitted).

[99] Although Justice O'Connor is correct that not all cross burnings have been directed at African Americans (Virginia v. Black 123 S. Ct. at 1549 (O'Connor, J.)), and that targets have included Jews, union leaders, lawyers, and others, history indicates that cross burning was created to target African Americans, and that they comprised the vast majority of victims.

decide today the notorious case of the Nazis in Skokie?[100] Is the swastika the next ''particularly virulent'' form of intimidation that should be banned? Although it is true that the ''slippery slope'' argument has become almost a cliché, one must be watchful for attempts to sanitize the public square from hateful symbols, words, and thoughts. Or will the Court's repeated emphasis on the uniqueness of the burning cross restrain the Court from proscribing other expression? Perhaps *Virginia v. Black* is a sui generis case of one.[101]

The most elegant solution is to recognize the burning cross for what it is: as a symbol that can never be divorced from its expressive conduct. Do not ban cross burning. Do not ban the burning of any object with the intent to intimidate, because the cross is still the real target of such a ban. Instead, ban *all* intimidating speech that threatens people with bodily harm or death. That rule will certainly proscribe some cross burnings, but not *because* they are cross burnings. That rule will cut through the Gordian knot that has tied up the Court, legislatures, and First Amendment theorists ever since *R.A.V.* Moreover, such a plan has ample support in the common law, and even in tort law. One could not argue that the common law of threats of bodily harm, or the private action of intentional infliction of emotional distress, violates the First Amendment. It is possible that a proscription against all intimidating speech might incidentally burden in total more speech than a proscription against cross burning alone. But it is the better choice to incidentally burden a greater volume of speech under a content-neutral law than to intentionally suppress less speech from content discrimination.

Oliver Wendell Holmes Jr. once wrote, ''Great cases like hard cases make bad law. For great cases are called great, not because of their real importance in shaping the law of the future, but because of some accident or immediate overwhelming interest which appeals

[100]National Socialist Party of America v. Skokie, 432 U.S. 43 (1977) (per curiam). *See* DONALD DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT (1985); DAVID HAMLIN, THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE (1980); ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979).

[101]The Supreme Court declined to review the so called ''Nuremberg Files'' case, involving a virulent anti-abortion website and alleged threats. In a 6–5 split, the 9th Circuit upheld a verdict against anti-abortion activists. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Scientists, 290 F. 3d 1058 (9th Cir. 2003) (en banc).

to the feelings and distorts the judgment.''[102] *Virginia v. Black* was an emotional case that resurrected memories of an infamous, racist era in America's not so distant past. Although the Court did not make ''bad law,'' and made some good law, it could have made better law by treating cross burning in a content-neutral manner and not singling it out for unique treatment.

[102]Northern Securities Co. v. United States, 193 U.S. 197 (1904).