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Cross Burning Revisited: What the Supreme Court Should Have Done in *Virginia v. Black* and Why It Didn't

by
W. WAT HOPKINS*

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In 1992, in what surely must be one of its most convoluted opinions involving free speech issues,¹ the Supreme Court of the United States reversed the conviction of a juvenile who had burned a makeshift cross in the yard of a neighbor.² The young man, known only as R.A.V.³ because of his age, had been convicted of violating three federal statutes—convictions that would be upheld⁴—but could not be convicted of the cross burning, the Court held, because the St. Paul ordinance under which he was convicted was discriminatory.⁵

The Court's holding in *R.A.V. v. St. Paul* has been demonstrated by both the literature and the case law to be anything but clear-cut. In a maze of rationale that is still difficult to follow, the Court did not say outright that cross burning is constitutionally protected. Indeed, it established a complicated framework that, despite years of case law to the contrary, would allow a court to hold a law banning cross burning to be constitutional, even if the law was not content neutral.⁶

The *R.A.V.* decision was met with a chorus of disapproval. The case, one scholar wrote, demonstrates “that no one theory of the application of the free speech guarantee yet commands widespread support. Indeed, the *R.A.V.* decision, aside from being riddled with ironies, is a classic example of a court united in judgment and divided in understanding.”⁷ Another commentator criticized the Court for ignoring “the fundamental issues surrounding hate crime legislation”

1. The use of the word “convoluted” to describe the opinion is not original to this article. See Jerome O’Callaghan, *Free Speech by the Light of a Burning Cross*, 42 CLEV. ST. L. REV. 215, 235 (1994); see also Jonathan M. Holdowsky, *Out of the Ashes of the Cross: The Legacy of R.A.V. v. St. Paul*, 30 NEW ENG. L. REV. 1115, 115 (1996) (“Few cases in recent years have confused the landscape of First Amendment jurisprudence more than *R.A.V. v. St. Paul*.”). In addition, Justice John Paul Stevens called a portion of the majority opinion “opaque.” *R.A.V. v. St. Paul*, 505 U.S. 377, 424 (1992) (Stevens, J., concurring in the judgment).

2. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

3. The juvenile was Robert A. Viktora. He was subsequently identified in a number of sources. See, e.g., EDWARD J. CLEARY, *BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE* (1994); Nick Coleman, *It Takes a Creep to Burn a Cross*, ST. PAUL PIONEER PRESS, June 23, 1992, at 1B; Nick Coleman, *The Court Sends a Message. Hate Crimes: Will Ruling Spur Bigotry?*, ATLANTA CONST., June 25, 1992, at A15.

4. See *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994). The decision combined cases against three juveniles, including R.A.V.

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

6. See, e.g., *infra* notes 68-77 and accompanying text.

7. O’Callaghan, *supra* note 1, at 216; see also Richard J. Williams Jr., *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court’s Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 678-79 (1995).

and constructing an “intricate new rule.”⁸ Instead, the Court could have applied the same analysis it did in *Texas v. Johnson*⁹—that is, the strict scrutiny analysis—and could have arrived at the same holding.¹⁰ Or, the commentator continued, the Court could have created a new category of unprotected expression for hate speech, similar to that of fighting words, private libel and obscenity.¹¹

In addition, since 1992, when the decision was delivered, states have taken up the challenge to produce laws that would pass constitutional muster while, at the same time, would ban cross burning. Cross-burning cases have been decided by six state appellate courts since *R.A.V.* In two of those cases, state statutes have been held to be constitutional;¹² in the remainder, the statutes—or portions of the statutes—have been held to be unconstitutional.¹³

When the Court took up the issue of cross burning for a second time, therefore, a reasonable deduction was that it did so to help resolve the confusion it created in *R.A.V.* The issues seemed to be relatively clear-cut.

The Commonwealth of Virginia and its supporters had encouraged the Court to uphold a ban on cross burning because the history of the action made it so obnoxious that any expressive content was outweighed by hatred and virulence intrinsic to cross burning.¹⁴ They also argued that cross burning consisted of conduct—specifically, threatening conduct—rather than speech¹⁵ and, therefore, the government could more easily restrict it.¹⁶ Indeed, some commentators argued that cross burning belonged in a category of

8. Michael S. Degan, “Adding the First Amendment to the Fire”: *Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1144 (1993).

9. 419 U.S. 397 (1989).

10. Degan, *supra* note 8, at 1145 (citing *Texas v. Johnson*, 491 U.S. 397 (1989)).

11. *Id.*

12. See *In re Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994); *Florida v. T.B.D.*, 656 So. 2d 479 (Fla. Ct. App. 1995). See also *infra* notes 169-72 and accompanying text.

13. See *New Jersey v. Vawter*, 642 A.2d 349 (N.J. 1994); *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993); *Maryland v. Sheldon*, 629 A.2d 753 (Md. 1993); *Washington v. Talley*, 858 P.2d 217 (Wash. 1993). See also *infra* notes 149-52, 155-65 and accompanying text.

14. See Brief of Petitioner at 32-37, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107). See also Brief of Amicus Curiae State of New Jersey et al. at 10, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

15. See Brief of Amicus Curiae The United States at 11, 26, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107); Brief of Amicus Curiae The Criminal Justice Legal Foundation at 3, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107); Brief of Amicus Curiae Anti-Defamation League et al. at 15, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107); Brief of Amicus Curiae State of California at 2, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

16. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

speech that lay outside First Amendment protection.¹⁷ One commentator suggested that the Court create a new category of speech—“abhorrent” speech—that would include cross burning and other forms of speech that the Court would hold were unprotected by the Constitution.¹⁸

Free speech advocates, on the other hand, argued that the history of cross burning gave the activity its substantive message.¹⁹ That is, cross burning was banned specifically because of the hateful message it conveyed, but the Constitution prohibited the proscription of speech just because it is obnoxious, offensive or even hateful.²⁰ The regulation, they also argued, is a content-based, viewpoint-based restriction on speech.²¹

In *Virginia v. Black*,²² however, the Court refused the invitation to settle the issue and, taking a compromise position, tromped further into the mire that had surrounded cross burning for eleven years. It held that states have the power under the First Amendment to ban cross burning as intimidating speech.²³ Intimidating speech is equivalent to threatening speech, the Court held, which may be regulated.²⁴ However, the Court also found the Virginia statute to be unconstitutional because it restricted all forms of cross burning.²⁵ Some cross burning, the Court noted, is, in fact, political speech and deserving of First Amendment protection.²⁶

The Court, therefore, chose to bifurcate the issue, making inevitable further opinions in which it will be required to carve out a test providing guidance for lower courts confronted with cross burning cases. The history of the cross-burning debate in the courts demonstrates that a more logical path would have been for the Court to hold that cross burning is protected political speech, but to allow

17. See, generally, C. Catherine Scullon, *Cross Burning is Not a Threat: Constitutional Protection for Hate Speech*, 14 MISS. C. L. REV. 631 (1994).

18. See Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1889 (1992).

19. See Brief on Merits for Respondents at 12-14, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

20. See *id.*

21. See Brief of Amicus Curiae Thomas Jefferson Center for the Protection of Freedom of Expression at 5-14, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107). See also, Brief of Amicus Curiae The Rutherford Institute at 2-9, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) (No. 01-1107).

22. 538 U.S. 343 (2003).

23. *Id.* at 363.

24. *Id.* at 360.

25. *Id.* at 365.

26. *Id.* at 366.

law enforcement agencies to prosecute cross burners when the activity is clearly threatening or is part of broader threatening conduct. The history of cross burning jurisprudence is described here, followed by an evaluation of the Court's decision in *Virginia v. Black*.

I. *R.A.V. v. St. Paul*

R.A.V., with at least two other teenagers, assembled a cross from broken chair legs and burned it in the fenced yard of a black family.²⁷ He was convicted of violating St. Paul's Bias-Motivated Crime Ordinance, which provided:

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.²⁸

The trial court dismissed the action on grounds that the ordinance was overbroad and impermissibly content-based, but the Minnesota Supreme Court reversed, holding that its narrow interpretation of the ordinance was sufficient to limit its reach only to fighting words.²⁹ The ordinance, therefore, according to the state supreme court, only reached speech not protected by the First Amendment.³⁰ R.A.V. appealed to the Supreme Court.

A. Arguments to the Supreme Court

The questions presented to the Supreme Court in the petition for *certiorari* and in briefs on the merits focused on whether local governments could pass so-called "hate-crime" ordinances, even when those ordinances had been narrowly construed to proscribe only fighting words or incitement to imminent lawless action.³¹ Attorneys for St. Paul argued that the ordinance only proscribed fighting words, true threats and "conduct directed to inciting or

27. 505 U.S. 377, 379-80 (1992).

28. *Id.* at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

29. *Id.* at 380 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)).

30. *Id.* at 381. *See In re Welfare of R.A.V.*, 464 N.W.2d at 510.

31. *See* Petition for Certiorari at i, *In re the Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991); Brief in Opposition to Petition for Writ of Certiorari at 1, *In re the Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991); Brief for Petitioner at i, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief for Respondent at i, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675).

producing imminent lawless action.”³² Therefore, they argued, the ordinance is neither vague nor overbroad.

Under Minnesota law, the attorneys argued, a true threat need not be conveyed directly and in person, but is “a declaration of an intention to injure another.”³³ It must be made so that it supports the inference that a threat was intended. “Based on its historical and cultural subtext,” they argued, “the burning of a cross under circumstances where it is aimed against one or a group of victims *is* such a threat.”³⁴ The conduct, they continued, is directed at inciting or producing imminent lawless action and is likely to do just that.³⁵ The only question is whether the threat is clear and present.³⁶ To an African American, such a threat is not “remotely ambiguous.” The “reasonable and inevitable belief” of a person targeted by a cross burning is that further injury or death is likely unless the victim leaves the neighborhood.³⁷

Attorneys for R.A.V. disagreed. They argued that the ordinance was overbroad, that it regulated protected expressive conduct, and that it was not narrowly drawn to serve a compelling state interest.³⁸ The attorneys conceded that “fighting words”³⁹ and “incitement to imminent lawless action”⁴⁰ may be regulated under the First Amendment, but argued that neither type of expression was implicated by the St. Paul ordinance. Under the fighting words doctrine, they argued, the offensive language must be extremely personally offensive and must be uttered in a face-to-face manner to a specific individual rather than to a group.⁴¹ In addition, they argued, it’s not enough that there is a possibility that speech will provoke violence; there must be an immediate threat of violence.⁴² Similarly, while imminent lawless action may be regulated, advocating violence

32. Brief for Respondent, *supra* note 31, at 5.

33. *Id.* at 21.

34. *Id.* (emphasis in original).

35. *Id.* at 22.

36. *Id.*

37. *Id.* at 23.

38. Brief for Petitioner, *supra* note 31, at 4-7.

39. *Id.* at 27.

40. *Id.* at 29.

41. *Id.* at 27 (citing *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring); *Gooding v. Wilson*, 405 U.S. 518 (1972)).

42. *Id.* at 28 (citing *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974)).

in the abstract is not enough—there must be advocacy for the lawless violence to occur immediately.⁴³

The amicus briefs filed in the case, for the most part, advanced one of these two positions—either that the ordinance was overbroad and vague in its approach to regulating fighting words and advocacy of imminent lawless action, or that the ordinance had been sufficiently narrowed on these two points by the Minnesota Supreme Court. The Anti-Defamation League, for example, argued that the ordinance only prohibits fighting words or conduct directed at inciting imminent lawless action.⁴⁴ “A late-night cross burning in a black family’s yard is an act of violence, terror, harassment and intimidation,” the League’s brief argued.⁴⁵ The American Civil Liberties Union, on the other hand, took the approach that, while some expression, like threats, could be proscribed,⁴⁶ the St. Paul ordinance remained overbroad.⁴⁷ The ACLU also argued that the ordinance went beyond proscribing threats or imminent lawless behavior—it proscribed expression that, while obnoxious, was protected.⁴⁸

The nature of R.A.V.’s expressive conduct—was it fighting words, a true threat, or an incitement to imminent lawless action—and whether the St. Paul law had been sufficiently narrowed so that it addressed only those forms of expression were also raised at oral arguments. Indeed, the first questions posed to Edward J. Cleary, R.A.V.’s attorney, seemed to chide him because his brief had not focused more directly on the question at hand, which was “the statute

43. *Id.* at 29 (citing *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam)).

44. Brief of Amicus Curiae The Anti-Defamation League at 2, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675). *See also* Brief of Amicus Curiae The Asian American Legal Defense and Education Fund et al. at 5, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The Center for Democratic Renewal et al. at 2-3, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The State of Minnesota et al. at 4, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The National Association for the Advancement of Colored People et al. at 12-13, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae The National Institute of Municipal Law Officers et al. at 2, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675); Brief of Amicus Curiae People for the American Way at 10, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675).

45. *Id.* at 8.

46. Brief of Amicus Curiae The American Civil Liberties Union et al. at 18, *R.A.V. v. City of St. Paul*, 464 N.W.2d 507 (Minn. 1991) (90-7675).

47. *Id.* at 5-6, 19.

48. *Id.* at 21-22.

as the Minnesota Supreme Court has interpreted it[.]”⁴⁹ From there, questions quickly focused on how fighting words are defined and whether states can proscribe words that cause fear for one’s safety “even if the fear is for some act that will occur 24, 48 hours later.”⁵⁰ Cleary said they could.⁵¹ The Court then wanted Cleary to discuss the possible distinction made in *Chaplinsky v. New Hampshire*⁵² between words that cause a breach of the peace and “words that injure.”⁵³ Under questioning by the justices, Cleary admitted that he was arguing that the *Chaplinsky* reference to “words that injure” was, in fact, “an erroneous reference” that the Court should disavow.⁵⁴

The bulk of the argument by St. Paul’s attorney, Thomas J. Foley, was that the Minnesota Supreme Court had interpreted the ordinance to prohibit only conduct that inflicts injury, tends to incite an immediate breach of the peace or provokes imminent lawless action.⁵⁵ Justices seemed to be concerned about the fact that the ordinance only prohibited certain types of expression aimed at certain groups. Because of the distinction, one justice noted, the ordinance seemed to be content-based.⁵⁶ Foley disagreed, but argued that, even if the Court found the law to be content-based, “[T]here is a compelling state purpose in public safety and order and safety of their citizens for the city of St. Paul to pass such an ordinance.”⁵⁷

The stage was set, then, for the Court to consider cross burning under the parameters of fighting words, true threats or incitement to imminent violence.

B. Justice Scalia for the Court

But Justice Antonin Scalia took a different route. He skirted the issue of overbreadth and all but ignored the issue of the nature of the

49. Transcript of Oral Argument at 1, *R.A.V. v. City of St. Paul*, Dec. 4, 1991 (No. 90-7675).

50. *Id.* at 3.

51. *Id.*

52. 315 U.S. 568 (1949).

53. In *Chaplinsky*, the Court held that fighting words are not protected by the First Amendment, and defined “fighting words” as “those which by their very utterance *inflict injury* or tend to *incite an immediate breach of the peace.*” *Id.* at 572 (emphasis added).

54. Transcript of Oral Argument, *supra* note 47, at 7-8.

55. *Id.* at 15.

56. Content-based restrictions on speech are presumed to be unconstitutional. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Boos v. Barry*, 485 U.S. 312 (1988). *See also infra* notes 60-62 and accompanying text; *infra* notes 85-88 and accompanying text.

57. Transcript of Oral Arguments, *supra* note 49, at 16.

expression—whether it constituted fighting words, a true threat or an incitement to imminent violence. He noted that the Court was bound by the construction given to the St. Paul ordinance by the Minnesota Supreme Court and, therefore, accepted the lower court’s assertion that the ordinance reached only fighting words.⁵⁸ Justice Scalia did not mention the other forms of proscribable speech that had been prevalent in briefs and oral arguments—threats and advocacy of imminent lawless action. Despite accepting Minnesota’s assertion that the St. Paul ordinance only addressed fighting words, however, Justice Scalia wrote that it was still unconstitutional because “it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”⁵⁹

Then he launched into a new area of free expression law.

While the general proposition of the Court has always been that “content-based regulations are presumptively invalid,”⁶⁰ Scalia wrote, it is equally true that some “areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content.”⁶¹ Obscenity and defamation are two examples. Even though the Court has indicated that certain categories of expression are not within the area of constitutionally protected speech, Scalia wrote, “Such statements must be taken in context” and are not “literally true.”⁶²

Based on that proposition, Scalia advanced a second proposition, namely that speech can be proscribable on the basis of one feature but not on the basis of another. Such a proposition, he wrote, “is commonplace and has found application in many contexts.”⁶³ That means, for example, that burning a flag in violation of an ordinance against outdoor burning could be punishable, while burning a flag in violation of an ordinance prohibiting the dishonoring of the flag could not.⁶⁴ Similarly, time, place and manner restrictions on speech have been upheld as constitutional.⁶⁵ And, Scalia wrote, that also means that fighting words can be restricted, not based upon the content of the message they convey, but because of their “nonspeech” elements. “Fighting words are thus analogous to a noisy sound truck: Each is, . .

58. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

59. *Id.*

60. *Id.* at 382.

61. *Id.* at 383.

62. *Id.*

63. *Id.* at 385.

64. *Id.*

65. *Id.* at 386.

‘a mode of speech;’ both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment.”⁶⁶ The Court never said, Scalia wrote, that fighting words constitute “no part of the expression of ideas, but only that they constitute ‘no *essential* part of any exposition of ideas.’”⁶⁷

But Scalia also noted that the prohibition against content discrimination is not absolute.⁶⁸ The rationale for the prohibition is that content discrimination raises the specter that the government may drive some viewpoints from the marketplace of ideas.⁶⁹ But content discrimination among various instances of a class of proscribable speech often does not pose that threat, he wrote.⁷⁰ Justice Scalia then delineated three supposed exceptions to the general prohibition against content discrimination. Although he did not enumerate his exceptions, they have become a sort of test some lower appellate courts have appropriated in deciding cross-burning cases.⁷¹

First, Scalia wrote, when the basis for 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.”⁷² A state, therefore, may prohibit only the most patently offensive types of obscenity, even though punishment is allowed for the publication of any material that is deemed obscene. But, the state may not punish only obscene material that contains certain political messages.⁷³ Similarly, the federal government can criminalize threats of violence directed against the President, but may not criminalize only those threats that mention the President’s various policies.⁷⁴

A second exception to the general rule that content-based regulations are prohibited, Justice Scalia wrote, is when speech is

66. *Id.*

67. *Id.* at 385 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (emphasis in original).

68. *Id.* at 387.

69. *Id.* (quoting *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 116 (1991)).

70. *Id.* at 388.

71. See, e.g., *Maryland v. Sheldon*, 629 A.2d 753, 760-61 (Md. 1993); *New Jersey v. Vawter*, 642 A.2d 349, 357-59 (N.J. 1994). Indeed, members of the Court have adopted the exceptions as well. See *Virginia v. Black*, 538 U.S. 343, 361-62 (2003); *id.* at 381-82 (Souter, J., concurring in judgment in part and dissenting in part).

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

73. *Id.*

74. *Id.*

associated with particular secondary effects caused by the speech, so that the regulation is justified without reference to the content of the speech but to control the secondary effects.⁷⁵ For example, he wrote, a state could permit all obscene live performances except those involving minors. The purpose of the regulation would be the secondary effect of protecting minors. In addition, he wrote, a particular content-based subcategory of a proscribable class of speech can sometimes be swept up incidentally within the reach of a statute directed at conduct rather than at speech.⁷⁶

Finally, Justice Scalia wrote that an exception to the general rule that content-based regulations are unconstitutional occurs when “there is no realistic possibility that official suppression of ideas is afoot.” As a result, “[T]he regulation of ‘fighting words,’ like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.”⁷⁷

The effect of the opinion is that the government could choose not to proscribe subcategories of proscribable speech even though the larger categories had been determined to lay outside the protection of the First Amendment. Justice Scalia, therefore, was abandoning the so-called “categorical” approach of free speech jurisprudence.

Justice Scalia then applied those principles to the St. Paul ordinance and found it unconstitutional because it discriminated against certain groups of people, even though it may have been narrowly construed by the Minnesota Supreme Court. In short, it did not fit any of the exceptions. Wrote Justice Scalia:

Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.⁷⁸

The St. Paul ordinance, Scalia wrote, is not aimed at certain groups, but rather at certain messages that are aimed at groups.⁷⁹ It is the obligation of the government, Scalia wrote, to confront hatred based on virulent notions of racial supremacy, “[B]ut the manner of that confrontation cannot consist of selective limitations upon speech

75. *Id.* at 389.

76. *Id.*

77. *Id.* at 390.

78. *Id.* at 391.

79. *Id.* at 392.

. . . The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”⁸⁰

Fighting words are prohibited, Scalia noted, not because of any particular ideas they convey, but because their content embodies a particularly intolerable mode of expressing ideas. St. Paul, he wrote, has not singled out an especially offensive mode of expression—such as threats—but has proscribed language that communicates messages of racial, gender or religious intolerance. “Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas,” he wrote. “That possibility would alone be enough to render the ordinance presumptively invalid.”⁸¹

C. A “Transparently Wrong” Opinion

Four justices—though agreeing that R.A.V.’s conviction should be overturned—took issue with the majority for “cast[ing] aside long-established First Amendment doctrine without the benefit of briefing and adopt[ing] an untried theory. This is hardly a judicious way of proceeding,” Justice Byron White wrote in an opinion concurring in the judgment, “and the Court’s reasoning in reaching its result is transparently wrong.”⁸² The Court, wrote Justice White, joined by Justices Harry Blackmun, Sandra Day O’Connor and John Paul Stevens, should have found the St. Paul ordinance fatally overbroad because it criminalizes not only unprotected expression but protected expression as well.⁸³ Instead, he wrote, the Court “[H]olds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases . . . ”⁸⁴

Justice White criticized Justice Scalia for abandoning the categorical approach to free speech jurisprudence. The Court, he wrote, has “plainly stated that expression falling within certain limited categories”⁸⁵ is not protected by the First Amendment because the expressive content “is worthless or of de minimis value to society.”⁸⁶

80. *Id.*

81. *Id.* at 393-94.

82. *Id.* at 398 (White, J., concurring in judgment).

83. *Id.* at 397 (White, J., concurring in judgment).

84. *Id.* at 398 (citing *Burson v. Freeman*, 504 U.S. 191 (1992)) (White, J., concurring in judgment).

85. *Id.* at 399 (White, J., concurring in judgment).

86. *Id.* at 400 (White, J., concurring in judgment).

The *R.A.V.* Court, however, Justice White wrote, “announces that earlier Courts did not mean their repeated statements that certain categories of expression are ‘not within the area of constitutionally protected speech.’”⁸⁷ But, he added, “To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence.”⁸⁸

Justice White wrote that it was inconsistent to hold that the government could proscribe an entire category of speech because of its content, but could not treat a subset of that category differently without violating the First Amendment. “[T]he content of the subset,” he wrote, “is by definition worthless and undeserving of constitutional protection.”⁸⁹ The implication in the majority opinion that fighting words could be categorized as a form of debate particularly rankled Justice White. By so categorizing, he wrote, “[T]he majority legitimates hate speech as a form of public discussion.”⁹⁰

Justice White also criticized the majority for what he called “a general renunciation of strict scrutiny review,” which he called “a fundamental tool of First Amendment analysis.”⁹¹ And the Court provided no reasoned basis for discarding strict scrutiny analysis in *R.A.V.*⁹² The St. Paul ordinance, Justice White wrote, if it were not overbroad, would certainly pass such review. It proscribes a subset of fighting words—those that injure on the basis of race, color, creed, religion or gender, an interest even the majority concedes is compelling⁹³—and the ban is on “a class of speech that conveys an overriding message of personal injury and imminent violence.”⁹⁴

87. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 483 (1957)) (White, J., concurring in judgment).

88. *Id.* (White, J., concurring in judgment).

89. *Id.* at 401 (White, J., concurring in judgment).

90. *Id.* at 402 (White, J., concurring in judgment).

91. *Id.* at 404 (White, J., concurring in judgment). Justice White pointed out that two of the five justices who joined Justice Scalia’s opinion had also joined the plurality opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), handed down less than a month before *R.A.V.*, and which affirmed the strict scrutiny standard applied in a case involving a First Amendment challenge to a content-based statute. *Id.* at 398 (citing *Burson*, 504 U.S. at 198) (White, J., concurring in judgment). *Burson* was delivered May 26, 1992; *R.A.V.* was delivered June 22, 1992.

92. *Id.* at 406 (White, J., concurring in judgment).

93. *Id.* at 407 (White, J., concurring in judgment).

94. *Id.* at 408 (White, J., concurring in judgment).

Justice White wrote that the case should be settled on grounds that the ordinance is overbroad,⁹⁵ because it reaches categories of speech that are constitutionally protected.⁹⁶

Justices Blackmun and Stevens also wrote opinions concurring in the judgment.

Justice Blackmun, writing alone, was not as passionate as Justice White, but was just as condemning. “The majority opinion signals one of two possibilities,” he wrote. “It will serve as precedent for future cases, or it will not. Either result is disheartening.”⁹⁷ The majority opinion, he wrote, abandons the categorical approach to restricting speech and relaxes the level of scrutiny applicable to content-based laws, “setting law and logic on their heels.” This weakens the traditional protections of speech, because, “If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.”⁹⁸

Second, the case may be viewed as an aberration: “a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words.”⁹⁹ The Court, Justice Blackmun wrote, may have been distracted from its proper mission by the temptation to decide the issue over “politically correct speech” and “cultural diversity,” neither question of which was presented. “If this is the meaning of today’s opinion,” he wrote, “it is perhaps even more regrettable.”¹⁰⁰ Concluded Justice Blackmun:

I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community. I concur in the judgment, however, because . . . this particular ordinance reaches beyond fighting words to speech protected by the First Amendment.¹⁰¹

Justice Stevens, joined in part by Justices White and Blackmun, took issue with the opinions of both Justice Scalia and Justice White.

95. *Id.* at 411 (White, J., concurring in judgment).

96. *Id.* at 413 (White, J., concurring in judgment).

97. *Id.* at 415 (Blackmun, J., concurring in judgment).

98. *Id.* (Blackmun, J., concurring in judgment).

99. *Id.* (Blackmun, J., concurring in judgment).

100. *Id.* at 415-16. (Blackmun, J., concurring in judgment).

101. *Id.* at 416. (Blackmun, J., concurring in judgment).

Justice Stevens wrote that threatening a person because of the person's race or religious beliefs could be punished for the trauma it causes, just as lighting a fire near an ammunition dump could be punished.¹⁰² And, agreeing with Justice White, he wrote that the St. Paul ordinance was unconstitutional because it was overbroad.¹⁰³ But, he added, he was writing separately "to suggest how the allure of absolute principles has skewed the analysis of both the majority and Justice White's opinions."¹⁰⁴

Justice Stevens indicated that the majority's fatal flaw is that its central premise—that content-based regulations are presumptively invalid—"has simplistic appeal, but lacks support in our First Amendment jurisprudence."¹⁰⁵ While the Court has often stated that premise, it has also recognized that a number of types of speech can be restricted based on their content—obscenity, child pornography and fighting words, for example.¹⁰⁶ The Court, then, disregards a "vast body of case law" and applies a new type of "prohibition on content-based regulation to speech that the Court had until today considered wholly 'unprotected' by the First Amendment—namely, fighting words. This new absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law."¹⁰⁷

Justice Stevens also wrote that he had problems with the "categorical approach" advocated by Justice White. While the approach has some appeal—"the categories create safe harbors for governments and speakers alike"—it "sacrifices subtlety for clarity and is, I am convinced, ultimately unsound."¹⁰⁸ Therefore, Justice Stevens wrote, "Unlike the Court, I do not believe that all content-based regulations are equally infirm and presumptively invalid; unlike Justice White, I do not believe that fighting words are wholly unprotected by the First Amendment."¹⁰⁹ The decisions of the Court, he wrote, "establish a more complex and subtle analysis . . . that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech."¹¹⁰ Under such an

102. *Id.* at 416-17 (Stevens, J., concurring in judgment).

103. *Id.* at 417 (Stevens, J., concurring in judgment).

104. *Id.* (Stevens, J., concurring in judgment).

105. *Id.* at 425 (Stevens, J., concurring in judgment).

106. *Id.* at 421 (Stevens, J., concurring in judgment).

107. *Id.* at 422 (Stevens, J., concurring in judgment).

108. *Id.* at 426 (Stevens, J., concurring in judgment).

109. *Id.* at 428 (Stevens, J., concurring in judgment).

110. *Id.* (Stevens, J., concurring in judgment).

approach, he concluded, a “selective, subject-matter regulation,” like that of St. Paul, is constitutional.¹¹¹

Justice Stevens wrote that he assumes, as does the Court, that the St. Paul ordinance regulates only fighting words.¹¹² It “regulates speech, not on the basis of its subject matter or viewpoint expressed, but rather on the basis of the *harm* [it] causes,” that is, speech that the speaker knows will inflict injury.¹¹³ The ordinance, therefore, resembles a law prohibiting child pornography, an ordinance regulating speech because of the harm it could cause.¹¹⁴

But, Justice Stevens wrote, even if the ordinance regulated fighting words based on their subject matter, it would be constitutional.¹¹⁵ The ordinance does not prohibit “advocates of tolerance and advocates of intolerance” from “hurling fighting words at the other on the basis of their conflicting ideas,” but on the basis of the target’s race, color, creed, religion or gender. In effect it prohibits “below the belt” punches, favoring neither side.¹¹⁶ The ordinance is also narrow and does not “raise the specter” that the government might “drive certain ideas or viewpoints from the marketplace.”¹¹⁷

In sum, Justice Stevens wrote, the ordinance would be constitutional were it not overbroad.¹¹⁸

II. Cross Burning in Lower Appellate Courts

Both the United States government and various states continued to punish cross burning despite the Court’s decision in *R.A.V.*, but by use of different approaches. Most states enforced statutes that, to one degree or another, prohibited the act of burning a cross. The federal government, on the other hand, punished cross burning as part of a broader attempt by a criminal perpetrator to restrict an individual’s civil rights, specifically, the right to inhabit a dwelling free from fear due to threatening behavior.¹¹⁹

111. *Id.* (Stevens, J., concurring in judgement).

112. *Id.* at 432 (Stevens, J., concurring in judgment).

113. *Id.* at 433 (Stevens, J., concurring in judgment).

114. *Id.* (Stevens, J., concurring in judgment).

115. *Id.* (Stevens, J., concurring in judgment).

116. *Id.* at 435 (Stevens, J., concurring in judgment).

117. *Id.* at 436 (Stevens, J., concurring in judgment).

118. *Id.* (Stevens, J., concurring in judgment).

119. The prosecutions are generally based upon alleged violations of, among other statutes, 18 U.S.C. § 241 (2003) (prohibiting conspiracies to “injure, oppress, threaten or intimidate” a person who is attempting to exercise that person’s rights), 18 U.S.C. § 844(h)(1) (2003) (prohibiting the use of fire or explosives in the commission of a felony)

A. Federal Prosecutions for Cross Burning

The federal government has clearly been more successful in prosecuting defendants who burned crosses as part of protests than have state governments. Of five cases prosecuted for violation of various civil rights or fair housing laws, in only one did a federal appellate court overturn a conviction, and in that case the court left the door open for a retrial based on the cross burning.¹²⁰ In *Lee v. United States*,¹²¹ the United States Court of Appeals for the Eighth Circuit affirmed a conviction for conspiracy, but reversed a conviction for using fire in the commission of a felony. The court, which had affirmed similar convictions in other cases,¹²² provided a framework whereby a conviction of Bruce Roy Lee could be affirmed. Had the judge instructed the jury that expression could be punished if it was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” and if the jury had convicted under that standard, the conviction could be affirmed.¹²³ The court held that Lee’s action could be interpreted as an action designed to advocate the use of force or violence and was likely to produce such a result.¹²⁴

The four other cross-burning convictions that reached the federal appellate courts since *R.A.V.* were much more clear-cut.¹²⁵

and 42 U.S.C. § 3631(a) (2003) (prohibiting the interference with the right of a person to purchase, rent or occupy a dwelling because of the person’s race).

120. The four cases in which convictions were upheld were *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994); *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993). See discussion accompanying *infra* notes 126-48.

121. 6 F.3d 1297 (8th Cir. 1993).

122. See cases cited at *supra* note 120, and *infra* notes 141-48 and accompanying text.

123. 6 F.3d at 1302 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969)).

124. *Id.* at 1303.

125. At least two other cases in which defendants were charged with similar crimes reached federal appellate courts but are not considered here. In *Munger v. United States*, 827 F. Supp. 100 (N.D.N.Y. 1992), a criminal defendant burned a cross as part of what the court called a “terroristic and racially motivated assault.” *Id.* at 105. In that case, however, the defendant was charged with interference with housing rights and assault. The court held that the case was not a cross-burning case: “That petitioner chose to burn a cross during his terroristic and racially motivated assault on the victim offers him no protection from the force of the statute.” *Id.* The nature of the defendant’s criminal conduct, the court held, was not addressed in *R.A.V.* *Id.* at 105-06. *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001), was a cross-burning case, but the defendant did not appeal on First Amendment grounds. Michael B. Magleby appealed on various procedural grounds, including the argument that the government could not prove that his burning of a cross in the yard of a racially mixed couple was done with the requisite requirement that his action was racially motivated. *Id.* at 1312-13. Magleby argued that he abandoned his attempt to burn the cross in the yard of his initial victim when too many people were gathered at that

In two cases, defendants were charged with interference with the housing rights of another and use of fire in commission of a federal felony.¹²⁶ In *United States v. Hayward*,¹²⁷ the Seventh U.S. Circuit Court of Appeals found the purpose of the law was “to protect the right of an individual to associate freely in his home with anyone, regardless of race.”¹²⁸ The law, therefore, is aimed at prohibiting intimidating acts, not at prohibiting expressive conduct.¹²⁹ The fact that the defendants may have used expressive conduct to achieve the goal of intimidation does not bring the action within the protection of the First Amendment under *R.A.V.*, the court held.¹³⁰ The defendants, in the middle of the night, had burned two crosses in the yard of a white family, apparently because members of the family frequently had black guests in the home.¹³¹ Applying the intermediate scrutiny test enunciated in *United States v. O’Brien*,¹³² the court held that “the incidental restrictions on the alleged First Amendment rights in this case are no greater than is necessary to further the government’s valid interest of protecting the rights” of individuals to associated freely with whomever they choose.¹³³

The Eleventh U.S. Circuit Court of Appeals reached a similar conclusion two years later. In *United States v. Stewart*,¹³⁴ the court found the statutes under which the defendants were convicted to be facially valid and neither overbroad nor vague.¹³⁵ In addition, the

home, and he only burned the cross in the yard of the second victim on the guidance of one of his co-defendants. *Id.* at 1309. He did not know the race of the eventual victims, he argued, so the government could not meet its burden of proof. *Id.* at 1312. The court disagreed, finding sufficient evidence to permit a jury to find beyond a reasonable doubt that Magleby targeted the eventual victims because of their race. *Id.* at 1313.

126. In addition to the First Amendment challenge, the court, in one case, rejected arguments by counsel for the defendants that the statute prohibiting the use of fire in the commission of a felony was limited to the prosecution of arson cases. *United States v. Hawyard*, 6 F.3d 1241, 1246 (7th Cir. 1993). The court found nothing in the language to so limit the statute. *Id.*

127. 6 F.3d 1241 (7th Cir. 1993).

128. *Id.* at 1250.

129. *Id.*

130. *Id.* at 1251.

131. *Id.* at 1244.

132. 391 U.S. 367, 377 (1968) (Is the regulation within the constitutional power of the government; does it further an important or substantial governmental interest; is the interest unrelated to the suppression of free expression; is the incidental restriction on First Amendment freedoms no greater than essential to further the governmental interest?).

133. 6 F.3d at 1251.

134. 65 F.3d 918 (11th Cir. 1995).

135. *Id.* at 929.

court found that the conduct was not protected under *R.A.V.*¹³⁶ The defendants had burned a cross in the yard of Linda and Isaiah Ruffin, a black couple with two young daughters, who had recently moved into a nearly all-white community.¹³⁷ During the incident, which took place in the middle of the night, there was also an altercation between Isaiah Ruffin and the defendants.¹³⁸ Therefore, the court noted, the cross burning was more than an act of expression:

The act of burning the cross . . . was an expression of the defendant's hatred of blacks, just as the act of killing is sometimes an expression of a murderer's hatred of the victim. Because we punish the act and not the opinion or belief which motivated it, the cross burning in this case was not protected by the First Amendment, just as a murder would not have been protected in similar circumstances. Notwithstanding the fact that some Klan cross burnings may constitute protected expression, these defendants did not burn their cross simply to make a political statement. The evidence clearly shows that the defendants intended to threaten and intimidate the Ruffins with this cross burning.¹³⁹

The law's requirement that there must be an intent to intimidate—as there was in this case—insulates the statute from constitutional challenge, the court held.¹⁴⁰

Two more cases, both out of the Eighth U.S. Circuit Court of Appeals and one involving the same juvenile whose conviction was overturned in *R.A.V.*, further demonstrate the federal government's success in prosecuting defendants who burned crosses. *R.A.V.* and two other juveniles were convicted of violating laws prohibiting the interference with federal housing rights by burning crosses in the yards of three families.¹⁴¹ The Eighth Circuit held that the critical issue in the case was whether the cross burnings “were intended as threats, rather than as merely obnoxious, but protected, political statements.”¹⁴² The court held that they were¹⁴³ and, therefore, “[E]ven though these acts may have expressive content, the First Amendment does not shield them from prosecution.”¹⁴⁴

136. *Id.* at 929-30.

137. *Id.* at 921.

138. *Id.* at 921-22.

139. *Id.* at 930.

140. *Id.*

141. *United States v. J.H.H.*, 22 F.3d 821, 823 (8th Cir. 1994).

142. *Id.* at 826.

143. *Id.* at 828.

144. *Id.*

Similarly, in *United States v. McDermott*,¹⁴⁵ the Eighth Circuit affirmed the convictions of two defendants who culminated 18 months of wielding baseball bats, axe handles and knives, throwing rocks and bottles, veering cars toward and chasing black persons by burning a 15-foot cross.¹⁴⁶ The court held that the cross burning by William and Daniel McDermott was “merely the final act” in a “threatening course of conduct,”¹⁴⁷ and, therefore, that the jury did not base its conviction solely on that act.¹⁴⁸

B. State Prosecutions for Cross Burning

State officials have had considerably less success prosecuting cross burning. Since *R.A.V.*, six state courts have ruled in cross-burning cases.¹⁴⁹ Supreme courts in New Jersey¹⁵⁰ and South Carolina¹⁵¹ and the court of appeals in Maryland¹⁵² overruled convictions because cross burning was determined to be a form of protected speech. Only two appellate courts—in California¹⁵³ and Florida¹⁵⁴—have held cross-burning statutes to be constitutional. One of the earliest cases, *Washington v. Talley*,¹⁵⁵ might demonstrate the split personality with which most cross-burning cases are imbued.

In *Washington*, the state supreme court consolidated two cases. In the first, David Talley was convicted of six counts of malicious harassment in connection with activities he conducted in his yard. He built a 4-foot cross, set it afire and began to “hoot and holler.”¹⁵⁶ The activity apparently frightened off a mixed-race couple who was planning to purchase the house next door to Talley’s.¹⁵⁷ In the second case, Daniel Myers, Brandon Stevens and several other teenagers burned an 8-foot cross in the yard of a black schoolmate whom they

145. 29 F.3d 404 (8th Cir. 1994).

146. *Id.* at 405.

147. *Id.* at 407.

148. *Id.* at 408.

149. In addition to New Jersey, South Carolina, Maryland, California, Florida and Washington, *see infra* notes 150-55, county courts in Pennsylvania split, one ruling that cross burning is not a threat, *Commonwealth v. Kozak*, 21 Pa. D. & C. 4th 362 (Allegheny County, 1993), the other ruling that cross burning is not protected expression, *Commonwealth v. Lower*, 2 Pa. D. & C. 4th 107 (Cargon County, 1989).

150. *New Jersey v. Vawter*, 642 A.2d 349 (N.J. 1994).

151. *State v. Ramsey*, 430 S.E.2d 511 (S.C. 1993).

152. *Maryland v. Sheldon*, 629 A.2d 753 (Md. 1993).

153. *In re Steven S.*, 31 Cal. Rptr. 2d 644 (Cal. Ct. App. 1994).

154. *Florida v. T.B.D.*, 656 So. 2d 479 (Fla. Ct. App. 1995).

155. 858 P.2d 217 (Wash. 1993).

156. *Id.* at 220.

157. *Id.*

said was acting “too cool” at school. They were charged with one count of malicious harassment.¹⁵⁸ All three defendants challenged the convictions on grounds that the malicious harassment statute was unconstitutional.¹⁵⁹

The defendants were convicted under two sections of Washington’s malicious harassment statute. Section 1 prohibited actions that, based upon a person’s race, color, religion, ancestry, national origin or handicap, caused physical injury or placed a person in fear of injury because of a variety of actions, including cross burning. Section 2 provided that cross burning constituted a per se violation of the law.¹⁶⁰ The state supreme court held that Section 1 of the law withstood constitutional scrutiny because it is aimed at criminal conduct and only incidentally affects speech, but that Section 2 was unconstitutionally overbroad because it inhibited free speech on the basis of content.¹⁶¹

Section 1, the court held, differed from the St. Paul ordinance because it “is aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category.”¹⁶² The statute, the court noted, is “triggered by victim selection regardless of the actor’s motives or beliefs.”¹⁶³ The second section of the law, however, is unconstitutional because it “criminalizes symbolic speech that expresses disfavored viewpoints in an especially offensive manner.”¹⁶⁴ Even if the law was construed to address only fighting words, the court held, it would still be unconstitutional “because even fighting words may not be regulated based on their content.”¹⁶⁵

Many of the themes arising in *Washington* also appeared in the other cross-burning cases. The cases, then, turned, not on different issues, but on the way courts interpreted the law as it applied to those issues. Cases did not turn, for example, on where the cross burning occurred. Four of the state statutes prohibited cross burning on the property of another unless the burner had the permission of the property owner. Courts split on the constitutionality of the statutes,

158. *Id.*

159. *Id.* at 221.

160. *Id.* at 220-21 (citing WASH. REV. CODE § 9A.36.080 (West 1989)).

161. *Id.* at 221.

162. *Id.* at 222.

163. *Id.*

164. *Id.* at 231.

165. *Id.*

without reference to this particular provision.¹⁶⁶ Nor did cases turn on whether cross burning was expressive conduct that conveyed a powerful message. The courts were in relative agreement that cross burnings convey powerful, even repugnant messages.¹⁶⁷ Such actions, the New Jersey Supreme Court noted, convey a clear message: “hatred, hostility, and animosity.”¹⁶⁸

From there, however, there was clear divergence by state courts as to how cross burning and cross-burning statutes should be interpreted.

Courts holding cross-burning statutes to be constitutional did so because the messages conveyed were found to be more than expression—they were determined to be conduct, that is, threats. The Florida Court of Appeals, for example, held:

An unauthorized cross-burning by intruders in one’s own yard constitutes a direct affront to one’s privacy and security and has been inextricably linked in this state’s history to sudden and precipitous violence—lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct. A more terrifying symbolic threat for many Floridians would be difficult to imagine.¹⁶⁹

The California Court of Appeals agreed. A cross burning, the court held, “does more than convey a message. It inflicts immediate injury by subjecting the victim to fear and intimidation, and it conveys a threat of future physical harm.”¹⁷⁰ Indeed, the California court found cross burning to fall into the category of speech known as “true threats.”¹⁷¹ The California Court of Appeals found a “true threat” to occur “when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily

166. Compare *Maryland v. Sheldon*, 629 A.2d 753, 762-63 (Md. 1993) (The statute meets none of the exceptions delineated in *R.A.V.* and does not survive strict scrutiny, so it is unconstitutional.), and *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993) (The statute is facially unconstitutional; it limits fighting words only conveyed by a burning cross.), with *Florida v. T.B.D.*, 656 S.2d 479, 480-81 (Fla. Ct. App. 1995) (The statute is a constitutional method of protecting individuals from threats.), and *In re Steven S.*, 31 Cal. Rptr. 2d 644, 653 (Cal. Ct. App. 1994) (Cross burning is a form of terrorism, and the statute is constitutional.).

167. See, e.g., *Maryland*, 629 A.2d at 757.

168. *New Jersey v. Vawter*, 642 A.2d 349, 354 (N.J. 1994). See also *Maryland*, 629 A.2d at 757; *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993).

169. *Florida v. T.B.D.*, 656 So. 2d 479, 481 (Fla. Ct. App. 1995).

170. *In re Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Cal. Ct. App. 1994).

171. *Id.* In *Watts v. United States*, 394 U.S. 705, 707 (1969), the Supreme Court noted that a threat against the president is not protected expression because it is, in fact, a threat. See *infra* notes 303-10 and accompanying discussion.

harm,”¹⁷² a definition with which the Supreme Court would seem to agree. In *Watts v. United States*, the Court quoted with approval a lower court definition of threats as voluntary utterances charged “with ‘an apparent determination to carry them into execution.’”¹⁷³

New Jersey law also prohibits actions that constitute threats, but the state supreme court held that the law did not prohibit only threats; the law also proscribed “expressions of contempt and hatred,”¹⁷⁴ expressions that, while contemptible, are protected. The law, therefore, was unconstitutional.

Florida¹⁷⁵ and California¹⁷⁶ found cross burning to fall under the category of “fighting words.” In so doing, the California Court of Appeals called upon the language from *Chaplinsky* proscribing words that inflict injury. “The typical act of malicious cross burning is not done in the victim’s immediate physical presence and thus does not tend to incite an immediate fight,” the court held.¹⁷⁷ But, the court added, “[T]he fighting words doctrine encompasses expressive conduct that by its very commission inflicts injury.”¹⁷⁸

Of the courts finding cross-burning statutes to be unconstitutional, only the South Carolina Supreme Court addressed the fighting words issue, and that court held that the statute in question was discriminatory—like that of St. Paul—because it did not prohibit the use of fighting words, but only “the use of those fighting words symbolically conveyed by a burning cross.”¹⁷⁹ Though Florida’s cross-burning statute contained language that was virtually identical to that of South Carolina,¹⁸⁰ that state’s supreme court found the statute to be content neutral because it was not limited to any favored

172. 31 Cal. Rptr. 2d at 647.

173. 394 U.S. at 707 (quoting *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918)).

174. *New Jersey v. Vawter*, 642 A.2d 349, 359 (N.J. 1994).

175. *See Florida v. T.B.D.*, 656 So. 2d 479, 481 (Fla. Ct. App. 1995).

176. *See In re Steven S.*, 31 Cal. Rptr. 2d 644, 648 (Cal. Ct. App. 1994).

177. *In re Steven S.*, 31 Cal. Rptr. 2d at 648.

178. *Id.*

179. *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1993).

180. The South Carolina statute prohibits the placing of “a burning or flaming cross” or any exhibit containing such a cross, real or simulated without the permission of the property owner. *Id.* at 513 n.1 (quoting S.C. Code Ann. § 16-7-120 (Law. Co-op. 1985)). The Florida statute makes it unlawful for anyone “to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission” of the property owner or resident. *Florida*, 656 So. 2d at 480 (quoting Fla. Stat. Ann. § 876.18 (1993)).

topics. In addition, the Florida court found that the cross-burning statute was not overbroad.¹⁸¹

In both Maryland¹⁸² and New Jersey,¹⁸³ appellate courts found the cross-burning statutes did not survive strict scrutiny. In addition, each court examined the respective state law against the three exceptions supposedly advanced by Justice Scalia in *R.A.V.*, and found that the law did not meet any of the exceptions.

The New Jersey Supreme Court found that the state's cross-burning law suffered from the same deficiencies as the ordinance struck down in *R.A.V.*¹⁸⁴

The Maryland Court of Appeals found cross burning to be odious and cowardly, but, nevertheless, expressive conduct.¹⁸⁵ In addition, since there was no way to justify the cross-burning statute "without referring to the substance of speech it regulates," the statute was not content neutral and was subject to strict scrutiny.¹⁸⁶ The statute, the court held, is not necessary to serve the state's asserted interest.¹⁸⁷ While protecting the social welfare of its citizens is a compelling state interest, the court held, "[T]he Constitution does not allow the unnecessary trammeling of free expression even for the noblest of purposes," and the cross-burning law "cannot be deemed 'necessary' to the State's effort to foster racial and religious accord."¹⁸⁸

Before either state addressed the issue of strict scrutiny, however, each applied the three exceptions to the prohibition against content discrimination delineated by Scalia and held that the exceptions did not apply. Both did so reluctantly. The New Jersey high court specifically criticized the holding: "Although we are frank to confess that our reasoning in that case would have differed from Justice Scalia's, we recognize our inflexible obligation to review the constitutionality of our own statutes using his premises."¹⁸⁹

The New Jersey Supreme Court held that the state laws in question did not fit into any of the three exceptions delineated by

181. *Florida*, 656 So. 2d at 482.

182. *See Maryland v. Sheldon*, 629 A.2d 753, 762-63 (Md. 1993).

183. *See New Jersey v. Vawter*, 642 A.2d 349, 359-60 (N.J. 1994).

184. *Id.* at 359-60.

185. *Maryland*, 629 A.2d at 758.

186. *Id.* at 759.

187. *Id.* at 762.

188. *Id.* at 763.

189. *New Jersey*, 642 A.2d at 358.

Justice Scalia in *R.A.V.*¹⁹⁰ First, they did not prohibit only threats, but also prohibited expressions of contempt and hatred—expressions that might be obnoxious, but are not illegal. And they suffered from the same deficiencies as *R.A.V.*¹⁹¹ Second, whatever secondary effects the laws might target were the same as those targeted by *R.A.V.*, so the laws suffered from the same deficiencies as the St. Paul ordinance.¹⁹² Finally, the legislative history of the laws indicates that they were passed specifically to outlaw messages of religious or racial hatred, so the argument that no official suppression of ideas is afoot cannot survive.¹⁹³

The Maryland Court of Appeals went through a similar machination, arriving at the same conclusion.¹⁹⁴

III. *Virginia v. Black*

The Virginia Supreme Court consolidated three cases for decision in *Black v. Commonwealth*.¹⁹⁵ *Elliott v. Commonwealth* and *O'Mara v. Commonwealth*¹⁹⁶ grew out of an incident involving the burning of a cross in the yard of David Targee, a neighbor of Richard J. Elliott, May 2, 1998. At a party, Elliott apparently complained about a disagreement between himself and Targee and suggested that a cross be burned in Targee's yard in retaliation.¹⁹⁷ Elliott was convicted of attempted cross burning, was sentenced to 90 days in jail and was fined \$2,500.¹⁹⁸ Jonathan O'Mara pleaded guilty to attempted cross burning and conspiracy to commit cross burning and received the same sentence.¹⁹⁹ Both men appealed, and both convictions were upheld by the Virginia Court of Appeals.²⁰⁰

The case involving Barry Elton Black arose from a Ku Klux Klan rally August 22, 1998, in Carroll County, Virginia. The cross was burned in an open field that belonged to Annabell Sechrist, who participated in the rally. Though the property on which the cross was

190. See *R.A.V. v. St. Paul*, 505 U.S. 333, 388-90 (1992). See also *supra* notes 71-77 and accompanying text.

191. *New Jersey*, 642 A.2d at 359.

192. *Id.*

193. *Id.*

194. *Maryland*, 629 A.2d at 760-61 (Md. 1993).

195. 553 S.E.2d 738 (Va. 2001).

196. 535 S.E.2d 175 (Va. App. 2000).

197. 553 S.E.2d at 740.

198. *Id.* at 741.

199. *Id.* at 740.

200. 535 S.E.2d at 181.

burned was private, it was visible from a public highway and from nearby homes.²⁰¹ Black was convicted of violating Virginia's cross-burning statute and was fined \$2,500. His conviction was also affirmed.²⁰²

The statute the three men were convicted of violating prohibited "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."²⁰³ The law also provided that "any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons."²⁰⁴

Black argued that the statute was unconstitutional because it engaged in viewpoint and content discrimination. He also contended that the provision permitting the inference of an intent to intimidate from the act of burning a cross excused the state from its burden of proving a *prima facie* case.²⁰⁵

A. The Virginia Supreme Court Ruling

The Virginia Supreme Court found *R.A.V.* controlling. The Virginia statute, the court held, was "analytically indistinguishable" from the St. Paul ordinance.²⁰⁶ The state's argument that the Virginia statute was constitutional because it did not discriminate, as did the St. Paul statute, and because the *R.A.V.* Court noted that threats of violence are outside First Amendment protection "distorts the holding of *R.A.V.*," the court held.²⁰⁷ A statute punishing intimidation or threats based solely upon a content-focused category—such as race or religion—of otherwise protected speech, the court held, violates the First Amendment.²⁰⁸ The court quoted heavily from those portions of *R.A.V.* in which Justice Scalia described the categories and sub-categories of speech that might be protected²⁰⁹—the portions

201. 553 S.E.2d at 748 (Hassell, J., dissenting).

202. *Id.* at 741.

203. VA. CODE ANN. § 18.2-423 (Michie 1983). The law has been changed. In its 2002 term, the Virginia General Assembly amended the law so that it is now a crime for a person to burn any object, regardless of shape, on the property of another person without permission or to burn any object "on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury." VA. CODE ANN. § 18.2-423.01 (Michie 2002).

204. *Id.*

205. 553 S.E.2d at 741.

206. *Id.* at 742.

207. *Id.* at 743.

208. *Id.*

209. *Id.*

of the opinion with which Justice White took particular exception.²¹⁰ “*R.A.V.* makes it abundantly clear that, while certain areas of speech and expressive conduct may be subject to proscription, regulation within these areas must not discriminate based upon the content of the message,”²¹¹ wrote Judge Donald W. Lemons for the majority.

The absence of language referring to race does not save the statute, the court held: “The virulent symbolism of cross burning has been discussed in so many judicial opinions that its subject and content as symbolic speech has been universally acknowledged,”²¹² and those who burn crosses, “do so fully cognizant of the controversial racial and religious messages which such acts impart.”²¹³ In addition, the court noted, the Virginia statute was aimed specifically at regulating content rather than any secondary effects that cross burning might cause.²¹⁴

The Virginia Supreme Court then turned to Justice White’s opinion concurring in the judgment to find the state law overbroad. Using the opinion as a basis, the court found the state law “sweeps within its ambit for arrest and prosecution, both protected and unprotected speech” and, therefore, is unconstitutionally overbroad.²¹⁵

Three judges dissented, complaining that the state has the authority to punish an act “that intentionally places another person in fear of bodily harm,” as cross burning does.²¹⁶

In a concurring opinion written solely to respond to the dissent, however, Judge Cynthia D. Kinser wrote that the dissent was mistaken in its efforts to equate “an intent to intimidate” with a true threat or a “physical act intended to inflict bodily harm.”²¹⁷ Even if the dissent were correct in its assertion that the Virginia statute proscribes only conduct that constitutes true threats, the state still “cannot engage in content discrimination by selectively prohibiting only those ‘true threats’ that convey a particular message.”²¹⁸

210. See discussion accompanying *supra* notes 85-90.

211. 553 S.E.2d at 743.

212. *Id.* at 744.

213. *Id.* at 745.

214. *Id.*

215. *Id.* at 746.

216. *Id.* at 748 (Hassell, J., dissenting) (joined by Carrico, C.J., Koontz, J.). As a point of interest, Judge Hassell became the first African American chief justice of the Virginia Supreme Court on Feb. 11, 2003. See Alan Cooper, *Hassell Sworn in as Chief Justice; Historic Moment at Supreme Court*, RICHMOND TIMES-DISPATCH, Feb. 12, 2003, at A1.

217. *Id.* at 747 (Kinser, J., concurring).

218. *Id.* (Kinser, J., concurring).

B. Before the U.S. Supreme Court

A common thread running through the cross-burning cases—and through briefs filed in *Black* and oral arguments, as well—was the issue of intimidation. Virginia, supported by at least four amicus briefs, including one from the Solicitor General of the United States,²¹⁹ took the position that the government has the authority to proscribe intimidating speech. Attorneys for Black, Elliott, and O’Mara, on the other hand, along with their amici,²²⁰ argued that cross burning, even if it is intimidating speech, does not rise to a level that would require the serious damage to First Amendment rights that punishing the expressive conduct would cause.

It would seem, therefore, a key question was how much intimidation is too much for the First Amendment?

The brief of the Thomas Jefferson Center was the only one that made the argument that a distinction should be made between language that is intimidating and language that is threatening, though the issue surfaced in the briefs filed by both the Commonwealth of Virginia²²¹ and attorneys for Black, Elliott and O’Mara.²²² And, indeed, Virginia Supreme Court Justice Kinser made the same point in her concurring opinion.²²³ Virginia acknowledged that intimidation is different from a threat,²²⁴ but argued that intimidating speech should be regulated.²²⁵ The respondents, however, argued that a key problem with the law is clear: “Admittedly, it may also be seen, in a given time and place, as a true threat, but it cannot plausibly be maintained that every act of cross burning is a threat.”²²⁶

219. Brief of Amicus Curiae The Criminal Justice Legal Foundation at 3, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107); Brief of Amicus Curiae State of California at 2, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107); Brief of the States of New Jersey et al. at 2, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107); Brief of Amicus Curiae The United States at 11, 26, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107). In addition, the brief of the Anti-Defamation League indicated that it supported neither party, but the arguments tracked those made by amicus briefs supporting the commonwealth of Virginia. See Brief of Amicus Curiae Anti-Defamation League et al. at 15, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107).

220. See Brief of Amicus Curiae The Rutherford Institute, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107); Brief of Amicus Curiae The Thomas Jefferson Center for the Protection of Freedom of Expression, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107).

221. See Brief on Merits for Respondents, *supra* note 19, at 35-36.

222. See Brief of Petitioner, *supra* note 14, at 14.

223. *Black v. Virginia*, 553 S.E. 2d 738, 747 (Va. 2001) (Kinser, J., concurring). See *supra* note 215 and accompanying text.

224. Brief of Petitioner, *supra* note 14, at 14.

225. *Id.* at 24.

226. Brief on Merits for Respondents, *supra* note 19 at 35-36.

Intimidation, Virginia argued, is different from both threats and fighting words. With an epithet or, the brief implied, a threat, the danger is likely to soon pass. Intimidation is different, the brief argued, even though it then used the word “threat” as a synonym for “intimidation”: “A threat to do bodily harm to an individual or his family is likely to sink deep into the psyche of its victim, acquiring more force over time.”²²⁷ Intimidations, therefore, should be proscribed.

Virginia also argued that the cross-burning statute is content neutral because it prohibits an act that can be used to intimidate anyone, not just persons of particular groups. “A cross burning—standing alone and without explanation—is understood in our society as a message of intimidation,” the brief argued, and can intimidate anyone, regardless of race.²²⁸ Often bigotry is involved, but there is no direct correlation between race and burning a cross.²²⁹

Even if the statute is content-based, Virginia argued, it is justified by the three exceptions delineated in *R.A.V.*: It is a particularly virulent form of intimidation,²³⁰ it has an array of secondary effects,²³¹ and no official suppression of ideas is afoot.²³²

Virginia “incessantly repeats the mantra” that the state law requires an intent to intimidate,²³³ attorneys for Black, Elliott, and O’Mara, countered. “But the point of *R.A.V.* is that it does not matter.”²³⁴ A law banning fighting words is permissible, but not a law banning racist fighting words. Similarly, a law banning intimidation is permissible if the concept of intimidation is sufficiently confined, but not a law banning intimidation through cross burning. Virginia’s argument, the brief maintained, “collapses on itself and dissolves into incoherence, for the statute only makes logical sense if it is construed as driven by Virginia’s concern with *what is communicated* when a cross is burned.”²³⁵ That’s because, the brief argued, the law unconstitutionally discriminates on the basis of content and viewpoint.²³⁶ The state’s position, it continued, is that content and

227. Brief of Petitioner, *supra* note 14, at 14.

228. *Id.* at 26.

229. *Id.* at 26-27.

230. *Id.* at 32-34.

231. *Id.* at 37-39.

232. *Id.* at 40-41.

233. Brief on Merits for Respondents, *supra* note 19, at 11-12.

234. *Id.*

235. *Id.* at 12 (emphasis in original).

236. *Id.* at 6.

viewpoint discrimination reside only in the language. But such discrimination can also reside in specific symbols.²³⁷

Certain symbols—the American Flag, the Star of David, the Cross, the swastika—exude powerful magnetic charges, positive and negative, and are often invoked to express beliefs and emotions high and low, sublime and base, from patriotism, faith, or love to dissent, bigotry, or hate.²³⁸

And the government may not regulate speech on the basis of its message about such symbols, nor is the government allowed to protect certain symbols from attack:

If the government is permitted to select one symbol for banishment from public discourse there are few limiting principles to prevent it from selecting others. And it is but a short step from the banning of offending symbols such as burning crosses to the banning of offending words.²³⁹

Virginia cannot have it both ways, the brief asserted, by arguing that the violent history of cross burning does not render the statute content and viewpoint based, then arguing that cross burning is equivalent to intimidation because of its history. The state, the brief argued, is “ignoring the history of cross-burning in one part of its argument and invoking it in the next.”²⁴⁰ The pivotal question, therefore, was whether the law’s focus is sufficient to render it content and viewpoint based: “And however much Virginia protests, under our First Amendment traditions to single out for special treatment one symbol in this manner *does* pose a danger that suppression of ideas is afoot.”²⁴¹

Virginia’s position, then, was that even though intimidation is different from threats, intimidation is a more serious form of speech and can be punished under the Constitution. Virginia did not address the issue that the Supreme Court has proscribed true threats, at least when they are aimed at the President, but has allowed threatening language aimed at the President when that language is part of political hyperbole.

Attorneys for Black, Elliott, and O’Mara, on the other hand, also distinguishing between threats and intimidation, argued that intimidation that does not rise to the level of threats or fighting words, is protected under the Constitution.

237. *Id.* at 7.

238. *Id.* at 8.

239. *Id.* at 3.

240. *Id.* at 15.

241. *Id.* at 37.

The attorneys made essentially the same points during oral arguments December 11, 2002. The justices seemed to be intrigued by the nature of cross burning—was it like brandishing an automatic weapon, Justice Antonin Scalia wanted to know,²⁴² or like telling a person “I’ll kill you,” Justice Stephen Breyer wanted to know.²⁴³ Indeed, Justice Breyer eventually summed up the key question in the case: “And so the question before us is whether burning a cross is such a terrorizing symbol . . . in American culture that even on the basis of heightened scrutiny, it’s okay to proscribe it.”²⁴⁴

William H. Hurd, Virginia State Solicitor, and Michael R. Dreesben, Deputy U.S. Solicitor General, told the justices, in essence, that cross burning could be proscribed because it is tantamount to a threat. It “is very much like brandishing a firearm,” Hurd told Justice Scalia. It is “an especially virulent form of intimidation.”²⁴⁵ Cross burning, he argued, says, “[W]e’re close at hand. We don’t just talk. We act . . . The message is a threat of bodily harm, and . . . it is unique.”²⁴⁶

Dreeben agreed, calling cross burning “a signal to violence or a warning to violence” that is not protected speech.²⁴⁷ Justice Clarence Thomas went even further in his questioning of Dreeben, wondering aloud whether the attorney was understating the issue. He suggested that cross burning is “significantly greater than intimidation or a threat”²⁴⁸ because “It was intended to cause fear . . . and to terrorize a population.”²⁴⁹ Dreeben agreed, adding that the focus of the Virginia statute was not on any particular message, but “on the effect of intimidation, and the intent to create a climate of fear and . . . a climate of terror.”²⁵⁰

University of Richmond law professor Rodney A. Smolla, however, argued that cross burning is significantly different from brandishing a weapon or telling a person, “I’ll kill you.” Cross burning involved symbolism rather than intimidation, he argued, and was being proscribed because of the message it conveyed rather than

242. Transcript of Oral Argument at 8-9, 27, *Virginia v. Black*, 538 U.S. 343 (2003), Dec. 11, 2002 (No. 01-1107).

243. *Id.* at 41-42.

244. *Id.* at 37.

245. *Id.* at 8.

246. *Id.* at 16.

247. *Id.* at 20.

248. *Id.* at 22.

249. *Id.* at 23.

250. *Id.* at 24.

any threat.²⁵¹ Cross burning, Smolla said, is not a particularly virulent form of intimidation, but, rather, is “an especially virulent form of expression on ideas relating to race, religion, politics.”²⁵² Restrictions on it, therefore, are content-based. “There’s not a single interest that society seeks to protect . . . that cannot be vindicated perfectly as well, exactly as well with no fall-off at all by content-neutral alternatives,” he argued.²⁵³ “It’s important to remember,” Smolla added, “that our First Amendment jurisprudence is not just about deliberate censorship and realized censorship. It is also about . . . chilling effect and about . . . breathing space.”²⁵⁴

C. Justice O’Connor for the Court

The decision in *Virginia v. Black* was almost as splintered as that in *R.A.V.* Justice Sandra Day O’Connor, writing for five members of the Court, found that states could proscribe cross burning that was designed to intimidate.²⁵⁵ Justice O’Connor, in a description of the history of cross burning, wrote that the activity “is inextricably intertwined with the history of the Ku Klux Klan,”²⁵⁶ but that because the Klan used cross burnings during rallies and rituals, it has had a dual purpose: “[C]ross burnings have been used to communicate both threats of violence and messages of shared ideology.”²⁵⁷ But regardless of whether the message is political or intimidating, she wrote, “[T]he burning cross is a ‘symbol of hate.’”²⁵⁸ Therefore, “[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.”²⁵⁹

It is cross burning as intimidation that may be restricted, Justice O’Connor wrote. The First Amendment, she wrote, is designed to protect the free trade in ideas—even ideas that the overwhelming majority of people find distasteful or discomforting. In addition, the First Amendment protects symbolic or expressive conduct as well as

251. *Id.* at 33.

252. *Id.* at 31.

253. *Id.*

254. *Id.* at 40.

255. 538 U.S. 343, 363 (2003).

256. *Id.* at 352.

257. *Id.* at 354.

258. *Id.* at 357.

259. *Id.*

actual speech.²⁶⁰ It does not protect either fighting words or true threats, however. Fighting words, she indicated, are words ““which by their very utterance inflict injury or tend to incite an immediate breach of the peace,””²⁶¹ and 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.””²⁶² In addition, the protection from threatening speech extends beyond the intent of the person issuing the threat. “The speaker,” Justice O’Connor wrote, “need not actually intend to carry out the threat.””²⁶³ People are protected from the fear of violence in addition to being protected from the violence itself.²⁶⁴

Therefore, she wrote, the protection extends to intimidating words, which are a form of true threats: “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 group of persons with the intent of placing the victim in fear of bodily harm or death.””²⁶⁵ Intimidation, therefore, is designed to produce fear, and it is that production that may be proscribed and punished.

Justice O’Connor then applied *R.A.V.* to the facts of *Virginia v. Black* and found that Virginia could constitutionally outlaw cross burnings “done with the intent to intimidate””²⁶⁶ The Court in *R.A.V.*, Justice O’Connor wrote, specifically held that some types of content discrimination are allowed under the First Amendment. That is, if an “entire class of speech” is proscribable, a jurisdiction may constitutionally decide to proscribe only a subset of that category of speech.²⁶⁷ Instead of prohibiting all intimidating messages, Virginia has chosen to prohibit only those intimidating messages disseminated by means of the burning cross, and that decision does not violate the Constitution.²⁶⁸ That is, “[A] State may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.””²⁶⁹

260. *Id.* at 358.

261. *Id.* at 359 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

262. *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

263. *Id.* at 360.

264. *Id.*

265. *Id.*

266. *Id.* at 362.

267. *Id.*

268. *Id.*

269. *Id.* at 363.

Despite that, however, Justice O'Connor found the Virginia law unconstitutional because it provided that any burning of a cross would be *prima facie* evidence that there was an intent to intimidate. The provision, she wrote, permits a jury to convict defendants in every case in which they exercise their constitutional right not to put on a defense. And, she added, even when a defendant presents a defense, the provision "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case."²⁷⁰ In some of those cases, the cross burners may be involved in "core political speech," Justice O'Connor wrote. Even so, the act may arouse a sense of anger or hatred, "But this sense of anger or hatred is not sufficient to ban all cross burnings."²⁷¹

Justice Antonin Scalia, who agreed that states may proscribe cross burnings that constitute intimidating speech, did not join the portion of Justice O'Connor's opinion striking down the law because of the *prima facie* evidence provision.²⁷² Justice David Souter, joined by Justices Anthony Kennedy and Ruth Bader Ginsberg, however, also had problems with the *prima facie* clause, concurring in the judgment but in only part of Justice O'Connor's opinion.²⁷³

Justice Souter, writing that none of the exceptions outlined in *R.A.V.* would save the Virginia law,²⁷⁴ agreed with Justice O'Connor that "[T]he *prima facie* evidence provision stands in the way of any finding" the law constitutional.²⁷⁵ The primary effect of the provision, he wrote, would be:

[T]o skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten.²⁷⁶

The plurality opinion by Justice O'Connor and the joiner by Justice Souter, therefore, provided seven votes for the proposition that the Virginia law was unconstitutional because of the *prima facie* evidence provision.

270. *Id.* at 365.

271. *Id.* at 366.

272. *Id.* at 368-80 (Scalia, J., concurring in the judgment in part, dissenting in part).

273. *Id.* at 380-81 (Souter, J., concurring in judgment and in part).

274. *Id.* at 381-86 (Souter, J., concurring in judgment and in part).

275. *Id.* at 385 (Souter, J., concurring in judgment and in part).

276. *Id.* (Souter, J., concurring in judgment and in part).

Justice Scalia also concurred in the judgment, but in an opinion that was only slightly less convoluted than his *R.A.V.* majority opinion. Joined in part by Justice Clarence Thomas, he agreed that the judgment of the Virginia Supreme Court should be vacated, but only so the lower court could “authoritatively construe the prima-facie-evidence provision.”²⁷⁷ Justice Scalia found no constitutional problem with the provision so long as defendants were given the opportunity to rebut the presumption that there was an intent to intimidate.²⁷⁸

Finally, Justice Thomas dissented, writing, in effect, that everyone who considered cross burning a form of speech was wrong, so the activity could be banned in all circumstances as threatening conduct.²⁷⁹

IV. Threats and Intimidation from *Schenck* to *Claiborne Hardware*

The Supreme Court has clearly delineated standards for those types of speech that lie outside the protection of the First Amendment. Obscene speech must meet the three-part test first enunciated in *Miller v. California*.²⁸⁰ Fighting words must tend to cause an immediate breach of the peace.²⁸¹ Words constitute true threats when there is a reasonable expectation that there will be actions to follow the words.²⁸² Advocacy to overthrow the government through violence or to engage in other illegal, violent acts must be specific and imminent.²⁸³ It’s not enough for the recipient of such speech to be able to speculate about possible results; the advocacy must be such that it is likely to cause the desired result.²⁸⁴

The Court has established these rules of law to ensure that the government not encroach upon valuable free speech rights in the name of controlling obnoxious speech. Speech that is disagreeable, hateful or even intimidating may not be restricted because someone

277. *Id.* (Scalia, J., concurring in judgment and in part).

278. *Id.* at 368 (Scalia, J., concurring in judgment and in part).

279. *Id.* at 388-400 (Thomas, J., dissenting.)

280. 413 U.S. 15, 24 (1973) ((a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest, (b) whether the work describes in a patently offensive way, sexual conduct specifically defined by applicable state law, (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value).

281. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

282. *See* *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam).

283. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

284. *See id.*

in government doesn't like the nature or content of that speech. Obscenity may be proscribed because it has been determined by the Court to be without redeeming social value. Other forms of speech are proscribed because their value is overridden by the physical response they invoke; only when the speech rises to the level of action or of causing some retaliation may it be banned.

The requirement that threatening speech must rise to the level of action before it may be banned likely had its origins with the clear and present danger test first enunciated by Justice Oliver Wendell Holmes in *Schenck v. United States*.²⁸⁵ The rule provided that the government could proscribe speech that caused a clear and present danger of bringing about "substantive evils that Congress has a right to prevent." Specifically, the Court held that the First Amendment does not necessarily protect words "that may have all the effect of force."²⁸⁶

The rule was reaffirmed in *Abrams v. United States*²⁸⁷ and expanded more than twenty years later with the fighting words doctrine enunciated in *Chaplinsky v. New Hampshire*.²⁸⁸ *Chaplinsky* provided that words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace"²⁸⁹ could be proscribed and punished.

Then, in 1952, the Court seemed to expand the fighting words doctrine, though it based the expansion on libel law. In a case with elements resembling those of some cross-burning cases—specifically *R.A.V.*—the Court affirmed the conviction of Joseph Beauharnais for violating an Illinois law prohibiting a person from using language that "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."²⁹⁰ Justice Felix Frankfurter, writing for a Court of five in *Beauharnais v. Illinois*, held that the law was "specifically directed at a defined evil,"²⁹¹ and was directed at words "liable to cause violence and disorder"²⁹²—language very much like that used to

285. 249 U.S. 47 (1919).

286. *Id.* at 52.

287. 250 U.S. 616 (1919) (affirming convictions under the Espionage Act for attempting to harm the United States by hampering the war effort).

288. 315 U.S. 568 (1942).

289. *Id.* at 571.

290. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952)(quoting Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, § 471).

291. *Id.* at 253.

292. *Id.* at 254.

support the ordinances in both *R.A.V.*²⁹³ and *Virginia v. Black*.²⁹⁴ In the face of the history of race relations in the United States, Justice Frankfurter wrote, “[W]e would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.”²⁹⁵

That same history, of course, was called upon to justify the cross-burning statute in *Virginia*.²⁹⁶ And, while a public cross-burning may not be a false defamation, it is certainly “calculated to have a powerful emotional impact on those to whom it was presented.” *Beauharnais* was never specifically repudiated by the Court, but it would seem to have been nullified by *R.A.V.*²⁹⁷

In 1969, the Court enunciated what became known as “the incitement doctrine,” expanding protection for obnoxious, but politically motivated speech. In *Brandenburg v. Ohio*,²⁹⁸ the Court held that the First Amendment protects speech that advocates violence, so long as the speech is not directed at inciting or producing imminent lawless action and is not likely to incite or produce such action.²⁹⁹ In *Brandenburg*, a Ku Klux Klan leader was convicted of violating a state law prohibiting persons from advocating the use of terrorism to accomplish political goals. The Court said his speech promising “revengeance,” however,³⁰⁰ while advocating violence, was not “directed to inciting or producing imminent lawless action.”³⁰¹ The distinction was important. *Brandenburg* established the rule that, in order for inflammatory speech to be proscribed, that speech must advocate immediate violent action. Advocacy to “take the fucking streets” was not an incitement, for example, because the advocacy was not for immediate action; rather, it was for possible action some time in the future.³⁰²

293. See *supra* notes 28-30, 38-43 and accompanying text.

294. See *supra* notes 260-64 and accompanying text.

295. *Beauharnais*, 343 U.S. at 261.

296. See *Virginia v. Black*, 538 U.S. 343, 352-57 (2003).

297. *But see* 505 U.S. 377, 383 (1992) (citing *Beauharnais*).

298. 395 U.S. 444 (1969) (per curiam).

299. *Id.* at 447. See also *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Dennis v. United States*, 341 U.S. 494, 509-10 (1951).

300. *Id.* at 446.

301. *Id.* at 447.

302. *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam). See also *Noto v. United States*, 367 U.S. 290, 297-98 (1961) (“The mere teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for

The same year it decided *Brandenburg*, the Court also decided *Watts v. United States*,³⁰³ a case that both sides in *Virginia v. Black* have cited as supporting various arguments.³⁰⁴ *Watts* provided that the government could punish speech that constituted a “true threat” while recognizing that not all threatening speech constituted such threats—some was rhetorical hyperbole.

In *Watts*, the Supreme Court reversed the conviction of Robert Watts for violating the federal law prohibiting the making of threats against the President of the United States. The Court did not invalidate the law, but, in a *per curiam* opinion, held that statements by Watts did not rise to the level of a threat.³⁰⁵

The incident in question occurred during a public rally on the grounds of the Washington Monument. The crowd broke into discussion groups. In one group, Watts was heard to complain about receiving notice of his 1-A draft classification and to state that he would refuse to be inducted into the armed forces. “I am not going,” he was heard to say. “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”³⁰⁶ Attorneys for Watts argued that the statement was made during political debate, that it was conditioned upon the induction of Watts into the armed forces, and that the reaction of those who heard the statement was laughter.³⁰⁷

The Court noted that the statute prohibiting threats against the President is constitutional: “The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of violence.” But, the Court added, “[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”³⁰⁸ The Court held that the government must prove what it called a “true ‘threat’” in order to convict a person under the statute. Wrote the Court:

violent action and steeling it to such action.”); *Yates v. United States*, 354 U.S. 298, 318 (1957) (There is a distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action.).

303. 394 U.S. 705 (1969) (*per curiam*).

304. See Brief of Petitioner, *supra* note 14, at 14, 26; Brief on Merits for Respondents, *supra* note 19, *passim*.

305. 394 U.S. at 708.

306. *Id.* at 706.

307. *Id.* at 707.

308. *Id.*

We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁰⁹

Language used in political debate, the Court noted, is often “vituperative, abusive, and inexact.” Watts’ only offense, therefore, “was ‘a kind of very crude offensive method of stating a political opposition to the President.’ Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”³¹⁰

Similarly, the Court, in 1982, held that a civil rights leader’s speeches threatening violence against blacks who violated a boycott of white-owned businesses may have been intimidating—or even threatening—but was still protected speech. *NAACP v. Claiborne Hardware Co.*³¹¹ began when white businessmen in Claiborne County, Mississippi, sued a number of blacks, the NAACP and Charles Evers, NAACP Field Secretary of Mississippi, because of a boycott Evers had helped organize.³¹² In encouraging local blacks to adhere to the boycott, Evers was reported to have said in speeches that, “‘If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.’”³¹³

The Court noted that the First Amendment protects neither violence nor threats of violence,³¹⁴ and did not take issue with a lower court’s finding that “‘coercion, intimidation, and threats’ formed ‘part of the boycott activity’ and ‘contributed to its almost complete success.’” But, the Court held, to the extent that the lower court’s judgment “rests on the ground that ‘many’ black citizens were ‘intimidated’ by ‘threats’ of ‘social ostracism, vilification, and traduction,’ it is flatly inconsistent with the First Amendment.”³¹⁵ The entire success of the boycott, the Court held was not caused by violence or threats of violence.³¹⁶

309. *Id.* at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

310. *Id.*

311. 458 U.S. 886 (1982).

312. *Id.* at 889-90.

313. *Id.* at 902.

314. *Id.* at 916.

315. *Id.* at 921.

316. *Id.*

The Court, then, established a narrow test for allowing prohibitions against intimidating, and even threatening, speech.

Virginia v. Black changed all that.

V. *Virginia v. Black* and the Re-Definition of Intimidating Speech

The Court may have ruled that cross burning designed to express an ideology or “shared group identity” is protected by the First Amendment,³¹⁷ but it also added “intimidation”—at least as it is expressed through cross burning—to the family of speech categories not protected by the First Amendment. Intimidating speech, the Court held, “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.”³¹⁸

On the surface, this bifurcated approach to cross burning appears to make sense. The Court seems to be reaffirming the integrity of First Amendment protection for expressive conduct while, at the same time, affirming the more popular position that cross burning, when directed at individuals, is a particularly heinous form of speech that does not deserve such protection. A closer examination, however, reveals the flaws in the Court’s reasoning and the significant erosion in First Amendment protections that could result.

First, Justice O’Connor’s inclusion of intimidation among those categories of speech that cannot claim First Amendment protection makes even more ambiguous the line that separates protected and unprotected expressive conduct. In its line of cases from *Schenck* through *Claiborne Hardware*, the Court has made it clear that the government can proscribe and punish speech that takes on the role of action. Speech that has “all the effect of force”³¹⁹ in its efforts to incite violence,³²⁰ materially disrupt the operations of courts³²¹ or schools,³²² or genuinely threaten individuals³²³ may be punished, regardless of how such expression is communicated.

Intimidation, however, was a type of speech distinct and separate from true threats, and a significant body of law supported the

317. *Virginia v. Black*, 538 U.S. 343, 356 (2003).

318. *Id.* at 360.

319. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

320. *See Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).

321. *See Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

322. *See Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 511 (1969).

323. *See Watts v. United States*, 394 U.S. 705 (1969).

proposition that intimidating speech was not the equivalent of threatening speech. As previously indicated, for example, the Court has held that there is a distinction between advocating violence as an abstract political tool and advocating immediate violent action.³²⁴ Similarly, the Court held that advocating possible violence at some point in the future was protected speech.³²⁵ Indeed, when NAACP official Charles Evers threatened to break the necks of African Americans who violated a boycott of white-owned businesses, the Court recognized that the speech, while intimidating, was not threatening and, therefore, was protected. “Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases,” the Court held, and Evers’ speech “did not transcend the bounds of protected speech”³²⁶ Similarly, in *Watts*, the Court recognized that when “a form of pure speech” is criminalized, the law “must be interpreted with the command of the First Amendment clearly in mind.”³²⁷ Justice O’Connor’s history and description of cross burning would clearly establish the conduct as a form of “pure speech.”³²⁸ It can only be proscribed, therefore, if it rises to the level of putting one in fear of immediate harm.

Intimidation doesn’t necessarily involve threats of immediate harm. Indeed, the Commonwealth of Virginia argued that intimidation and threats fell into different categories: Threats constitute speech that intimated immediate danger; intimidation, on the other hand, constitutes speech that is more long-lasting—speech that “is likely to sink deep into the psyche of its victim, acquiring more force over time.”³²⁹ The case law on regulating such speech, as has been demonstrated, focuses on the immediate problem of violence. Justice O’Connor’s definition of intimidation focuses, not on violence, but on fear, a much more ambiguous standard.³³⁰

A second problem with the opinion in *Virginia v. Black*—related to the first—is that, though a majority of the justices recognize the political nature of cross burning,³³¹ the majority remains willing to bifurcate First Amendment protection for such political speech. In

324. See *Yates v. United States*, 354 U.S. 298, 318 (1957).

325. See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam).

326. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982).

327. 394 U.S. at 707.

328. See *Virginia v. Black*, 538 U.S. 343, 352-57 (2003).

329. Brief of Petitioner, *supra* note 14, at 14.

330. 538 U.S. at 360.

331. See *id.* at 365 (plurality) (O’Connor, J., joined by Rehnquist, C.J., Stevens, Breyer, JJ.); *id.* at 385 (Souter, J., concurring in judgment in part and dissenting in part) (joined by Kennedy, Ginsburg, JJ.).

striking down Virginia's requirement that the act of cross burning standing alone was *prima facie* evidence of an intent to intimidate,³³² Justice O'Connor wrote that such a requirement "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."³³³ Sometimes, Justice O'Connor wrote, "the cross burning is a statement of ideology, a symbol of group solidarity."³³⁴ If a jury is not allowed to consider the facts of the case, in the face of the *prima facie* evidence provision, the jury cannot determine whether a cross burning is designed to intimidate or to express an ideology.

What Justice O'Connor and her joiners failed to acknowledge, however, was that even when a cross burning may be directed at an individual it can be designed to express a political message. A particular form of speech is not stripped of its political nature simply because it is directed at an individual or group or because it may have some additional meaning. And, indeed, such an action is not automatically threatening or intimidating because it is so directed. To a degree, the majority accepts the argument that simply burning a cross is *prima facie* evidence of an intent to intimidate. The majority simply inserts an additional requirement—that the burning be aimed at an individual or group. This is not to say that threatening speech—even if it is political—should not be proscribed, only that the political nature of the speech needs to be considered and that there are ways of regulating such speech without classifying intimidating speech as unprotected.

The shift by the Court to allowing proscription of intimidating speech that may not intimate immediate harm is based, in part, on the virulent nature of the speech. Justice O'Connor wrote that Virginia could outlaw intimidating cross burnings because the action "is a particularly virulent form of intimidation" and, therefore, fits into one of the exceptions to the prohibition on content-based restrictions enunciated in *R.A.V.*³³⁵ "Virginia may choose to regulate this subset of

332. Justice O'Connor's opinion on this point received only three additional votes, but Justice Souter, joined by Justices Kennedy and Ginsburg, wrote separately that the *prima facie* evidence provision was unconstitutional. *Id.* at 386-87 (Souter, J., concurring in judgment).

333. 538 U.S. at 367.

334. *Id.* at 365-66.

335. *Id.* at 363.

intimidating messages,” she wrote, “in light of cross burning’s long and pernicious history as a signal of impending violence.”³³⁶

Justice Souter disagreed with the Court’s assessment because, he wrote, the determination of the particularly virulent nature of cross burning focused on the communication generally associated with the message, while none of the exceptions described in *R.A.V.* did so.³³⁷

The Court shifted the emphasis in its test to determine whether obnoxious speech is proscribed from immediacy and a tendency to incite, then, to virulence or the obnoxious quality of the speech. The shift is significant given the fact that the rationale is based upon the content of the message, not on a determination that cross burning constitutes a true threat. A threat—regardless of the vehicle used to convey it—can be proscribed. By allowing states to single out cross burning from the many ways individuals can be intimidated, the Court is inviting erosion of another longstanding judicial tradition—that political expression receives the most stringent protection guaranteed by the First Amendment. Because much of the debate over cross burning is political rather than judicial, every time a court is required to determine whether a specific cross burning falls into the category of intimidation or constitutes political expression, there is a possibility that protection for political expression will be eroded. The erosion is much more likely in those instances when the cross burning is not easily categorized.

One might argue, as Justice Blackmun did in *R.A.V.*, that the reason for such a shift might have been the temptation to decide the issue on grounds of “politically correct speech” or “cultural diversity” rather than to adhere to its proper mission,³³⁸ particularly since the Court was not willing to punish intimidating speech aimed at African Americans by African Americans, as in *Claiborne Hardware*.

Regardless of the reason for the shift, its effect, presumably, is that the Court will now allow proscription of speech that advocates some possible harm at some possible time in the future. Indeed, because there need not be an intent to carry out the threat, the rule does not require an intent to harm—it is sufficient that the speaker only intends to cause fear. Few cross burnings in the cases adjudicated by the various state and federal courts, occurred while the burners

336. *Id.*

337. *Id.* at 381-82 (Souter, J., concurring in the judgment in part and dissenting in part).

338. 505 U.S. 377, 415-16 (1992) (Blackmun, J., concurring in judgment).

were present.³³⁹ In most cases, indeed, in *R.A.V.* as well, the burners placed their crosses, ignited them and then retreated for fear of being seen. The act of burning a cross in someone's yard, however, is apparently sufficiently imbued with a message that it will cause the inhabitants of the home to become afraid. Under the rule established in *Virginia v. Black*, though the method for putting the rule into operation has yet to be determined, the act may be proscribed and persons violating cross burning laws may be punished. As previously indicated, it's almost as if Justice O'Connor, while striking down Virginia's *prima facie* evidence requirement, is tacitly recognizing that cross burning is, indeed, a form of intimidation when it is aimed at specific individuals, regardless of the circumstances.

Virginia v. Black exemplifies the problem. The Court dismissed the conviction of Barry Black on grounds that the cross burning, which took place in an open field during a KKK rally, was political expression. There was testimony at trial by a woman who said she became frightened when she saw the burning cross, however.³⁴⁰ Does she not deserve to be protected from that fear?

Similarly, the Court remanded the convictions of Richard Elliott and Jonathan O'Mara for further action, on grounds that the cross burning in which they participated was intimidating—they involved burning a cross in the yard of a neighbor. But could not Elliott and O'Mara have moved the cross fifty feet or so, outside the boundaries of the neighbor's yard, and then argued that they did not intend to intimidate the neighbor, they merely intended to express their ideological opposition to integration or to African Americans in general? Indeed, Justice O'Connor made it clear that, regardless of the intent of the cross burner, the message of cross burning is always one of hatred.³⁴¹ But that's not enough for the activity to be proscribed, because sometimes, Justice O'Connor admitted, cross burning constitutes core political speech,³⁴² and a majority of the Court agreed that it often is intended to express an ideological message.³⁴³ Only when the activity moves beyond ideology and

339. The exception to this rule occurred when the cross burners took additional actions designed to heighten the intimidation. *See, e.g.*, *United States v. Stewart*, 6 F.3d 918 (11th Cir. 1995); *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994); *Washington v. Talley*, 858 P.2d 217 (Wash. 1993).

340. 538 U.S. at 348-49.

341. *Id.* at 357.

342. *Id.* at 365.

343. *Id.* at 357 (plurality opinion) (O'Connor, J., joined by Rehnquist, Stevens, Breyer, JJ.); *id.* at 381 (Souter, J., concurring in judgment and dissenting in part) (joined by Kennedy and Ginsburg, JJ.).

becomes intimidating—threatening is no longer the test—may it be banned.

This is a conundrum with which state and federal courts have been wrestling since *R.A.V.* created a similar loophole. States that have upheld cross-burning statutes have done so on the basis that cross burnings are threats, which can be proscribed under the First Amendment.³⁴⁴ In addition, federal courts that have affirmed cross-burning convictions have often used the terms “threat” and “intimidation” synonymously or in conjunction with each other.³⁴⁵ State courts that have refused to affirm convictions for cross burning, however, have generally done so because the statutes were content-based restrictions, and, implicitly, the cross burnings did not rise to the level of threats.³⁴⁶

It’s not at all clear whether the ruling in *Virginia v. Black* would have changed any of the outcomes of the state or federal cases or whether it will help lower courts with cross burning cases yet to be heard. On the one hand, it is relatively simple to establish that cross burning is only proscribable when it is intimidating. On the other hand, however, the Court has not established a division that is easily recognizable. Indeed, cross burning might be the perfect example of the dilemma the Court recognized 35 years earlier when it established the intermediate scrutiny test to determine when expressive conduct may be regulated.³⁴⁷ In *United States v. O’Brien*, Chief Justice Earl Warren noted that the court “[C]annot 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 ideas.”³⁴⁸ The government has greater power to regulate expressive conduct, Chief Justice Warren wrote, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct.”³⁴⁹ Cross burning is the epitome of conduct that combines speech and

344. See, e.g., *In re Steven S.*, 31 Cal. Rptr. 2d 644, 647-48 (Cal. 1994); *State v. T.B.D.*, 656 So.2d 497, 480-81 (Fla. 1995);

345. See, e.g., *United States v. Haywood*, 6 F.3d 1241, 1250 (7th Cir. 1993); *United States v. Stewart*, 65 F.3d 918, 928-29 (11th Cir. 1995); *United States v. J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994).

346. See, e.g., *State v. Vawter*, 642 A.2d 349 (N.J. 1994).

347. *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The test provides that a government regulation on expressive conduct is constitutional if (1) the regulation is within the constitutional power of the government, (2) if it furthers an important or substantial governmental interest, (3) if the governmental interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

348. *Id.* at 376.

349. *Id.*

nonspeech elements, a point dramatically demonstrated by Justice O'Connor's majority opinion.³⁵⁰

VI. Conclusion

Before 2003, the Supreme Court had established a scheme for the regulation of threatening and intimidating speech that struck a reasonable balance between free speech and the expression of true threats. In *Virginia v. Black*, however, the Court abandoned that scheme and replaced it with a significantly more arbitrary approach to regulating such speech. Under the rules established in the case, a court must decide when a cross burning is intimidating and when it constitutes political speech. Even if the cross burning is political, however, the court must then balance its political speech against a presumption that the activity is intimidating when it is directed at an individual or a group. The ruling is a severe limitation of the well-established doctrine that a primary purpose of the First Amendment is the protection of political speech. And it grants to the government a power the Court has often said the government doesn't have—the power to limit expression simply because the government doesn't like that expression.

What the Court should have done in the case was to rule that cross burning is protected political speech, and that prohibitions against it must be narrowly tailored to meet a compelling government interest. Prosecutions for intimidating speech—including cross burning—remain intact under such a ruling. Indeed, as previously noted, the federal government has successfully prosecuted cross burning when such cross burning was clearly designed as intimidation.³⁵¹ The Court's First Amendment jurisprudence—from *Schenck* through *Watts*—allows proscriptions on threatening or intimidating speech without carving out exceptions for specific types of such speech.

In order to make such a ruling, however, the Court would be required to repudiate key portions of *R.A.V.*, which it was obviously unwilling to do. Indeed, Justice O'Connor perpetuated the holding of *R.A.V.* allowing such carve-outs.³⁵²

It's clear that the Court is not finished with its jurisprudence regarding intimidation in general and cross burning in particular. Just as the Court first established that obscenity is not protected by the

350. See *Virginia v. Black*, 538 U.S. 343, 352-58 (2003).

351. See *supra* notes 119-48 and accompanying text.

352. 538 U.S. at 361-62.

First Amendment, then years later established a test to determine when material is obscene; just as the Court first established that some expressive conduct is protected and years later determined a test to determine when that symbolic speech is protected, the Court is eventually going to have to establish a test to determine when speech becomes intimidating.

Until that time, unfortunately, the same benediction that Justice Harry Blackmun pronounced for *R.A.V.* will apply to *Virginia v. Black*: “It will serve as precedent for future cases or it will not. Either result is disheartening.”³⁵³

353. 505 U.S. 377, 415 (1992)(Blackmun, J., concurring).