

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

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

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Barry Black organized a Ku Klux Klan rally in Carroll County, Virginia, on August 22, 1998. During the rally, Klan members made numerous racist remarks. One speaker claimed “he would love to take a .30/30 and just random[ly] shoot the blacks.” At the end of the rally, Klan members burned a very large cross. While the cross was burning, police officers arrested Black and charged him with violating a state law that declared: “It shall be unlawful for any person . . . , with the intent of intimidating any person . . . to burn . . . a cross on the property of another.” Virginia law further declared that proof of cross burning would be “prima facie evidence of an intent to intimidate.” This means that the prosecution did not have to present any evidence that Black (or anyone else who burned a cross) had done so with the purpose to intimidate. Rather, once a cross burning had been established, a jury could conclude that Black had the guilty intent. This presumption in practice meant that defendants were advised to present evidence that they had some other, legal motive. Black was found guilty and fined \$2,500. After the Court of Appeals of Virginia declared the Virginia statute unconstitutional, Virginia appealed to the Supreme Court of the United States.

The Thomas Jefferson Center for the Protection of Free Expression and several conservative activist groups filed amicus briefs urging the justices to strike down the Virginia law. The Jefferson Center brief declared,

Because cross burning is expressive, and conveys a distinctive message to those who view it, a statute that punishes those who burn crosses must be viewpoint-neutral. The statute must also be precise enough to afford adequate guidance to persons who are potentially subject to its provisions. The scope of such a law must not be so broad as to reach, and potentially subject to legal sanctions, any substantial amount of expression that the First Amendment protects. The challenged statute fails appreciably to meet each of these tests.

Prominent anti-discrimination groups, many states and the United States filed amicus briefs urging the Court to declare the cross burning statute constitutional. The brief for the United States declared,

The United States has a significant interest not only in prosecuting acts of cross burning that come within the scope of its own statutes, but also in assuring that the States retain wide discretion to address the continuing national problem of cross burning as an instrument of intimidation. Some States, following the United States’ approach, may choose to adopt statutes that encompass a wide array of coercive conduct intended to prevent or deter their citizens from engaging in protected activities. Other States, following Virginia’s approach, may choose to adopt statutes focused on the particular conduct that has been employed to intimidate their citizens. Both approaches should be permissible under the First Amendment so long as the gravamen of the offense is intimidation, not expression.

The judicial vote in *Virginia v. Black* is a bit confusing. A 6–3 majority ruled that the Virginia statute banning cross burning was constitutional. A different 7–2 majority determined that the prima facie provision was unconstitutional. How does Justice O’Connor distinguish the Virginia statute from the statute at issue in *R.A.V. v. City of St Paul* (1992) that was declared unconstitutional? Why did Justice Souter reject that distinction? Given the history of the Klan should cross burning be considered off-limits, even if in theory people could burn crosses for legitimate First Amendment reasons?

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court in part, and an opinion which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join in part.

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. . . . Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

[From the inception of the second Klan in 1905], cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. . . . This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. . . .

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. . . . In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town . . . . When the law fails you, call on us." . . . And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. . . . These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

. . . .  
To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." . . . And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. . . . In sum, while 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.

. . . .  
. . . . [A] State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." . . . Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." . . . And the First Amendment also permits a State to ban a "true threat." . . .

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. . . . 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. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. . . . [T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

. . . .

Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V. v. St. Paul* (1992), the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." . . . It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." . . .

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." . . .

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. . . . The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "would create an unacceptable risk of the suppression of ideas." . . . The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. . . .

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. . . .

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. . . . The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

...

JUSTICE STEVENS, concurring.

...

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred . . . and the profane. I believe that cross burning is the paradigmatic example of the latter.

. . . In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

...

[T]he majority's brief history of the Ku Klux Klan only reinforces th[e]common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those its dislikes, uses the most brutal of methods.

Such methods typically include cross burning—"a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." . . .

...

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia 'might well consider passing legislation' to restrict the activities of the Ku Klux Klan." . . .

Strengthening . . . my conclusion that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. . . .

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

...

The plurality . . . is troubled by the presumption because this is a First Amendment case. . . . First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second . . . , the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

...

JUSTICE SCALIA, with whom JUSTICE THOMAS joins in part concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V. v. St. Paul* (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. . . . I



write separately . . . to explain why I believe there is no justification for the plurality's apparent decision to invalidate [the prima facie presumption] on its face.

. . .  
. . . The class of persons that the plurality contemplates could impermissibly be convicted under [Virginia law] includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. . . .

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment overbreadth doctrine. For this Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." . . .

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression. . . . I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V. v. St. Paul* (1992) or any acceptable variation of it.

. . . [T]he specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone.

. . .  
*R. A. V.* defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. . . . The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," . . . and the explanation was rounded out with some illustrative examples. None of them, however, resembles the case before us.

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," . . . with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. . . . The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience exception.

. . . .  
As I see the likely significance of the [prima facie] provision, its primary effect is to 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. . . . One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in respondent Black's case . . . , the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. . . .



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