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Amanda J. Congdon

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Note

Burned Out: The Supreme Court Strikes Down Virginia's Cross Burning Statute in *Virginia v. Black*

*By Amanda J. Congdon**

I. INTRODUCTION

Liza Costa and her family moved to Rushville, Missouri in 1997.[1] Believing that Ms. Costa and her children were African American, three men schemed to burn a cross in the Costas' lawn to frighten the family into leaving town.[2] They welded metal pipe into the shape of a cross and wrapped the cross in towels.[3] The men then met at the volunteer fire station in town and took turns dousing the cross with gasoline.[4] There were approximately twenty other people gathered at the fire station to advocate their notions of white supremacy and to discuss the three men's intent to burn the cross in the Costas' yard.[5] Two of the men threw rocks and beer cans at those in the crowd who were unwilling to participate in the cross burning directed at the Costa family.[6]

Two of the original planners and one minor left the meeting to burn the cross.[7] One man, wearing a .22 caliber revolver in a shoulder

* J.D. expected May 2005. To my family, particularly my mother, I thank you for your infinite amount of support and love. I would also like to thank Chad for his constant encouragement and guidance. To my friends, thank you for your tolerance while I devoted most of my time to this project. Finally, I owe the most gratitude to the editors and members of the Loyola University Chicago Law Journal for their extensive assistance in getting this Note just right.

1. United States v. Pospisil, 186 F.3d 1023, 1027 (8th Cir. 1999).

2. *Id.* The United States Court of Appeals for the Eighth Circuit noted that the Costas are not African American but rather are of Cape Verdean ancestry, which is closer to Portuguese lineage than to African. *Id.* at 1027 n.3.

3. *Id.* at 1027.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

holster, planted the cross in the Costas' front lawn and lit it afire while another slashed the tires of the Costas' car.[8] The men then circled the family's home in their car and one of the three fired several shots as they drove away.[9] These men were convicted under a federal statute for conspiring to violate the Costas' civil rights.[10]

When the Commonwealth of Virginia enacted its cross burning statute, it intended to protect its citizens against the intimidation that results from cross burning like that directed at the Costa family.[11] The Virginia Code prohibits an individual from burning a cross with the intent to intimidate.[12] The statute also includes an evidentiary provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or a group of persons."[13] This prima facie provision meant that a jury would be able to infer intimidation from the act of cross burning itself.[14]

Over eighty years ago, in his dissenting opinion in *Gilbert v. Minnesota*, United States Supreme Court Justice Louis Brandeis noted that an individual's freedom of speech is more important to the United States than it is to that individual, thereby declaring the fundamental

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8. *Id.*

9. *Id.*

10. *Id.*; *see infra* note 192 (describing the federal government's efforts at prosecuting cross burning as a violation of civil rights). Missouri did not have a cross burning statute at the time this case was decided but now has a proposed regulation pending. *See infra* note 489 and accompanying text (discussing Missouri's proposed state bill to prohibit cross burning with the intent to intimidate).

11. VA. CODE ANN. § 18.2-423 (Michie 1996).

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

Id.; *see also* Black v. Virginia, 553 S.E.2d 738, 742 n.3 (Va. 2001) (citing to several articles to emphasize the frequency with which cross burnings occurred prior to the enactment of the Virginia statute).

12. VA. CODE ANN. § 18.2-423.

13. *Id.*

14. *See infra* notes 241–46 (explaining how the trial judge instructed the jury as to the application of the prima facie evidence provision in Black's and Elliott's cases). Virginia convicted Barry Black under section 18.2-423 for setting a cross afire at a Ku Klux Klan rally. Virginia v. Black, 123 S. Ct. 1536, 1542 (2003). Virginia convicted Richard Elliott under the same statute for setting a cross on fire in his neighbor's yard. *Id.* at 1543. Prima facie evidence is "evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." BLACK'S LAW DICTIONARY 579 (7th ed. 1999).

nature of the protected right.[15] In his concurring opinion in *Whitney v. California*, Justice Brandeis acknowledged that unless the speech in question provokes imminent harm or threatens serious injury to the government, the state has alternative means by which it can deter crime that do not involve restricting individual rights to free speech and expression.[16] The Supreme Court has struggled to define the boundaries of First Amendment protections for many years.[17] Through this struggle, the Court has determined that there is a difference between using freedom of expression to intimidate and using freedom of expression as a protected right under the First Amendment.[18]

Questions regarding whether the Virginia cross burning statute violated the First Amendment arose after the Commonwealth of Virginia held that Barry Black violated Virginia Code section 18.2-423 when he burned a cross on private property as a part of a Ku Klux Klan ("Klan") rally to express the group's ideals and opposition to minorities.[19] Richard Elliott and Jonathan O'Mara were convicted under this statute when they burned a cross in Elliott's neighbor's yard, allegedly in retaliation for his complaints about Elliott's shooting in Elliott's backyard.[20] The state court of appeals later affirmed Black's, Elliott's, and O'Mara's convictions.[21] Each man appealed to the

15. Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting) (writing that an individual's exercise of free speech is "more important to the Nation than it is to himself"); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (stating, to emphasize how the constitutional principle should exist in fact, that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots").

16. Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring) (stating that education should be a deterrent to prevent crime rather than a diminution of the freedom of speech), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). Justice Brandeis said that proper deterrents to crime should be "education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." *Id.* (Brandeis, J., concurring); *see* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1338 (1983) (discussing Justice Brandeis' impact on First Amendment analysis). Professor Rabban wrote, "The result, the analytical and rhetorical brilliance of his first amendment opinions in the 1920's, has never been equaled, and *Whitney*, his most developed opinion, defies paraphrase." *Id.*

17. *See infra* Part II.C (discussing the evolution of First Amendment jurisprudence with regard to the freedom of expression).

18. *See infra* Parts II.D.2–3 (discussing true threats and the fighting words doctrine as differentiating between protected and prohibited speech). For example, true threats are not considered protected under the First Amendment as freedom of expression. *See infra* Part II.D.2 (discussing the true threats doctrine as the United States Supreme Court used it in *Watts v. United States*).

19. *Black*, 123 S. Ct. at 1542.

20. *Id.* at 1543.

21. *Id.*

Supreme Court of Virginia, contending that the statute was facially unconstitutional.[22] Namely, they asserted that the prima facie evidence provision of the Virginia statute violated the First Amendment of the United States Constitution.[23] The Supreme Court of Virginia held the statute to be facially unconstitutional, basing its reasoning on the United States Supreme Court's holding in *R.A.V. v. City of St. Paul*.[24] Virginia appealed the Virginia Supreme Court's decision to the United States Supreme Court, and thus the United States Supreme Court faced the issue of whether Virginia's cross burning statute was constitutional.[25]

Ultimately, in a 6-3 decision, the United States Supreme Court held that the Virginia prima facie evidence provision violated the First Amendment of the Constitution because it chilled speech.[26] Nevertheless, the Court stated that a statute that makes illegal cross burning with the intent to intimidate was within constitutional boundaries, so long as the statute did not include a similar prima facie evidence provision.[27] Therefore, although the Court struck down Virginia's statute, the Court did not prohibit all cross burning statutes.[28]

Before this Note examines *Virginia v. Black*, Part II first will discuss the history of First Amendment jurisprudence.[29] Part II then will consider the rationale behind First Amendment protections and several doctrines that the Court has used to analyze challenges on First Amendment grounds.[30] Finally, Part II will look at symbolic speech and the issues that cross burning has created within the First Amendment context.[31]

Part III then will examine Virginia's trial, appellate, and supreme court opinions[32] along with the United States Supreme Court opinions

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22. *Id.*

23. *Id.* at 1548. Black, Elliott, and O'Mara, the respondents, argued that the prima facie evidence provision was facially unconstitutional. *Id.* at 1550.

24. *Id. See generally infra* Part II.H (discussing the holding in *R.A.V. v. City of St. Paul* and other cross burning cases).

25. *Black*, 123 S. Ct. at 1541.

26. *Id.*; *see supra* note 14 (defining prima facie evidence) .

27. *See infra* note 292 and accompanying text (explaining how the Court held in *Virginia v. Black* that a prohibition on cross burning with intent to intimidate is constitutional).

28. *Black*, 123 S. Ct. at 1541.

29. *See infra* Part II.A (reviewing the history of the First Amendment).

30. *See infra* Part II.B–C (detailing the Court's different analytical approaches to the First Amendment).

31. *See infra* Part II.D–G (discussing cases leading up to *Virginia v. Black* that serve as examples of the Court's analysis of symbolic speech and types of conduct that may be protected under the First Amendment).

32. *See infra* Part III.A–C (examining *Black*'s history in the lower courts before it reached the United States Supreme Court).

of *Virginia v. Black*.[33] Part IV will analyze the *Virginia v. Black* decision and argue that while the Court correctly concluded that a state may ban cross burning with intent to intimidate, the Court erroneously declared the statute facially unconstitutional based on its prima facie evidence provision.[34] Next, Part V will discuss both the impact that this case will have on First Amendment jurisprudence and the public's perception and reaction to the decision.[35] This Note will conclude by predicting that a similar case someday will come before the Supreme Court because the Court left several questions unanswered in *Virginia v. Black*.[36]

II. BACKGROUND

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[37] The First Amendment generally prevents the government from proscribing speech or expressive content simply because the government does not approve of the message conveyed.[38] However, the First Amendment does not provide absolute protection for every utterance and action.[39] Accordingly, this Part describes the

33. *See infra* Part III.D.1–3 (detailing the plurality opinion along with the separate concurring and dissenting opinions).

34. *See infra* Part IV (questioning the analysis adopted by the plurality).

35. *See infra* Part V (proposing that the lack of a majority opinion in *Black* will have an uncertain impact on the regulation of expression and the public's perception of these laws).

36. *See infra* Part VI (concluding that the case was a significant First Amendment case, but that it failed to provide a definitive interpretation of the First Amendment).

37. U.S. CONST. amend. I.

38. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see* GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 52–53 (1995) ("The First Amendment is the only one of the first eight amendments that is somewhat innovative . . . . These were rights that were confirmed, not created, by the . . . provisions of the First Amendment."). Professor Anastaplo noted that the First Amendment does not protect absolutely the freedom of expression because "[a]n unregulated freedom of expression can, in some circumstances, undermine the character and education needed for sustained self-government." ANASTAPLO, *supra*, at 53–54. He explained, "Freedom of expression . . . is something that a people should want to see protected to a considerable extent, but there is not for it the absolute protection that is confirmed by the First Amendment for freedom of speech and of the press." *Id.* at 54.

39. Roth v. United States, 354 U.S. 476, 482–83 (1957). All states made either blasphemy or profanity or both statutory crimes as early as the ratification of the Constitution in 1792. *Id.* at 482. "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 483; *see also* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (stating that libel is not within the area of constitutionally protected speech).

history leading to the adoption of the First Amendment,[40] explains the rationale behind its guarantees,[41] and discusses the several doctrines that the United States Supreme Court has used to analyze First Amendment issues.[42] Next, this Part discusses restrictions on freedom of speech[43] as well as the special protection granted to symbolic speech.[44] This Part then examines hate crimes and speech,[45] paying specific attention to cross burning.[46] This Part concludes with a survey of First Amendment jurisprudence regarding cross burning statutes.[47]

A. The History of the First Amendment

Constitutional scholars have noted that the First Amendment was unquestionably a reaction against the suppression of speech and the press that existed in English society.[48] The framers[49] foresaw the

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40. *See infra* Part II.A (discussing the historical development of the First Amendment).

41. *See infra* Part II.B (explaining the four major rationales used by courts to justify the fundamental nature of free speech).

42. *See infra* Part II.C.1 (describing content-neutral versus content-based regulations); *infra* Part II.C.2 (describing the vagueness and overbreadth doctrines); *infra* Part II.C.3 (describing the general presumption against prior restraints).

43. *See infra* Part II.D.1 (discussing the clear and present danger test); *infra* Part II.D.2 (discussing the true threats doctrine); *infra* Part II.D.3 (discussing the fighting words doctrine).

44. *See infra* Part II.E (explaining that symbolic speech is included in First Amendment protections).

45. *See infra* Part II.F (reviewing legislation concerning hate crimes and hate speech).

46. *See infra* Part II.G (detailing the history of cross burning).

47. *See infra* Part II.H (discussing the holdings in *R.A.V. v. City of St. Paul* and other cross burning cases).

48. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 892 (2002); *see also* NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 57–68 (1980) (discussing the impact of England's speech-restrictive laws on the development of the First Amendment). *See generally* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 4–27 (1985) (providing a detailed description of the historical regulation of expression, covering the evolution of the freedom of speech from Ancient Greece and Italy through eighteenth-century England); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983) (discussing more thoroughly the inception of the First Amendment right to free speech); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1279 (1998) (advocating that "free speech is a right that is limited by the fundamental rights of other individuals and the community as a whole"). Heyman explained that eighteenth-century Americans understood free speech as a "right inherent in human nature . . . that was bounded by the rights of others." Heyman, *supra*, at 1279.

49. The original framers were fifty-five men who took part in the Federal Convention to revise the Articles of Confederation. *See* ANASTAPLO, *supra* note 38, at 7–8 (summarizing the events that led to the 1787 Federal Convention); *see also* M.E. BRADFORD, ORIGINAL INTENTIONS, at xvi (1993) (describing then Governor of Virginia Edmund Randolph's view on the delegates who were trying to ratify the revised Articles of Confederation for their states); WILLIAM PETERS, A MORE PERFECT UNION: THE MAKING OF THE UNITED STATES CONSTITUTION 23–26 (1987) (describing the previous experiences of the delegates involved with the Convention); FRED

possibility of a democratic majority being as repressive as the English monarchy.[50] Throughout the Constitutional Convention, the framers argued about whether they should spell out the fundamental rights in the body of the Constitution.[51] Some argued that there was no need for a national bill of rights because many states already had adopted their own declarations of rights.[52] Others vehemently disagreed with this claim, and James Madison, a vigorous advocate of a national bill of rights, was one of the members of the House committee assigned to study proposals for a national bill of rights.[53] In fact, he had his own ideas about the protection of freedom of speech and religion that involved raising them to the level of Constitutional rights.[54] Yet, the original draft of the Constitution did not enumerate the individual rights

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RODELL, 55 MEN: THE STORY OF THE CONSTITUTION 23 (Stackpole Books 1986) (1936) (describing how the framers decided what they wanted and ultimately "set down on paper the foundation of the United States").

50. *See* HENTOFF, *supra* note 48, at 71 (noting that the effect of democratic regulation on individual dissenters would be the same as a monarch's regulation); THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961) (addressing the "Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation").

51. *See* HENTOFF, *supra* note 48, at 71 (summarizing the main point of a letter written by Madison to Jefferson in 1787); *see* THE FEDERALIST NO. 84, at 575 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (asserting that "[t]he most considerable of these remaining objections . . . is that the plan of the convention contains no bill of rights").

52. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 5 (1964) (describing the relationship between the states' declarations and the proposals for a national bill of rights).

53. TEDFORD, *supra* note 48, at 38 (noting that Madison took the lead in the House of Representatives to make the proposals for the First Amendment).

54. *See id.* (describing Madison's proposals for free speech protections). Madison's proposed amendment was composed of three sections:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> The people shall not be deprived or abridged of their right to speak, to write or to publish their sentiments, and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
>
> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances, for redress of their grievances."

Id. (quoting 1 ANNALS OF CONG. 434 (1789)). Additionally, Madison proposed that the states should be required to guarantee certain fundamental rights. *Id.* The House approved Madison's proposal, but the Senate rejected it. *Id.* This resulted in a limitation on the federal government and not on the state governments. *Id.* It was not until 1925 that the Supreme Court finally held that the First Amendment could be applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the freedom of speech was a fundamental right protected under the Fourteenth Amendment).

of American citizens.[55] To secure ratification of the Constitution, the framers instead drafted an abbreviated version of Madison's proposed amendment for the freedom of speech along with the rest of the Bill of Rights.[56]

On December 15, 1791, Virginia approved the proposed Bill of Rights, becoming the last state to do so, thereby completing ratification of these constitutional amendments.[57] With the First Amendment, the framers created a limit on Congress's power to restrict speech.[58] However, the enactment of the Alien and Sedition Acts in 1798 brought forth concerns that the First Amendment actually protected very little in the form of speech.[59] The Alien Act permitted the President to exile aliens whom he believed were dangerous to the United States.[60] The Sedition Act punished those who wrote scandalous and malicious publications that the writer intended as defamation.[61] Although the Supreme Court never reviewed the constitutionality of the Sedition Act before it expired in 1801, lower federal courts sustained the pro-

55. *See* CHAFEE, *supra* note 52, at 5 (noting that, even though the states each had adopted a free speech provision, citizens were still dissatisfied that there was no federal assurance of this right). For an extensive critical analysis of Chafee's First Amendment theories and study, see Rabban, *supra* note 16, at 1283–1303.

56. TEDFORD, *supra* note 48, at 38. Unfortunately, the framers gave very little indication as to the exact meaning of the Amendment. *See* CHAFEE, *supra* note 52, at 16 (noting, however, that there are "a few important pieces of evidence to show that the words were used in the Constitution in a wide and liberal sense").

57. GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 24 (1971).

58. CHAFEE, *supra* note 52, at 30.

59. *See id.* at 23. However, Professor Chafee noted that the First Amendment's framers "sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions." *Id.* at 22. Congress passed the Alien and Sedition Acts at the urging of Alexander Hamilton and the Federalist Party in response to poor relations with a post-revolutionary France. Kathleen Sullivan, *Freedom of Expression in the United States Past and Present*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY 2 (Thomas R. Hensley ed., 2001). These Acts allowed the President to expel aliens perceived as dangerous and to punish the demonstration of ideas perceived as malicious toward the United States government. *Id.*; *see also* The Alien Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800) (allowing the government to take measures against aliens who opposed the government's position); The Sedition Act, ch. 774, 1 Stat. 596 (1798) (expired March 3, 1801) (enumerating punishments for crimes against the United States). While the Alien Act was not strongly enforced, the government vigorously prosecuted under the Sedition Act. TEDFORD, *supra* note 48, at 47–48 (following incidents of the expression of free speech and their consequences under the Sedition Act). For a more detailed explanation of the effects of the Alien and Sedition Acts of 1798 and a description of the immediate reaction of the population after the Act's adoption in 1798, see HENTOFF, *supra* note 48, at 79–85.

60. §§ 1–2, 1 Stat. 570.

61. § 2, 1 Stat. 596.

censorship Act numerous times.[62] It was not until 1964 that the Supreme Court expressly declared that the Sedition Act violated the Constitution.[63]

B. Rationales for the Freedom of Speech

The United States Supreme Court declared in *Gitlow v. New York* that freedom of speech is a fundamental right.[64] The Supreme Court has relied on four core justifications in holding freedom of speech a fundamental right.[65] One justification for the protection of the freedom of speech is self-governance.[66] Scholars have explained that the freedom of speech is a crucial component to, and necessarily arises from, a democratic society.[67] While political speech is at the core of First Amendment protections, the Supreme Court has never accepted the view that the First Amendment protects only political speech.[68] The second core justification for the protection of free speech is that it is vital for the discovery of truth.[69] Justice Oliver Wendall Holmes's famous metaphor of the "marketplace of ideas," or the test of truth in competition, supported this rationale for First Amendment protections.[70]

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62. HENTOFF, *supra* note 48, at 84.

63. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). Justice Brennan stated, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.*

64. Gitlow v. New York, 268 U.S. 652, 666 (1925). The Court noted that the "freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.*

65. CHEMERINSKY, *supra* note 48, at 898–902 (explaining the four justifications as self-governance, truth, autonomy, and tolerance); *see also* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 9–18 (2d ed. 2003) (reiterating the rationales that Chemerinsky enumerated).

66. CHEMERINSKY, *supra* note 48, at 898–99.

67. *Id.* at 898. Political philosopher Alexander Meiklejohn wrote that the freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). Justice Brennan characterized this right of the people as "the central meaning of the First Amendment." *N.Y. Times Co.*, 376 U.S. at 273.

68. CHEMERINSKY, *supra* note 48, at 898–99. "In part, this is probably because of the difficulty of defining what is political speech. Virtually everything from comic strips to commercial advertisements to even pornography can have a political dimension." *Id.* at 899.

69. *Id.*

70. *Id.* This "marketplace of ideas" approach came from theories expressed by John Stuart Mill and was utilized by Justice Holmes in his dissent in *Abrams v. United States*. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."). Critics challenge the idea that the marketplace of ideas will produce truth. *See* Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 952 (1997) (arguing that the marketplace theory fails because it relies solely on tenuous analogy, and "analogy is the weakest form of argument in

A third rationale for the protection of free speech is that free speech is an integral aspect of personal autonomy.[71] Some commentators advocate that free speech allows fulfillment of a very basic human proclivity toward creativity and self-expression, and others claim that it serves as a part of a human's acceptance of his own autonomy.[72] Finally, a fourth justification for labeling the freedom of speech as a fundamental right is that freedom of speech is central to tolerance of others' ideas and such tolerance should be a basic value in our society.[73] All of the above-listed rationales are important to understanding why and to what extent the Supreme Court uses certain approaches to protect freedom of speech.[74]

C. The Ways in Which the Supreme Court Has Analyzed First Amendment Issues

The Supreme Court has analyzed whether a statute violates the First Amendment's protection of speech in three different ways.[75] Often, the Supreme Court applies many of these analyses within the same case,

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logic"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (1984) (arguing that just as the economic market has flaws, so does the marketplace theory, as each depends on constantly changing factors, and stating, "Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market"). *See generally* Darren Bush, *The "Marketplace of Ideas": Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107 (2000) (asserting that the fact that some economic-minded legal theorists have extended their analysis of free speech beyond traditional law and economics may hamper the search for truth).

71. CHEMERINSKY, *supra* note 48, at 900–01; *see also* Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM L. REV. 979, 981–82 (1990) (explaining that personal autonomy cannot justify speech in every situation); STONE, *supra* note 65, at 14–15 (2003) (describing different variations of the self-autonomy justification). Justice Marshall agreed with this rationale and declared that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression." Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

72. STONE ET AL., *supra* note 65, at 14–15 (discussing several commentators' varying versions of the self-autonomy justification); *see also* CHEMERINSKY, *supra* note 48, at 901 (stating that other justifications for speech emphasize its "instrumental values of expression").

73. CHEMERINSKY, *supra* note 48, at 901; *see* Jay Schiffman, *Tolerance as Understanding*, 3 MARGINS 1, 2 (2003) (setting forth a theory that "conceptualizes tolerance as a moral obligation stemming from paramount moral virtues such as empathy and compassion, rather than as a means for achieving liberal goals such as autonomy").

74. *See infra* Part II.C (outlining the different approaches the Supreme Court has used to examine challenges based on First Amendment grounds).

75. *See infra* Part II.D (discussing the Supreme Court's rationale for holding certain areas of speech protected under the First Amendment).

causing confusion.[76] This section therefore outlines the three methods of analyzing statutory challenges on First Amendment grounds: (1) the distinction between content-based and content-neutral laws, (2) the vagueness and overbreadth doctrines, and (3) the general presumption that prior restraint is invalid.[77]

1. Distinguishing Between Content-based and Content-neutral Laws

The Supreme Court has stated that the First Amendment prohibits the government from legislating against speech because the government views the speech as controversial or unpleasant.[78] Indeed, the Court has explained that the core purpose of the First Amendment is to prevent the government from creating such content-based statutes.[79] The Court has created exceptions to this general prohibition on content-based legislation;[80] however, the Court nevertheless imposes stricter scrutiny on legislation that is content-based than legislation that is content-neutral.[81]

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76. CHEMERINSKY, *supra* note 48, at 903; *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 304–05 (1997) (explaining that confusion also can arise from the three-tiered analysis by the courts, where "three-tiered" means that the Supreme Court applies strict scrutiny to content-based statutes, that it applies intermediate scrutiny to content-neutral statutes, and that "although the Court has not expressly so held, its cases suggest that minor and incidental burdens on speech imposed by laws not directed at speech as such are subject to minimal or no First Amendment scrutiny").

77. *See infra* Part II.C.1–3 (examining justifications for First Amendment challenges).

78. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). Justice Marshall wrote that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

79. CHEMERINSKY, *supra* note 48, at 903 (citing *Police Dep't*, 408 U.S. at 95–96); *see* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (finding, under strict scrutiny, that the "Son of Sam" law was a content-based statute). The Son of Sam law "require[d] any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract . . . and to turn over any income under that contract to the Board," and the statute applied to "all such contracts in any medium of communication." *Simon & Schuster*, 502 U.S. at 109. The Court subjected this statute to strict scrutiny, finding that the "State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* at 118 (internal quotes omitted) (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). While the Court found that the state had a legitimate interest in protecting the victims of crimes, the state had minimal interest in "limiting such compensation to the proceeds of the wrongdoer's speech about the crime." *Id.* at 120.

80. *See infra* notes 205–11 and accompanying text (discussing the exceptions to the prohibition on content-based statutes such as allowances for regulations on entire classes of speech and statutes targeting secondary effects of speech).

81. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (explaining that content-based restrictions "must be subjected to the most exacting scrutiny"). The Court would have to analyze whether the content discrimination fit into one of the exceptions before it could determine the statute's constitutionality. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (stating that there may be bases for classifying on content, but "to validate such selectivity (where totally proscribable

A law that restricts speech is content-based if the government bases its regulation on the subject matter or viewpoint of the expression.[82] In contrast, a law is content-neutral if the government's justification for the law does not relate to the content of the speech.[83] The principal question that the Supreme Court asks in its determination of the content-neutrality of a law is whether the law has regulated speech with or without reference to its content.[84] For example, a law prohibiting cross burning with the intent to intimidate someone based on that person's race or sexual orientation is a content-based restriction.[85] If the Court

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speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot"). Additionally, for a state to enforce a content-based statute constitutionally, it must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). For an example of the Court's analysis of a content-neutral statute, in which the appropriate inquiry is whether the statute serves a legitimate purpose and allows for other means of communication, see City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

82. CHEMERINSKY, *supra* note 48, at 908; *see also* Leslie Gielow Jacobs, *Clarifying the Content-based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 622 (2003) (allocating some of the confusion in First Amendment jurisprudence to the definition of "content" and arguing that "the proper meaning of 'content' is the communicative impact. The appropriate question is . . . whether its application depends upon the communicative impact of the speech affected. If so, then the action is content-based.").

83. CHEMERINSKY, *supra* note 48, at 908; STONE ET AL., *supra* note 65, at 281; *see also* Geoffrey R. Stone, *Content-neutral Restrictions*, 54 U. CHI. L. REV. 46, 54–57 (1987) (clarifying the distinction between content-neutral and content-based restrictions and the concerns associated with the approaches); Jacobs, *supra* note 82, at 619 (discussing the clarification required in the content-neutral inquiry).

84. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For an analysis of whether the government has regulated speech based on content, see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763–66 (1994). In *Madsen*, the Court evaluated an injunction that was imposed because a group of people repeatedly violated a court order. *Madsen*, 512 U.S. at 763. The fact that the people against whom the injunction was enforced all had the same viewpoint regarding abortion was not relevant. *Id.* The Court explained that where an injunction is at issue, it must determine "whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.'" *Id.* at 764 (quoting *Ward*, 491 U.S. at 791). However, because injunctions involve a higher risk of infringing on First Amendment rights than statutes do, the Court later declared that it must use the more rigorous test of evaluating "whether the challenged provisions of the injunction burden no more speech than [is] necessary to serve a significant government interest." *Id.* at 765; *see also* Hill v. Colorado, 530 U.S. 703, 721 (2000) (holding that a Colorado statute was acceptably content-neutral, and stating, "We have never held, or suggested, that it is improper to look at the content of an oral or written statement to determine whether a rule of law applies to a course of conduct.").

85. *See* Carey v. Brown, 447 U.S. 455, 471 (1980) (finding that an Illinois statute prohibiting picketing unless the picketing related to labor issues was unconstitutional and content-based because it allowed speech only on the subject of labor); *infra* note 197 and accompanying text (discussing the statute the Supreme Court found to be content-based in *R.A.V. v. City of St. Paul*); *see also supra* note 79 (discussing the rationale the Supreme Court used to strike down the Son of

finds a statute to be content-based, it then uses strict scrutiny to analyze the statute.[86] An example of a content-neutral statute is one in which the government prohibits the distribution of pamphlets or oral communications within a certain distance from the entrance to a health clinic.[87] The Court has accepted content-neutral statutes as valid so long as the government has designed the statutes to serve a legitimate purpose and alternate avenues of communication exist.[88]

2. The Vagueness and Overbreadth Doctrines

The Supreme Court also has recognized that one can challenge a statute on First Amendment grounds because the regulation is disproportionately vague or overbroad.[89] Both vagueness and overbreadth are facial challenges to the constitutionality of a law because of the potential applications of the law, not because of how the state has actually applied the law.[90] For example, a person may

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Sam law in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board* as an impermissible regulation of content).

86. *See supra* note 76 (discussing the three levels of scrutiny used in Supreme Court analyses of content-based and content-neutral statutes).

87. *See Hill*, 530 U.S. at 719 (determining that a Colorado statute placed no restrictions on viewpoints and was thus content-neutral). The Colorado statute cited by the Court provided, in part, as follows:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Id. at 707 (citing COLO. REV. STAT. § 18-9-122(3)). The Court in *Hill* stated that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726.

88. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (finding that a zoning ordinance regulating the location of adult movie theaters was constitutional because it was a content-neutral "time, place, and manner regulation" and the government had substantial interest in such regulation).

89. CHEMERINSKY, *supra* note 48, at 919; *see* STONE ET AL., *supra* note 65, at 113 (introducing the vagueness and overbreadth doctrines by explaining that "courts may invalidate restrictions on expression because the means of suppression are impermissible, even though the particular speech at issue might constitutionally be restricted by some other means").

90. STONE ET AL., *supra* note 65, at 117. "Under [a facial constitutional challenge], a state law prohibiting any person to 'advocate unlawful conduct' is unconstitutional 'on its face' because the law purports to forbid expression that the state may not constitutionally prohibit." *Id.* For example, in *Broadrick v. Oklahoma*, the Supreme Court emphasized that the Court

> has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

challenge a statute, arguing that the law is either vague or overbroad based on its application to others, though not necessarily to himself.[91] To determine whether a statute is facially invalid due to vagueness or overbreadth, the Supreme Court first considers whether the legislation seems to regulate expression that the Constitution traditionally has protected.[92] In determining the degree of vagueness, the Court uses a reasonable person standard: whether a reasonable person could ascertain what speech the law seeks to prohibit and what speech the law permits.[93] If a reasonable person could not determine what speech the statute actually permits and prohibits because the statute fails to define clearly the conduct it proscribes, then the statute is unconstitutionally vague.[94] A statute prohibiting abusive language that may cause a breach of peace is an example of a vague statute.[95]

To determine whether the law is overbroad, the Court analyzes whether the law regulates more speech than the Constitution permits a state to restrict.[96] Unconstitutional regulations of protected speech may

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Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (citing Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)). A facial challenge differs from the traditional as-applied approach—an approach that "tests the constitutionality of the legislation as it is applied to particular facts on a case-by-case basis." STONE ET AL., *supra* note 65, at 117.

91. Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").

92. Boos v. Barry, 485 U.S. 312, 329 (1988). The Court determines whether the statute "reaches a substantial amount of constitutionally protected conduct." *Id.*; *see also Gooding*, 405 U.S. at 528 (finding a Georgia statute prohibiting a breach of peace by use of abusive language to be vague and overbroad).

93. CHEMERINSKY, *supra* note 48, at 919; STONE ET AL., *supra* note 65, at 122; *see, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (applying the reasonable person standard in analyzing an ordinance that prohibited groups of people to assemble on sidewalks). The Supreme Court held that the statute in *Coates* was vague because "no standard of conduct is specified at all . . . . [and,] [a]s a result, 'men of common intelligence must guess its meaning.'" *Coates*, 402 U.S. at 614. The Court then declared that the statute was facially unconstitutional because of its vagueness. *Id.* at 615.

94. CHEMERINSKY, *supra* note 48, at 926 (explaining that "[a] law would be vague because a reasonable person could not know what was outlawed and what was permitted"); STONE ET AL., *supra* note 65, at 122. Emphasizing the importance of this doctrine, Professor Stone noted,

> The vagueness doctrine has special bite in the first amendment context, however, for where First Amendment interests are affected, a precise statute evincing a legislative judgment that certain specific conduct [be] proscribed, assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation.

STONE ET AL., *supra* note 65, at 122 (internal quotations omitted).

95. *See, e.g.*, *Gooding*, 405 U.S. at 518–19 (describing a Georgia statute that the Court found to be vague and overbroad).

96. CHEMERINSKY, *supra* note 48, at 921; *see, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (holding that an Oklahoma statute was not overbroad because the problem

deter non-litigating parties from speaking, and therefore the law may escape judicial examination.[97] Further, the Court has stated that for the overbreadth to be unconstitutional, it must be both real and substantial, as the doctrine is of limited application.[98] Further, the state can overcome a challenge of overbreadth by showing that it can construe the statute narrowly, so as not to infringe upon constitutionally protected speech.[99]

3. Prior Restraints: The Most Serious Infringements on First Amendment Rights[100]

A prior restraint on speech occurs when a law prevents speech before it is spoken.[101] Classic forms of prior restraints include court injunctions and licensing systems that stop speech that the court deems offensive.[102] For example, in an early prior restraint case, *Near v. Minnesota*, the Supreme Court struck down a law that permitted the government to enjoin a publication that accused a Chief of Police of not fulfilling his duties.[103] In *Near*, the Supreme Court held that it will presume that laws enforcing prior restraints are unconstitutional.[104]

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complained of was not real and substantial); *see also Gooding*, 405 U.S. at 528 (finding a Georgia statute to be both vague and overbroad).

97. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.8 (1980) (explaining that the "overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review" (citing *Broadrick*, 413 U.S. at 612–13)).

98. *Broadrick*, 413 U.S. at 615.

99. *Id.* at 613.

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.

Id. However, when the Court finds that a limiting construction has been placed or can be placed on the statute, a facial challenge for overbreadth will not stand. *Id.*

100. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (stating that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

101. CHEMERINSKY, *supra* note 48, at 926. While prior restraint is most clearly defined as "an administration system or judicial order that prevents speech from occurring," the definition of prior restraint is often "elusive," and definitions can be "too broad." *Id.* The Supreme Court first adopted the doctrine of prior restraint in the 1930s in *Near v. Minnesota*. Near v. Minnesota, 283 U.S. 697, 716 (1931).

102. CHEMERINSKY, *supra* note 48, at 927. *See generally* Carolyn Grose, *"Put Your Body on the Line": Civil Disobedience and Injunctions*, 59 BROOK. L. REV. 1497 (1994) (analyzing when, in cases of civil disobedience, injunctions constitute prior restraints).

103. *Near*, 283 U.S. at 704.

104. *Id.* at 716.

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint

Because of this presumption, the government bears a heavy burden of showing good reason for the imposition of such prior restraint.[105] For example, the Supreme Court held that a prior restraint on a state-created resolution set forth to evaluate the morality of publications was unconstitutional because the government did not meet its burden of showing good reason.[106] However, the Supreme Court has recognized certain areas in which prior restraints may be appropriate, including: (1) restraints during war time, (2) enforcement of certain obscenity regulations, and (3) enforcement of laws against incitement.[107] The Supreme Court also has noted that it would permit a system of prior restraint only where judges supervised and immediately determined the validity of the restraints.[108]

D. Restrictions on First Amendment Protections

The Supreme Court has refused to label all expression as speech simply because the person intends to express an idea through his or her actions[109] and has singled out some categories of speech that do not

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in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Id. at 720. This case established the doctrine that there is a presumption against prior restraint. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that a prior restraint against publishing in newspapers was unconstitutional); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (holding that the state censorship at issue suppressed ideas and violated the First Amendment, concluding that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

105. *See* Org. for a Better Austin v. Keefe, 402 U.S. 415, 418–19 (1971) (holding that the injunction issued by the lower court violated the First Amendment because it was a prior restraint); *see also* James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REFORM 497, 506–12 (1982) (contending that courts have dangerously expanded the doctrine of prior restraint since *N.Y. Times Co. v. United States*, thus putting the doctrine at risk of inconsistent application).

106. *Bantam Books*, 372 U.S. at 72 (finding that the prior restraint was a "scheme of state censorship").

107. *Near*, 283 U.S. at 716. *See generally* Elliot Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HASTINGS L.J. 871, 872 (1993) (attempting to reconcile the inconsistencies in different prior restraint cases by noting that the cases involve two separate impulses: the libertarian impulse that defends the rights of the individual and of freedom of expression and the "statist" impulse that defers more to the government). For a critical analysis of the doctrine of prior restraint arguing that the doctrine of prior restraint is unclear and inconsistent, see Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 295–97, 314–15 (1999).

108. *Bantam Books*, 372 U.S. at 70.

109. United States v. O'Brien, 391 U.S. 367, 376 (1968). *See generally* Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991) (arguing that hateful speech neither serves a redeeming social value nor advances the search for truth and thus is a category of speech undeserving of First Amendment protection); Fred C. Zacharias, *Flowcharting the First*

qualify for protection and that the government may criminalize and prosecute.[110] This section will discuss the clear and present danger test as one way through which the Supreme Court has restricted the freedom of speech.[111] Further, this section will discuss the Supreme Court's reluctance to protect true threats[112] and fighting words[113] as constitutionally protected speech.

1. *Schenck v. United States*: The Clear and Present Danger Test

The first type of speech that the Supreme Court permitted the government to restrict and criminalize was war-related conduct.[114] The Court decided *Schenck v. United States*[115] in the aftermath of World War I, examining a challenge to the constitutionality of the Espionage Act.[116] *Schenck* was a landmark case because the Supreme Court announced the clear and present danger test as a way of analyzing a governmental restriction on free speech.[117] The government had charged Schenck with three counts of violating the Espionage Act of June 15, 1917 for circulating leaflets urging men to refuse to enter into the military draft.[118] He appealed his conviction on the ground that the Espionage Act violated the First Amendment, abridging his freedom of

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Amendment, 72 CORNELL L. REV. 936, 937 (1987) (proposing "a model for analyzing all cases in which the government selects and regulates individuals as a result of their political speech").

110. CHEMERINSKY, *supra* note 48, at 968 (discussing incitement of illegal activity, fighting words, and obscenity as unprotected speech); *see infra* notes 116–21 and accompanying text (discussing the areas of speech in which the government has sufficient interest to criminalize); *see also* HENTOFF, *supra* note 48, at 123–30 (discussing the Supreme Court's confrontation of seditious speech and that certain speech at wartime will not be protected by the First Amendment); H.L. POHLMAN, JUSTICE OLIVER WENDALL HOLMES 67 (1991) (analyzing *Schenck* and theorizing that "Holmes treated conspiracy differently when speech was the primary means that conspirators used to obtain their unlawful objective"). *See generally* Arielle D. Kane, Note, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L. REV. 159 (2001) (exploring litigation tactics for private parties who suffered harm from another's speech that the Court considers protected speech under *Brandenburg v. Ohio*).

111. *See infra* Part II.D.1 (outlining the evolution of the clear and present danger test).

112. *See infra* Part II.D.2 (discussing the government's compelling interest to prohibit true threats).

113. *See infra* Part II.D.3 (describing the fighting words doctrine).

114. Schenck v. United States, 249 U.S. 47, 51–53 (1919).

115. *Id.*

116. TEDFORD, *supra* note 48, at 69. Congress enacted the Espionage Act shortly after America declared war against Germany in 1917 to prevent sabotage and the communication of United States military secrets to the enemy. *Id.*; *see* Espionage Act of June 15, 1917, 40 Stat. 217, 219 (outlining a punishment scheme for spying).

117. TEDFORD, *supra* note 48, at 69–72; *see Schenck*, 249 U.S. at 52. *Schenck* was the first of the Espionage Act cases argued before the Supreme Court. TEDFORD, *supra* note 48, at 69.

118. *Schenck*, 249 U.S. at 48–49.

speech.[119] The Supreme Court stated that although the First Amendment would protect Schenck's conduct in ordinary circumstances, an examination of the entire situation was necessary to evaluate his conduct during times of war.[120] The Court concluded that the First Amendment does not provide the same level of protection to speech during wartime as it does during ordinary time because some utterances may prove to be hindrances to war efforts.[121]

The Court therefore set forth the clear and present danger test, in which it examines whether the circumstances surrounding the speech and the very nature of the speech create a clear and present danger of substantive evils that Congress has the authority to prevent.[122] These evils include an individual's or group's successful interference with Congress's questioned power in a particular situation.[123] This test permits the government to restrict speech that the First Amendment otherwise would protect when the immediacy of the circumstances presents additional risks of harm from the speech.[124] Thus, using the clear and present danger test, the Court affirmed Schenck's convictions, explaining that Schenck's draft-dodging leaflets were a hindrance to the government during times of war.[125] Constitutional scholars have noted that while *Schenck* sets forth the clear and present danger test, the Court did not apply it rigorously in that case, and the test was taken to mean bad tendency, or liability for speech that had a corrupt propensity regardless of the speaker's intent.[126] However, the clear and present

119. *Id.* at 49.

120. *Id.* at 52. While the Court admitted that in ordinary circumstances Schenck's conduct and expression would be protected under the First Amendment, "the character of every act depends upon the circumstances in which it is done." *Id.* Justice Holmes further stated, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.*

121. *Id.*

122. *Id.* "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." *Id.* (emphasis added).

123. *See* CHAFEE, *supra* note 52, at 81 ("Although 'the substantive evils' are not specifically defined, they mean successful interference with the particular power of Congress that is in question—in this instance [referring to the situation in *Schenck*], the war power.").

124. *Schenck*, 249 U.S. at 52. The Supreme Court explained, "It is a question of proximity and degree." *Id.*

125. *Id.*

126. TEDFORD, *supra* note 48, at 71–73; *see* Abrams v. United States, 250 U.S. 616, 625–31 (1919) (Holmes, J., dissenting) (advocating a more liberal standard of the clear and present danger test and setting forth the marketplace of ideas rationale); POHLMAN, *supra* note 110, at 66 (explaining that even though *Schenck* did not lend itself to the clear and present danger standard, an imperfect fit with the test did not automatically reduce the standard to bad tendency); STONE ET AL., *supra* note 65, at 25 (questioning the clear and present danger standard employed by the *Schenck* court, noting that "[u]nder this view, intent could be inferred from the tendency of the

danger standard evolved to mean more than tendency and to include the accompanying intent of the speech.[127]

In *Brandenburg v. Ohio*, the Court again applied the clear and present danger test.[128] However, this case showed the departure from the mere tendency approach of the earlier Court and required that the government prove that the danger was real.[129] In *Brandenburg*, the defendant was a Klan leader in Ohio who spoke out at a rally, shouting statements such as "Save America" and "Freedom for the Whites," as well as derogatory and threatening statements about African Americans.[130] Prior to the rally, the defendant had invited to the event a reporter and cameraman who later broadcast part of the rally on a local television station as well as the national network.[131] The state convicted Brandenburg under an Ohio statute that made it illegal to gather for the purpose of criminal syndicalism.[132] Brandenburg appealed his conviction on the ground that the statute infringed on his First-Amendment-protected speech.[133]

The Supreme Court reversed Brandenburg's conviction and declared the Ohio statute an unconstitutional violation of the First Amendment.[134] The Court stated that criminalizing advocacy and a gathering to support this advocacy violates the First Amendment's general protection of speech.[135] The Court further held that threatening speech is protected unless the state can show the existence of a clear and present danger.[136] Because the Supreme Court seriously had

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speech itself, on the theory that one intends the natural and foreseeable consequences of one's acts"); *see also* Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (urging a more rigorous standard for the clear and present danger test where the state convicted a defendant for being an active member of the Communist party), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

127. *See* HENTOFF, *supra* note 48, at 130 (noting that the bad tendency test "was so broad, so vague, that a judge or jury who despised certain ideas of a defendant could easily come to the conclusion that these views were so dangerous . . . that they *tended* to create great harm to government"); *supra* note 126 and accompanying text (describing the ambition of Justices Brandeis and Holmes to enforce a more rigorous standard for determining the existence of a clear and present danger).

128. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

129. *Id.* at 448–49.

130. *Id.* at 445–46.

131. *Id.* at 445.

132. *Id.* at 444. The statute in this case made it a crime to advocate "the duty, necessity, or propriety of crime . . . as a means of accomplishing . . . political reform." *Id.*

133. *Id.* at 445.

134. *Id.* at 449.

135. *Id.*

136. *Id.* at 447. The Court found that the state needed to prove that "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* It is also important to note Justice Douglas's concurring opinion, in which he wrote that the

discredited its decision in *Whitney v. California* upholding a similar law, the state could not show that mere advocacy of violence sufficed to present a clear and present danger here, as the state had done in *Whitney*.[137] The Court's decision in *Brandenberg* represented a departure from *Schenck*'s more meager analysis of the clear and present danger nature of the speech the state sought to regulate.[138]

2. The Government Has a Compelling Interest To Protect Against "True Threats"

The Supreme Court has adopted the notion that the government has a legitimate interest in protecting government officials against true threats and that it therefore can regulate speech it deems a true threat.[139] In *Watts v. United States*, the Court considered a challenge to a federal statute that made it illegal to threaten the President of the United States.[140] The defendant made a statement about not wanting to be drafted into the military and protested the possibility of having to carry a gun, stating that if he were forced to carry a gun, he would locate the President and place the President in his gun sights first.[141] While the Court noted that the federal government has a compelling interest in protecting the safety of its Chief Executive, the Court also found that the statute requires the government to prove that a true threat results from this expression, not merely a sign of political protest, in order to

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clear and present danger test "is not reconcilable with the First Amendment in days of peace." *Id.* at 452 (Douglas, J., concurring). *But see* United States v. O'Brien, 391 U.S. 367, 382 (1968) (holding that because the government had a legitimate interest in assuring the continued availability of Selective Service certificates, restricting the burning of these certificates was not abridging freedom of speech). *See also* Jeffrey A. Steele, Comment, *Fighting the Devil with a Double-edged Sword: Is the Speech-invoked Hostile Work Environment Hostile to* O'Brien*?*, 72 U. DET. MERCY L. REV. 83, 91 (1994) (discussing "whether an *O'Brien* analysis would support a statute that, while clearly directed toward the elimination of constitutionally proscribable discriminatory conduct, is triggered by an unfavorable reaction to a disfavored message"); Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231, 233 (2003) (urging the Supreme Court "to adopt a declarant-and-recipient-based objective standard for threat speech that is flexible enough to take into account the medium through which an alleged threat is transmitted").

137. *Brandenburg*, 395 U.S. at 447; *see supra* note 126 (citing the *Whitney* case).

138. *See supra* notes 122–26 and accompanying text (analyzing the Supreme Court's usage of the clear and present danger test in *Schenck v. United States*).

139. Watts v. United States, 394 U.S. 705, 707 (1969). The Supreme Court stated, "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 physical violence." *Id.*

140. *Id.* (discussing 18 U.S.C. § 871, which made it illegal to threaten the President of the United States).

141. *Id.* at 706. The defendant stated that if the government ever made him carry a gun, "the first man [he wanted] to get in [his] sights [was] L.B.J." *Id.*

prohibit that expression.[142] The Court found that because political speech is often imprecise and obnoxious, the statement made by the plaintiff was not a true threat, and he therefore should be acquitted.[143] However, the Court stated that the government had a legitimate interest in protecting the President against any possible threats and therefore held that the law at issue was facially constitutional.[144]

3. The State Can Restrict "Fighting Words"

The Supreme Court established the fighting words doctrine in *Chaplinsky v. New Hampshire* by holding that there are certain words in the English language that the Court will consider fighting words and that those words thus receive no protection under the First Amendment.[145] In *Chaplinsky v. New Hampshire,* the Supreme Court explained that words constitute fighting words if they would cause men of ordinary intelligence to start a fight and that such words could include profanity, obscenity, or threats.[146] Fighting words differ from speech posing a clear and present danger because they involve face-to-face encounters, while the clear and present danger doctrine usually involves the incitement of crowds or subversive advocacy directed at the general public.[147]

In *Chaplinsky v. New Hampshire*, the Court found that the New Hampshire statute at issue was constitutional because it prohibited fighting words.[148] The New Hampshire statute made it illegal to

142. *Id.* at 708; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (employing a hypothetical involving the President to show when content discrimination exists without danger).

143. *Watts*, 394 U.S. at 708. The Court termed political speech "vituperative, abusive, and inexact." *Id.*

144. *Id.* at 707. In interpreting the statute, however, the Court stated that a statute that criminalizes pure speech must distinguish clearly between the conduct prohibited and constitutionally protected speech. *Id.* Justice Douglas concurred in the opinion and compared the statute at issue to the Alien and Sedition Acts, "one of our sorriest chapters." *Id.* at 710 (Douglas, J., concurring). *See generally supra* note 136 (noting Justice Douglas' statement that the clear and present danger test should not be used to analyze First Amendment issues).

145. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). Fighting words can include those directed at someone to provoke them via profanity or obscenity. *Id. See generally* MARTHA T. ZINGO, SEX/GENDER OUTSIDERS, HATE SPEECH, AND FREEDOM OF EXPRESSION: CAN THEY SAY THAT ABOUT ME? 139 (1998) (explaining the importance of the fighting words doctrine by noting that even today, "the fighting words doctrine is at the center of legal discourse regarding hate speech regulations"); *infra* notes 180–86 and accompanying text (describing hate crime legislation and its criticisms).

146. *Chaplinsky*, 315 U.S. at 573.

147. *Id.*; *see supra* notes 128–37 and accompanying text (discussing the clear and present danger test in an incitement to violence context in the *Brandenburg* case).

148. *Chaplinsky*, 315 U.S. at 573.

provoke someone by using derogatory, annoying, or offensive words.[149] The state convicted the defendant under this statute for publicly calling someone a "Fascist" and a "racketeer."[150] The defendant appealed his conviction on the ground that the New Hampshire statute violated his First Amendment right because it placed an unreasonable restraint on his freedom of speech and was vague and indefinite.[151]

In analyzing the constitutional claim, the Court acknowledged that the right of free speech is not absolute at all times and in all circumstances.[152] Namely, the Court stated that the First Amendment does not protect fighting words.[153] Fighting words generally do not have expressive value; if they do, social interest in prohibiting these words outweighs their slight benefit to society.[154]

The United States Supreme Court has reiterated through its many First Amendment decisions that not all expression warrants protection under the First Amendment.[155] The Court has restricted freedom of speech through its use of the clear and present danger test and the prohibition of certain expressions classified as true threats or fighting

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149. *Id.* at 569. The statute stated:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 569 (quoting chapter 378, section 2, of the Public Laws of New Hampshire).

150. *Id.* His disparaging statements were, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.*

151. *Id.* *See generally supra* notes 93–95 and accompanying text (explaining the vagueness doctrine).

152. *Chaplinsky*, 315 U.S. at 571. Since the statute was narrowly drawn to prohibit only fighting words, the Court disposed of the defendant's claim that the statute was vague. *Id.* at 573.

153. *Id.* at 572 (citing ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)). The Court defined fighting words as those words that by their utterance "inflict injury or tend to incite an immediate breach of the peace." *Id.* The Court consequently has held that fighting words are generally proscribable under the First Amendment. *Id.* at 571–72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem .... It has been well observed that such utterances are no essential part of any exposition of ideas ...."); *see also* Cohen v. California, 403 U.S. 15, 20 (1971) (defining fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").

154. *Chaplinsky*, 315 U.S. at 572. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

155. *See supra* Part II.D (outlining the various restrictions the Supreme Court has set forth limiting the right to free speech).

words.[156] Thus, while the First Amendment's freedom of speech is fundamental, there are limitations on this right for the protection of United States citizens and the government.[157]

E. The Court's Analysis of Symbolic Speech

The Court has recognized symbols as important forms of communication and thus has granted their use some protection under the First Amendment.[158] Further, the Court has recognized that when a speaker combines speech and non-speech elements to express himself, the First Amendment protects him at times.[159] Symbols have been used most frequently to protest policies of the American government and to express a contrary viewpoint.[160] The Supreme Court consistently has upheld this right to protest.[161] In evaluating symbols, the Supreme Court has set forth a two-prong test.[162] The first question is whether the

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156. *See supra* Part II.D.1–3 (explaining the different doctrines under which the Supreme Court has limited an individual's right to free speech).

157. *See supra* Part II.D.1–3 (discussing the clear and present danger test and the state's ability to restrict true threats and fighting words in accordance with the First Amendment's protection of freedom of speech).

158. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632–33 (1943) (noting that "[s]ymbolism is a primitive but effective way of communicating ideas" and emphasizing that a person "gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another man's jest and scorn").

159. United States v. O'Brien, 391 U.S. 367, 376 (1968). *See generally* Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1526 (proposing a theory for determining when the Constitution protects non-speech under the First Amendment and stating that, under the theory, the requirements for protection are that (1) the "action must have meaning" and (2) "the actor must intend to communicate by means of the action").

160. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (explaining that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). In *Tinker*, students were suspended for wearing black armbands to school that expressed an opposition to the hostilities in Vietnam. *Id.* at 504. They brought suit on the ground that the suspension was a restriction on their freedom of expression rights. *Id.* The Court held that the school was wrong in denying the students their form of expression and that the students' suspension was indeed a violation of the First Amendment. *Id.* at 514.

161. *Id.* at 508–09. Further, Justice Fortas elaborated that "this sort of hazardous freedom . . . is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.*; *see also* United States v. Grace, 461 U.S. 171, 176 (1983) (reiterating that "[p]eaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment"); Gregory v. City of Chicago, 394 U.S. 111, 113 (1969) (reversing a decision of the Illinois Supreme Court that upheld the convictions of peaceful protestors, holding that the protestors' acts were entitled to First Amendment protection).

162. *See* Spence v. Washington, 418 U.S. 405, 410–12 (1974). This test reflects a departure from the four-prong test set forth in *United States v. O'Brien*. *See O'Brien*, 391 U.S. at 376 (explaining that the Supreme Court will find sufficient justification for a government regulation if

conduct constitutes speech.[163] In analyzing this question, the court will look at three factors: (1) the intent of the speaker; (2) the likelihood that the audience will understand the message that the speaker seeks to convey, if any; and (3) the context of the activity.[164] If the court finds that the conduct is speech, it then evaluates whether the state's interests are sufficiently significant that the state can justify interference with a person's constitutional rights.[165]

The Supreme Court first applied this two-prong test in *Spence v. Washington*, where it evaluated conduct as a manner of expression.[166] Spence displayed a United States flag with a peace symbol attached to both surfaces of the flag out of the window of his apartment.[167] The state convicted him under a Washington statute that made it a crime to display an American flag with extraneous material attached.[168] Spence testified that he desired to associate the flag with peace rather than war

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(1) "it is within the constitutional power of the Government," (2) "it furthers an important or substantial governmental interest," (3) "the governmental interest is unrelated to the suppression of free expression," and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

163. *Spence*, 418 U.S. at 410.

164. *Id.* at 410–11.

165. *Id.* at 412.

166. *Id.* at 405; *see* Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1851–53 (1997) (discussing several applications of the *Spence* test and the three factors that courts use to determine whether the conduct at issue is in fact speech). *See generally* Benjamin Means, *Criminal Speech and the First Amendment*, 86 MARQ. L. REV. 501, 516–24 (analyzing and synthesizing the test announced in *Spence* to contend that states should criminalize certain types of speech). Waldman wrote, "The traditional conception of *Spence* has ostensibly focused on the actual intent of the actor and on the case-specific facts at issue." Waldman, *supra*, at 1844.

167. *Spence*, 418 U.S. at 405.

168. *Id.* Rather than being convicted under the flag desecration statute, Spence was convicted under the "improper use" statute. *Id.* at 407. The improper use statute states:

> No person shall, in any manner, for exhibition or display:
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> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or
>
> (3) Expose to public view for sale, manufacture, or otherwise, or to sell, give, or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

WASH. REV. CODE § 9.86.020 (2000) (effective until July 1, 2004).

and violence by attaching the peace symbol thereto.[169] The Supreme Court concluded that there was no question that Spence was using symbols as a manner of expression.[170] Therefore, the Court overturned Spence's conviction.[171]

Another controversial use of symbols as expression is examined in *Texas v. Johnson*, in which the Court looked at a Texas statutory prohibition on burning the American flag.[172] The Court analyzed flag burning under the First Amendment.[173] The state of Texas had convicted Johnson under a Texas statute that prohibited the desecration of an American flag.[174] On appeal, the United States Supreme Court explained that it first must determine whether the flag burning constituted expressive conduct protected under the First Amendment.[175]

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169. *Spence*, 418 U.S. at 408. Spence was protesting events that happened a few days prior to his arrest—the invasion of Cambodia and the killings at Kent State University. *Id.*

170. *Id.* at 415. The Court explained that "his message was direct, likely to be understood, and within the contours of the First Amendment." *Id.*

171. *Id.*

172. Texas v. Johnson, 491 U.S. 397, 400 (1989); *see* James R. Dyer, Comment, Texas v. Johnson: *Symbolic Speech and Flag Desecration Under the First Amendment*, 25 NEW ENG. L. REV. 895, 902 (discussing the impact *Texas v. Johnson* has had on symbolic speech); Al Kamen, *Court Nullifies Flag-desecration Laws; First Amendment Is Held To Protect Burnings During Political Demonstrations*, WASH. POST, June 22, 1989, at A1 (describing the "emotional impact on the court" as "evident" because Chief Justice Rehnquist's opinion contained the text of the Star-Spangled Banner along with quotes from other patriotic material and because of Justice Stevens's unusual act of reading his opinion aloud from the bench); *see also* Fred Strasser & Marcia Coyle, *Final Stretch*, NAT'L L.J., June 12, 1989, at 5 (quoting a professor as stating that "some First Amendment cases, such as the flag-burning dispute, while fairly simple in the legal analysis, demand greater diplomacy in writing because of the depth of feelings held by large segments of the population on both sides of these issues").

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

174. *Id.* at 400. Johnson had participated in a political demonstration that had the purpose of protesting the policies of the Reagan administration. *Id.* at 399. Johnson set an American flag on fire during this demonstration. *Id.* He was convicted under the following statute:

> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> (1) a public monument;
>
> (2) a place of worship or burial; or
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.

TEX. PEN. CODE. ANN. § 42.09 (Vernon 1989).

175. *Johnson*, 491 U.S. at 399. The Court stated that if it deemed the conduct expressive, it then would decide whether the State's regulation related to the suppression of free expression. *Id.*; *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (noting that legislation is related to "the suppression of free expression" if it was ratified or directed to suppress conduct because of the ideas expressed or their "emotive impact" on the audience of the conduct). If the regulation is not related to expression, then the Court will use a less stringent standard. *Johnson*, 491 U.S. at 402.

The Court held that the state had convicted Johnson for engaging in constitutionally protected expressive conduct and that since there was no prevailing state interest in preventing his conduct, the Court would affirm the Texas Court of Criminal Appeals and overturn his conviction.[176] Although many Americans may find the act of burning a flag as an expression of protest offensive, the Court found that this act was not offensive enough to overcome the protection guaranteed by the First Amendment.[177] Yet, the Court noted that it did not automatically conclude that any action taken with respect to the American flag is expressive, and it stated that it must consider the context in which the conduct occurred.[178] While First Amendment protection of symbolic speech can be more controversial than protections of other forms of speech, provided that the speech does not involve an area unprotected under the First Amendment, the Supreme Court generally will protect symbolic expression.[179]

F. Legislation of Hate Crimes and Hate Speech

Hate crimes are violent crimes in which racial or other bigotry motivates the offender.[180] Hate speech refers to disparaging language directed toward an individual or group based on ethnicity, national origin, gender, sexual orientation, or any other classification of individuals.[181] Both hate crimes and hate speech garner attention

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The Court refers to the standard announced in *United States v. O'Brien*. *Id.* at 403; *see supra* note 162 (citing *O'Brien* and noting the standard against which the government may justify a regulation). This is a lesser standard of review than strict scrutiny because the governmental interest is not related to the suppression of free speech. *Id.* However, if the regulation relates to expression, the Court notes that it must "ask whether this interest justifies . . . [the] conviction under a more demanding standard." *Johnson*, 491 U.S. at 402.

176. *Johnson*, 491 U.S. at 420.

177. *Id.* at 414.

178. *Id.* at 405. *See generally supra* notes 166–71 and accompanying text (discussing the *Spence* case and the Court's approach to symbolic speech).

179. *See supra* notes 156–63 and accompanying text (outlining the test the Supreme Court has used in analyzing whether symbolic speech warrants protection under the First Amendment).

180. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9 (1999). A hate crime is a criminal offense motivated by hostility toward a racial or ethnic group or toward an individual because of his association with that group. *Id.*; *see* Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, BOSTON B.J., Jan.-Feb. 2000, at 6, 6 (describing hate crimes as a "modern plague afflicting communities throughout the nation"); *see also* Michael S. Degan, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1112–13 (1993) (setting forth three parts to a hate crime: "(1) a criminal act, (2) committed against a victim because of the victim's membership in a particular class, and (3) usually accompanied by bias-related speech").

181. Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003) (defining hate speech as "speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin"); *see* Kennedy, *supra*

because of the impact they can leave on the victims and society in general.[182] Hate crime offenders can be punished under federal law,[183] which prohibits the interference or intimidation of a person because of his or her race or other identifying trait.[184] State and federal legislatures also have responded to hate crimes with the development of penalty-enhancement statutes[185] and statutes that punish hate crimes as substantive crimes in themselves.[186] Legislation dealing with hate

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note 180, at 23 (differentiating between hate crimes and hate speech, stating, "Hate speech is protected by the First Amendment except in rare cases where it is used to incite violence. By contrast, bias-motivated acts of violence have no First Amendment protection.").

182. Patrick O'Driscoll, *Booklets To Help Fight Against Hate Crimes: Copies Being Sent to Nearly 1 Million Officials, Schools*, U.S.A. TODAY, Sept. 17, 1999, at 4A, *available at* 1999 WL 6853774; *see, e.g.*, *infra* note 325 (describing the impact that a burning cross had on one particular family).

183. 18 U.S.C. § 245(b)(2) (2000). This statute punishes a person who, "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . any person because of his race, color, religion or national origin." *Id. Compare* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1250 (2000) (arguing that the federal government does not have a police power with which to regulate hate crimes), *with* Charles H. Jones, Jr., *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689, 691 (setting forth the argument that 18 U.S.C. § 241 and § 245 "may be effectively and constitutionally employed to provide redress to victims of racially motivated violence"). *See generally infra* note 192 (discussing courts' application of the federal statute in a cross burning context).

184. *See supra* note 183 (discussing the federal hate crimes statute along with the legislative history behind 18 U.S.C. § 245(b)(2)). *See generally* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 6, 29–44 (1998) (examining different hate crime statutes).

185. Degan, *supra* note 181, at 1116. *See generally* Degan, *supra* note 181, at 1151 (arguing that punishing an individual more severely for his or her motive or bias in a crime is tantamount to punishing a particular viewpoint); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 742 (1999) (attacking criticism of penalty-enhancement statutes). Degan explains that penalty-enhancing statutes "increase the penalty associated with the underlying criminal act, such as assault, trespass, or battery, where a biased motivation is found." Degan, *supra* note 181, at 1116. Note that the Supreme Court declared Wisconsin's penalty enhancement statute constitutional under a First Amendment challenge in *Wisconsin v. Mitchell*. Wisconsin v. Mitchell, 508 U.S. 476, 487–90 (1993) (finding that the Wisconsin penalty-enhancement statute did not violate the First Amendment because "the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm"). The Wisconsin statute provides for penalty enhancement in situations where the offender "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property that is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." WIS. STAT. § 939.645(1)(b) (2001).

186. *See infra* note 197 and accompanying text (quoting the St. Paul ordinance from *R.A.V. v. City of St. Paul*); *see also* ANTI-DEFAMATION LEAGUE, COMBATING HATE, STATE HATE CRIMES STATUTORY PROVISIONS, *at* http://www.adl.org (last visited June 6, 2004) (highlighting hate crime legislation throughout the United States).

crimes or hate speech often finds justification in the fighting words doctrine because the speech involved usually is of little social value.[187]

G. A History of Cross Burning and its Regulation

Commentators, along with the Supreme Court, historically have recognized a burning cross as an expression of racial hatred.[188] For instance, the Klan often used cross burnings as a way to communicate both threats of violence and shared ideals of white supremacy.[189] The act of cross burning does not necessarily involve intent to intimidate; however, the Klan frequently used cross burnings to intimidate and convey a threat of impending violence.[190] The continued use of cross burning as a threat, particularly in the South, led many states to enact statutes that regulated cross burning.[191] These states justified their cross burning statutes by pointing to the South's nefarious history of cross burning and doctrines of unprotected speech such as the fighting words doctrine.[192]

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187. *See* ANTI-DEFAMATION LEAGUE, COMBATING HATE, *at* http://www.adl.org (last visited Mar. 7, 2004) (highlighting different areas in which hate crime has affected society). *See generally supra* Part II.D.3 (discussing the fighting words doctrine).

188. Lesley C. Barlow, *Crimes: Schoolyard Cross-burning: Free Speech or Felony?*, 30 MCGEORGE L. REV. 499, 504 (1999). A California court justified a statute prohibiting cross burning on school property on the ground that burning a cross is "an act of terrorism that inflicts pain on its victim, not the expression of an idea." *Id.* (quoting *In re* Steven S., 25 Cal. App. 4th 598, 612–13 (Ct. App. 1994)); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (Thomas, J., concurring) (declaring that the burning cross is not a religious symbol but rather a "symbol of hate"); Rosenfeld, *supra* note 181, at 1540 (noting that "[u]ndoubtedly, cross burning itself is rejected as repugnant by the vast majority of Americans").

189. Virginia v. Black, 123 S. Ct. 1536, 1545 (2003); *see Grand Jury Questions 2 on '63 Racist Bombing*, NEWSDAY (New York), Aug. 20, 1999, at A26, available at LEXIS, Newsday News File (discussing the investigation of a 1963 church bombing that killed four African American girls during a period of great Klan violence); *see also In re* Steven S., 25 Cal. App. 4th 598, 607 (Ct. App. 1994) (holding that the California cross burning statute implicated the true threats and the fighting words doctrines). In *In re Steven S.*, one woman testified:

> [T]he incident caused [me] to feel "[s]cared out of my life" and threatened with vengeance (presumably for her marriage to an African American): "To my understanding a cross burning means the KKK. They're the ones that invented it. It's vengeance if anything, they symbolize to do that for hate [*sic*] and when they burn crosses on people's yards it's a threat to their life. I took it as a threat to my life . . . ."

In re Steven S., 25 Cal. App. 4th at 607.

190. *Black*, 123 S. Ct. at 1546.

191. *See supra* note 11 and accompanying text (discussing the Virginia cross burning statute and its justifications); *infra* notes 192, 217 (discussing cases examining other states' cross burning statutes).

192. Barlow, *supra* note 188, at 508 (arguing that cross burning constitutes fighting words in certain circumstances). Federal courts also have examined the action of cross burning under the context of a violation of civil rights. For an example of the application of the federal civil rights statute, 18 U.S.C. § 241 (2000), in a cross burning context, see *United States v. Stewart*, 65 F.3d 918, 928 (11th Cir. 1995), in which it was held that convicting defendants of burning a cross did

H. R.A.V. v. City of St. Paul*: Cross Burning Statutes and Their Treatment in the Courts*

The last time the Supreme Court evaluated a statute that prohibited cross burning was in the 1992 case *R.A.V. v. City of St. Paul*.[193] In St. Paul, the defendant and several other white teenagers assembled a cross from broken chair legs.[194] The teenagers then allegedly burned this cross in the fenced-in yard of an African American family living across the street from one of the teenagers.[195] The city of St. Paul convicted the teenagers under its ordinance that prohibited cross burning.[196] The ordinance rendered cross burning a crime only if the burning was known to cause anger or resentment in a person of a particular race or of a particular religion.[197]

The Supreme Court held that the St. Paul ordinance was facially unconstitutional because it contained an impermissible content-based prohibition.[198] The Court recognized that it must follow the authoritative statement of the Minnesota Supreme Court that the ordinance reached only those expressions that constituted fighting

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not violate the First Amendment because the defendants were engaging in "an activity—threatening, intimidating, and interfering with the rights of [others] and using fire to do so." *See* United States v. J.H.H., 22 F.3d 821, 825 (8th Cir. 1994) (holding that 18 U.S.C. § 241 did not discriminate against viewpoints and therefore did not violate the First Amendment). *Compare* United States v. McDermott, 822 F. Supp. 582, 591 (N.D. Iowa 1993) (holding that 18 U.S.C. § 241 did not violate the First Amendment because the statute aimed at controlling unprotected threats, not expression protected under the First Amendment), *with* United States v. Lee, 6 F.3d 1297, 1301 (8th Cir. 1993) (holding that 18 U.S.C. § 241 violated the First Amendment as applied in this case because of erroneous jury instructions that showed that the government interest was the suppression of expression). This statute, entitled "Conspiracy Against Rights," provides in part for a fine or imprisonment of those who "conspire to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. § 241.

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

194. *Id.* at 379.

195. *Id.*

196. *Id.* at 379–80.

197. *Id.* at 380 (citing ST. PAUL LEGIS. CODE § 292.02 (1990)). The statute stated:

> "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."

Id. (quoting ST. PAUL LEGIS. CODE § 292.02 (1990)).

198. *Id.* at 391. *See generally supra* note 90 and accompanying text (discussing facial challenges).

words within the meaning of *Chaplinsky v. New Hampshire*.[199] Despite the ordinance's prohibition of fighting words only, the Supreme Court nonetheless found that the ordinance was facially unconstitutional because it forbade certain speech solely based on the speech's content.[200]

The Court noted that content-based regulations trigger a presumption of invalidity because the First Amendment generally precludes the government from prohibiting speech or expressive conduct based on disapproval of the expression.[201] In reviewing the St. Paul ordinance, the Court stated that although the First Amendment does not afford protection to all areas of expression, the government may not use legislation as a vehicle for content discrimination.[202] The Court also noted that the First Amendment permits the government to ban a nonverbal expressive activity because of the action it involves, but not the ideas it expresses.[203] However, it noted a few instances in which a content-based regulation might pass constitutional muster. [204]

The Supreme Court laid out several exceptions to the proscription against content-based regulation.[205] For instance, a state may prohibit content if the basis of the discrimination is that the entire class of speech is proscribable.[206] The Court also set forth an exception for when the

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199. *R.A.V.*, 505 U.S. at 381 ("[I]n construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court."); *see supra* Part II.D.3 (discussing the fighting words doctrine and *Chaplinsky v. New Hampshire*).

200. *R.A.V.*, 505 U.S. at 381. In analyzing the content-neutrality of legislation, the Court has noted that it first must look at the rationale for the regulation. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (finding that "the government may impose reasonable restrictions on the time, place, or manner of protected speech" if "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information'" (quoting Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984))). The Court held that the "principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*

201. *R.A.V.*, 505 U.S. at 382.

202. *Id.* at 383–84. The Court also noted that although some courts have mentioned that these unprotected areas are not speech, the courts really mean that "these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* . . . not that they are categories of speech entirely invisible to the Constitution." *Id.* at 383.

203. *Id.* at 385.

204. *Id.* at 387; *see infra* notes 205–08 and accompanying text (outlining the exceptions the Supreme Court set forth in *R.A.V.*).

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

206. *Id.* The Court gave the example that a statute may prohibit obscenity that exhibits the "most lascivious displays of sexual activity," but it may not prohibit "only that obscenity which includes offensive *political* messages." *Id.* (referring to *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990)); *see supra* Part II.D.2 (explaining why the government can constitutionally

statute targets secondary effects of the speech so that the regulation is warranted without any mention of the speech.[207] Further, the Court noted that a state may impose content-based regulation within a statute that prohibits conduct, not speech.[208]

The Court found that the St. Paul ordinance did not fit into the first exception because the city proscribed particular fighting words based on communication of messages of race, gender, or religious bigotry.[209] The St. Paul ordinance did not fall into the second exception because effects on listeners do not qualify as secondary effects.[210] Further, the Court found that St. Paul did not have a sufficiently compelling interest to justify content discrimination, thus it failed to satisfy the third exception.[211] Therefore, the Court found the St. Paul ordinance to be facially unconstitutional.[212]

Although the speech regulated was limited to fighting words, the Court recognized that abusive expressions are permissible unless addressed to a specifically enumerated topic in the ordinance.[213] The Court explained that the First Amendment does not allow the city to prohibit speech that it considers to be unfavorable.[214] The Court articulated that the St. Paul ordinance not only discriminated on the basis of content, but also discriminated against a certain viewpoint.[215]

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prohibit true threats against the President). The Court also mentioned that while it is acceptable to uphold a law prohibiting threats against the President, it is unacceptable to criminalize only those threats against the President that mention certain specific policy decisions. *R.A.V.*, 505 U.S. at 388. The Court noted, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390.

207. *R.A.V.*, 505 U.S. at 389 ("Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'" (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986))).

208. *Id.*

209. *Id.* at 393–94. "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* the speaker wishes to convey." *Id.* at 393.

210. *Id.* at 394. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

211. *Id.* at 395–96.

212. *Id.* at 391.

213. *Id.*

214. *Id.* Further, the Court explained that the city is not permitted to "impose special prohibitions on those speakers who express views on disfavored subjects." *Id.*

215. *Id.* The Supreme Court has defined viewpoint discrimination as the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker" and as "an egregious form of content discrimination." Rosenberger v. Rector, 515 U.S. 819, 829 (1995);

While concluding that burning a cross is a reprehensible activity, the Court held that St. Paul had other means to prevent this activity without infringing on the First Amendment, and therefore the St. Paul ordinance was unconstitutional.[216]

After the Supreme Court decided *R.A.V.*, state courts evaluated similar statutes that prohibit cross burning and reached conflicting results.[217] The determining factor in these cases was whether the purpose of the statute was to regulate content or reprehensible conduct.[218] However, a comparison of these cases does not lead to a conclusive understanding as to how courts should address the First Amendment concerns in cross burning statutes.[219] Because so many questions still existed after the *R.A.V.* case, it was clear that the

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see supra Part II.C.1 (discussing the distinction between content-based and content-neutral statutes and this distinction's significance in First Amendment analysis). The Court often has noted the importance of viewpoint neutrality with respect to the First Amendment. *See* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 505–06 (2000) (noting that the mandate of viewpoint neutrality arose in the "traditional public forum and general speech domains," and discussing the early Supreme Court cases that advanced First Amendment protection).

216. *R.A.V.*, 505 U.S. at 396. Justice White concurred with the majority; however, he argued that the statute should be declared facially unconstitutional because it was overbroad, explaining that "it criminalizes not only unprotected expression but expression protected by the First Amendment." *Id.* at 397 (White, J., concurring). Justice Stevens also wrote a concurring opinion and expressed that he thought the majority's and Justice White's opinions were "skewed" by the "allure of absolute principles." *Id.* at 417 (Stevens, J., concurring). *See generally* Jonathan M. Holdowsky, Note, *Out of the Ashes of the Cross: The Legacy of* R.A.V. v. St. Paul, 30 NEW ENG. L. REV. 1115, 1135–36 (1996) (asserting that Justice White's concurrence read more like a dissent because Justice White "sharply rebuked the majority's rationale" and rejected the theory that fighting words "serve[d] as a mode of expression").

217. *Compare* State v. Sheldon, 629 A.2d 753, 763 (Md. 1993), *and* State v. Ramsey, 430 S.E.2d 511, 514 (S.C. 1993) (striking down statutes that prohibit cross burning as content-based regulation), *with* State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995), *and In re* Steven S., 25 Cal. App. 4th 598, 612–13 (Ct. App. 1994) (finding that cross burning statutes were constitutional because they were sufficiently content-neutral). *See generally* Barlow, *supra* note 188, at 502–08 (analyzing the California cross burning statute under the existing First Amendment jurisprudence).

218. *See supra* note 217 (noting state court decisions examining cross burning statutes).

219. *E.g.*, Barlow, *supra* note 188, at 505 (scrutinizing the California cross burning statute, noting that "[t]he State's concern with the prevention of terrorism only blossoms when a religious symbol is treated in such a manner as to convey a particular message"); *see supra* note 217 (citing decisions addressing cross burning statutes); *see also* Andrea L. Crowley, Note, R.A.V. v. St. Paul*: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771, 797 (1993) (providing a critical analysis of *R.A.V. v. City of St. Paul*, arguing that the Court ignored St. Paul's compelling interest of preventing hate crimes, and contending that in striking the St. Paul ordinance, the Supreme Court abandoned its First Amendment jurisprudence and held that fighting words were constitutionally protected).

constitutionality of cross burning would again come before the Supreme Court for a more precise conclusion.[220]

III. DISCUSSION

In *Virginia v. Black,* the United States Supreme Court faced another challenge regarding the constitutionality of a statutory prohibition against cross burning.[221] The Supreme Court of Virginia had consolidated three cases that challenged convictions received under the cross burning statute of Virginia.[222] At issue was whether this statute was a constitutional regulation of speech under First Amendment jurisprudence.[223]

Trial courts convicted Barry Black as well as Richard Elliott and Jonathan O'Mara for violating the Virginia statute.[224] The Appellate Court of Virginia upheld each of these convictions, and each defendant appealed to the Supreme Court of Virginia.[225] Because the three men each challenged the statute on similar constitutional grounds, the Supreme Court of Virginia consolidated the three cases and held that the statute was facially unconstitutional.[226] After the Commonwealth of Virginia successfully petitioned for certiorari, the United States Supreme Court held, in a 6-3 decision, that the Virginia statute violated the First Amendment.[227]

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220. *See supra* note 217 and accompanying text (discussing the conflicting outcomes among the states following *R.A.V. v. City of St. Paul*).

221. Virginia v. Black, 123 S. Ct. 1536, 1541–42 (2003).

222. *Id.* at 1543. Black, Elliott, and O'Mara were contesting their convictions on the ground that the Virginia statute was unconstitutional. *Id.*

223. *Id.* at 1541; *see also id.* at 1547–48 (explaining areas of speech in which the Supreme Court has permitted regulation). Cross burning is symbolic expression, and the reason why individuals burn crosses instead of employing other methods of communication is that cross burning carries a particular message "in an effective and dramatic manner." *Id.* at 1548.

224. *Id.* at 1541.

225. *Id.* at 1543.

226. *Id.*

227. *Id.* at 1552. Justice Stevens wrote a brief concurring opinion. *See infra* Part III.D.2 (discussing Justice Stevens' concurring opinion). Justice Thomas wrote a dissenting opinion. *See infra* Part III.D.3 (discussing Justice Thomas' concurring opinion). Justices Scalia and Souter both wrote separate opinions in which they concurred and dissented in part. *See infra* Part III.D.4–5 (discussing these opinions). Justice Thomas partially joined Justice Scalia's opinion. *Black*, 123 S. Ct. at 1552 (Scalia, J., concurring in part and dissenting in part). Justices Kennedy and Ginsberg joined in Justice Souter's opinion. *Id.* at 1559 (Souter, J., concurring in part and dissenting in part).

A. Facts

Section 18.2-423 of the Virginia Code prohibited cross burning with the intent to intimidate.[228] The statute did not define intent to intimidate,[229] but it did provide that any cross burning is prima facie evidence of intent to intimidate.[230] Thus, due to this prima facie evidence provision, the Commonwealth proved its case so long as the defense did not rebut the prima facie evidence.[231] Any person who violated the statute was guilty of a Class 6 felony.[232] The defendants of the three consolidated cases that reached the United States Supreme Court in *Virginia v. Black* all challenged the constitutionality of this statute.[233]

In August of 1998, Barry Black led a Klan rally in Virginia that twenty-five to thirty people attended.[234] The gathering occurred on private property with permission from the property owner.[235] The town sheriff observed the rally from the side of the road for approximately an hour.[236] Another witness, who was related to the property owner, also viewed the rally.[237] This witness heard the rally and the Klan members' profession of their beliefs, including derogatory statements about non-Caucasian races.[238] At the conclusion of the rally, the attendees circled a twenty-five- to thirty-foot cross that was between 300 and 350 yards away from the road.[239] The sheriff stated that the cross suddenly burst into flames.[240] The sheriff then learned that Black was responsible for burning the cross and, consequently, arrested him pursuant to the Virginia law.[241]

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228. VA. CODE ANN. § 18.2-423 (Michie 1996).

229. *See supra* notes 11–13 and accompanying text (discussing the Virginia statute).

230. *See supra* notes 11–13 and accompanying text (discussing the Virginia statute). *See generally supra* note 14 (defining prima facie evidence).

231. Virginia v. Black, 123 S. Ct. 1530, 1553–54 (2003); *see supra* note 14 (defining prima facie evidence).

232. VA. CODE ANN. § 18.2-423.

233. *Black*, 123 S. Ct. at 1543.

234. *Id.* at 1542.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* In Black's trial, the judge instructed the jury: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." *Id.*; *see* VA. CODE ANN. § 18.2-423 (Michie 1996) (outlawing cross burning with intent to intimidate).

In May of 1998, Richard Elliott and Jonathan O'Mara attempted to burn a cross in the yard of Elliott's next-door neighbor, James Jubilee, an African American.[242] Their alleged intention was to "get back" at Jubilee for complaining about their habit of using Elliott's backyard as a shooting range.[243] When Jubilee and his family had moved into the neighborhood approximately four months prior to the incident, Jubilee asked Elliott's mother about gun shots he had heard coming from Elliott's backyard.[244] Jubilee testified that he was very scared when he saw the partially burned cross in his yard and feared what might follow the incident.[245] Both Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning in violation of Virginia's cross burning statute.[246]

B. The Trial Court's Decision

The Commonwealth of Virginia charged Black with burning a cross with the intent to intimidate in violation of Virginia Code § 18.2-423.[247] The trial judge defined the intent to intimidate to the jury.[248] The judge also instructed the jury that the act of burning a cross alone was sufficient evidence from which it might infer the intent required in the statute.[249] The jury found Black guilty, and the court of appeals later affirmed his conviction.[250]

At his trial, O'Mara pleaded guilty to both counts, yet reserved the right to challenge the constitutionality of the Virginia statute.[251] At Elliott's trial, the trial judge instructed the jury that the Commonwealth must prove that the defendant intended to commit a cross burning and that the defendant engaged in an affirmative act toward the commission

242. *Black*, 123 S. Ct. at 1542–43.

243. *Id.* at 1543.

244. *Id.*

245. *Id.*

246. *Id.* In Elliott's trial, the judge instructed the jury "that the Commonwealth must prove that 'the defendant intended to commit cross burning,' that 'the defendant intended to commit a direct act toward the commission of the cross burning,' and that 'the defendant had the intent of intimidating any person or group of persons.'" *Id.* Since O'Mara pleaded guilty, there was no issue as to the jury instructions given. *See id.* (illustrating O'Mara's guilty plea and his reservation to challenge the constitutionality of the cross burning statute).

247. *Id.*; *see also* VA. CODE ANN. § 18.2-423 (Michie 1996) (outlawing cross burning with intent to intimidate); *supra* note 11 (setting forth the commands of the statute).

248. *Black*, 123 S. Ct. at 1542. The "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm." *Id.* (internal quotations omitted).

249. *Id.*

250. *Id.*

251. *Id.* at 1543.

of the cross burning.[252] The judge further instructed the jury that the Commonwealth must prove that the defendant possessed the intent to intimidate in the act of the cross burning.[253] The judge, however, did not instruct the jury on the meaning of intimidation.[254] The jury found Elliott guilty of the attempted cross burning and acquitted him of conspiracy to commit a cross burning.[255] The Virginia Court of Appeals affirmed the convictions of both Elliott and O'Mara.[256]

C. The Supreme Court of Virginia Decision

All respondents, Black, Elliott, and O'Mara, appealed to the Supreme Court of Virginia on the ground that § 18.2-423 was facially unconstitutional and violated the First Amendment's protection of free speech.[257] The Supreme Court of Virginia consolidated all three cases and agreed with the respondents, holding that § 18.2-423 was facially unconstitutional.[258] The court analogized the Virginia statute to the Minnesota statute deemed unconstitutional in *R.A.V. v. St. Paul*.[259] As a result, the court held that the Virginia statute was content-based because it prohibited cross burning due to its particular message.[260] Further, the court held that the prima facie evidence provision rendered the statute overbroad because it enabled the Commonwealth to secure convictions more easily under the statute, chilling protected speech.[261]

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252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*; *see* O'Mara v. Commonwealth, 535 S.E.2d 175, 179 (Va. Ct. App. 2000) (explaining that the Virginia statute prevents conduct that could be considered both a true threat as well as fighting words).

257. *Black*, 123 S. Ct. at 1543; *see also* VA. CODE ANN. § 18.2-423 (Michie 1996).

258. *Black*, 123 S. Ct. at 1543. Facially unconstitutional means that the statute is completely unconstitutional, or that, as a whole, the statute is unconstitutional. BLACK'S LAW DICTIONARY 223 (7th ed. 1999).

259. *Black*, 123 S. Ct. at 1543; *see supra* Part II.H (discussing the Court's holding in *R.A.V.*).

260. *Black*, 123 S. Ct. at 1543. Respondents expanded on this idea in their brief to the Supreme Court by claiming that targeting a specific symbol, such as the cross, and a specific ritual, such as burning a cross, discriminates based on content. *See* Brief on Merits for Respondents at 7, *Black* (No. 01-1107) (arguing that the Virginia cross burning law discriminates on the basis of content and viewpoint).

261. *Black*, 123 S. Ct. at 1543. In its brief, the Commonwealth claimed that the prima facie evidence permitting an inference was permissible, explaining that

> [a] statutory inference is constitutional if (i) the state retains the burden of proof on the fact to be presumed, and (ii) "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Brief of Petitioner at 42 n.24, *Black* (No. 01-1107) (quoting Barnes v. United States, 412 U.S. 837, 842–43 (1973)). The respondents addressed the claim that the prima facie evidence

Three Justices dissented, stating that the statute was constitutional because it only proscribed true threats, not constitutionally protected speech.[262] The dissent distinguished the Virginia statute from the statute the United States Supreme Court had deemed unconstitutional in the *R.A.V.* case.[263] Specifically, the dissent argued that the statute was content-neutral because it applied to any individual burning a cross and did not target cross burning based on race or ethnicity motivations.[264] The dissent also disagreed with the majority's analysis of the prima facie evidence provision because the presumption alone was not sufficient to meet the beyond a reasonable doubt burden to prove that the defendant intended to intimidate someone by burning the cross.[265]

Unhappy with the Virginia Supreme Court's decision, the state of Virginia petitioned the United State Supreme Court for certiorari.[266] On May 28, 2002, the United States Supreme Court granted certiorari to hear the case.[267] Thus, after five years of litigation, the Supreme Court definitively decided the fate of the Virginia cross burning statute, ending the respondents' legal battle.

D. The United States Supreme Court Decision

In a plurality opinion, the United States Supreme Court affirmed the decision of the Supreme Court of Virginia, holding that while prohibiting cross burning with intent to intimidate is constitutional, the prima facie evidence clause in the statute was not, rendering the entire

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provision is unconstitutional by claiming that it enables "Virginia to obtain convictions through shortcuts the First Amendment does not allow, and . . . chills a range of constitutionally protected expression, rendering it overbroad." Brief on Merits for Respondents at 5, *Black* (No. 01-1107).

262. *Black*, 123 S. Ct. at 1543; Black v. Virginia, 553 S.E.2d 738, 753 (Va. 2001).

263. *Black*, 123 S. Ct. at 1543.

264. *Id.*; *Black*, 553 S.E.2d at 753.

265. *See Black*, 553 S.E.2d at 795.

266. *Black*, 553 S.E.2d 738, *petition for cert. filed*, 2002 WL 32135594 (U.S. Jan. 24, 2002) (No. 01-1107).

267. Virginia v. Black, 122 S. Ct. 2288 (2002). The Court also noted that after it granted certiorari, Virginia attempted to remedy the constitutional problems of its statute by banning the "burning of 'an object' when done with the intent of intimidating any person or group of persons." *Black*, 123 S. Ct. at 1544 n.1. This revision does not contain a "prima facie evidence provision [and] did not repeal the cross burning statute" that was challenged in this case. *Id.* (citations omitted). For a critical analysis of the Virginia Supreme Court decision, see Mark S. Enslin, Note, *Domestic Terrorism or Protected Free Speech: The Supreme Court Decides the Cross-burning Question in* Black v. Virginia, 553 S.E.2d 738 (Va. 2001), 26 HAMLINE L. REV. 178 (2002). Enslin accurately predicted that the United States Supreme Court would declare the Virginia statute to be different from the ordinance declared unconstitutional in *R.A.V. Id.* at 210. For an interesting synopsis of the oral arguments before the Supreme Court in this case, see Dahlia Lithwick, *Personal Truths and Legal Fictions*, N.Y. TIMES, Dec. 17, 2002, at A35, *available at* LEXIS, News Library, The New York Times File.

statute facially invalid.[268] This section will examine the plurality opinion and its First Amendment analysis.[269] Next, this section will examine the concurring opinion of Justice Stevens.[270] This section then will discuss Justice Thomas's dissenting opinion.[271] Finally, this section will discuss Justice Scalia's[272] and Justice Souter's concurring and dissenting opinions.[273]

1. The Plurality Opinion

Justice O'Connor wrote the plurality opinion for the case.[274] Chief Justice Rehnquist, Justice Stevens, and Justice Breyer joined in this opinion.[275] The Court began its discussion of the case by highlighting First Amendment jurisprudence.[276] The Court explained that the First Amendment operates as both a protection for the individual and a prohibition against the state.[277] The Court then acknowledged that the right to freedom of speech is not absolute.[278] For example, the Court noted that the First Amendment does not preclude a state from regulating speech that has little to no social value; a state may prohibit fighting words.[279] Moreover, the First Amendment allows a state to prohibit true threats.[280]

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268. *Black*, 123 S. Ct. at 1552 (plurality opinion). Note that the Court affirmed the decision of the Supreme Court of Virginia with respect to Barry Black and vacated the Virginia Supreme Court's decision with respect to Elliott and O'Mara and remanded for further proceedings. *Id.* (plurality opinion).

269. *See infra* Part III.D.1 (outlining the plurality opinion).

270. *See infra* Part III.D.2 (discussing Justice Stevens's concurrence).

271. *See infra* Part III.D.3 (discussing Justice Thomas's dissent).

272. *See infra* Part III.D.4 (discussing Justice Scalia's concurring and dissenting opinion).

273. *See infra* Part III.D.5 (discussing Justice Souter's concurring and dissenting opinion).

274. Virginia v. Black, 123 S. Ct. 1536, 1541–52 (2003) (plurality opinion). A plurality opinion is an opinion that receives more votes than any other, yet does not have enough votes to constitute a majority. BLACK'S LAW DICTIONARY 1119 (7th ed. 1999).

275. *Black*, 123 S. Ct. at 1541 (plurality opinion).

276. *Id.* at 1547 (plurality opinion).

277. *Id.* (plurality opinion). The First Amendment also protects some expressive conduct. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (discussing cross burning as protected expressive conduct); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (discussing flag burning as protected expressive conduct); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (discussing wearing of armbands as protected expressive conduct); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (discussing burning registration certificates as protected expressive conduct).

278. *Black*, 123 S. Ct. at 1547 (plurality opinion). *See generally supra* Part II.D (tracing First Amendment jurisprudence).

279. *Black*, 123 S. Ct. at 1547 (plurality opinion). *See generally supra* Part II.D.3 (presenting the fighting words doctrine).

280. *Black*, 123 S. Ct. at 1547 (plurality opinion); *see supra* Part II.D.2 (explaining the government's compelling interest in prohibiting true threats).

The Court then analyzed the decision of the Supreme Court of Virginia.[281] The Supreme Court recognized that cross burning is a form of symbolic expression because a burning cross represents the speaker's desired message in a remarkable manner.[282] However, the Court acknowledged that this conclusion was not dispositive of the outcome in this case because the Court still had to evaluate the rationale for the statute.[283] The United States Supreme Court then disagreed with the Supreme Court of Virginia's holding that the statute was unconstitutional solely because it discriminated on the basis of content.[284] The plurality reasoned that under *R.A.V.* not all content-based prohibitions are unconstitutional.[285] Upon review, the Court reiterated that its *R.A.V.* opinion did not hold that the First Amendment prohibits all forms of content-based discrimination.[286] Rather, there are certain circumstances in which content-based discrimination is constitutional: namely, prohibitions against an entire class of speech such as obscenity.[287]

The Supreme Court then differentiated the Virginia statute from the unconstitutional statute at issue in *R.A.V.*[288] The Virginia statute did not single out speech that fell into a disfavored category, whereas the *R.A.V.* statute focused on cross burners seeking to intimidate particular

281. *Black*, 123 S. Ct. at 1548 (plurality opinion). *See generally supra* Part III.C (outlining the decision of the Supreme Court of Virginia).

282. *Black*, 123 S. Ct. at 1548 (plurality opinion). *See generally supra* Part II.E (describing symbolic speech).

283. *Black*, 123 S. Ct. at 1548 (plurality opinion).

284. *Id.* (plurality opinion).

285. *Id.* at 1549 (plurality opinion). The Supreme Court of Virginia relied on the holding in *R.A.V. v. City of St. Paul*. *Id.* at 1548 (plurality opinion); *see supra* notes 259–60 and accompanying text (discussing the Supreme Court of Virginia's analogy to the statute in *R.A.V.*); *see also supra* Part II.C.1 (discussing the distinction between content-based and content-neutral statutes and this distinction's significance in First Amendment analysis).

286. *Black*, 123 S. Ct. at 1549 (plurality opinion). Content-based statutes are unconstitutional only when a danger of viewpoint discrimination exists. *Id.* (plurality opinion); *see* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (describing how the Supreme Court has defined viewpoint discrimination, explaining, "The general principle that has emerged . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). For a more detailed look at content-based regulations of speech after *R.A.V. v. City of St. Paul*, see Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873 (1993).

287. *Black*, 123 S. Ct. at 1549 (plurality opinion); *see supra* Part II.H (discussing the holding in *R.A.V.*); *supra* Part II.C.1 (discussing the distinction between content-based and content-neutral statutes and this distinction's significance in First Amendment analysis).

288. *Black*, 123 S. Ct. at 1549 (plurality opinion). *See generally supra* notes 198–200, 209–12 (describing the statute at issue in *R.A.V.*).

groups.[289] Instead, the Virginia statute applied to all who might burn a cross with the intent of intimidation, regardless of the cross burner's motivation.[290] The Court noted that not all cross burning is directed at an individual or group because of his race or religious affiliation, and the Virginia statute forbade cross burning with the intent to intimidate anyone.[291] The Court found that the Virginia statute fell into the "particularly virulent" exception from *R.A.V.*, concluding that the statute was content-based without providing extensive discussion.[292] Therefore, because the Virginia statute and the statute from *R.A.V.* greatly differed, the Court held that finding the Virginia statute unconstitutional was consistent with its holding in *R.A.V.*[293]

The Court continued by scrutinizing the holding of the Supreme Court of Virginia and the Virginia court's rationale for declaring the Virginia statute unconstitutional.[294] The Court noted that the Supreme Court of Virginia did not evaluate the prima facie evidence provision.[295] On appeal to the United States Supreme Court, the respondents argued that the evidentiary provision was facially unconstitutional.[296] The Supreme Court looked at the prima facie evidence provision as applied to each of the defendants in the case, noting that each defendant received a slightly different instruction.[297] The Court concluded that

289. *Black*, 123 S. Ct. at 1549 (plurality opinion); *see supra* Part II.H (describing the Court's holding regarding the St. Paul ordinance it found unconstitutional in *R.A.V.*).

290. *Black*, 123 S. Ct. at 1549 (plurality opinion).

291. *Id.* (plurality opinion). The court also noted that there was no clear indication of racial animus in the cross burnings of the Elliott and O'Mara cases. *Id.* (plurality opinion).

292. *Id.* (plurality opinion). Because of "cross burning's long and pernicious history as a signal of impending violence," the Court stated Virginia could choose to legislate specifically against that particular form of intimidation,. *Id.* (plurality opinion).

293. *Id.* at 1549–50 (plurality opinion).

294. *Id.* at 1550 (plurality opinion); *see supra* notes 258–61 and accompanying text (detailing the rationale of the Virginia Supreme Court as based on a determination that the Virginia statute was content-based, much like the St. Paul ordinance in *R.A.V.*, and that the prima facie evidence provision rendered the statute overbroad).

295. *Black*, 123 S. Ct. at 1543 (plurality opinion); *see supra* note 265 and accompanying text (noting the dissent's criticism of the majority's analysis of the prima facie evidence provision).

296. *Black*, 123 S. Ct. at 1550 (plurality opinion). This was the same argument the respondents made to the Supreme Court of Virginia. *Id.* (plurality opinion). *See generally supra* note 258 and accompanying text (defining facially unconstitutional).

297. *Black*, 123 S. Ct. at 1550 (plurality opinion). In O'Mara's case, the instruction was not at issue because he pleaded guilty. *Id.* In Elliott's case, the jury did not receive an instruction on the evidence provision. *Id.* In Black's case, the court instructed the jury that the provision meant that the burning of the cross alone was sufficient evidence from which the jurors might "infer the required intent." *Id.* (internal quotations omitted).

the prima facie evidence provision as defined by the differing jury instructions rendered the statute unconstitutional.[298]

The Court explained that the construal of the prima facie provision in the jury instructions given in Black's trial took away the basis upon which the Commonwealth could ban cross burning in the context of intimidation.[299] The provision permitted a jury to convict any defendant of cross burning if he exercised his constitutional right not to put forth a defense.[300] Further, the Court explained that the provision would make conviction more likely, regardless of the facts of the particular case, because it allowed a finding of intimidation without substantial proof.[301] The Court then concluded that this interpretation of the evidence provision unconstitutionally would suppress ideas by blurring the line between cross burning for expression and cross burning to threaten.[302]

Because of this distortion, the provision chilled free speech.[303] The Court recognized that a burning cross is not always intended to intimidate and that often it has been a symbol of group ideology and solidarity.[304] Further, sometimes the burning cross does not represent intimidation or a statement of ideology.[305] The Court again emphasized

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298. *Id.* (plurality opinion). *See generally supra* notes 241, 246 (discussing the jury instructions given in Black's and Elliott's trials).

299. *Black*, 123 S. Ct. at 1550 (plurality opinion). Justice O'Connor wrote, "As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate." *Id.* (plurality opinion); *see supra* notes 241, 246 (discussing the jury instructions given in Black's and Elliott's trials).

300. *Black*, 123 S. Ct. at 1550 (plurality opinion); *see supra* note 248 (discussing the Virginia statute as applied in Black's case).

301. *Black*, 123 S. Ct. at 1550 (plurality opinion). The jury will be more apt to find intimidation even if the defendant does set forth a defense. *Id.* (plurality opinion). "The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Id.* at 1550–51 (plurality opinion).

302. *Black*, 123 S. Ct. at 1551 (plurality opinion). Justice O'Connor stated that the provision "would create an unacceptable risk of the suppression of ideas." *Id.* (plurality opinion) (quoting Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (internal quotations omitted)).

303. *Id.* (plurality opinion). The provision chills 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." *Id.* (plurality opinion) (emphasis added). *But see infra* Part III.D.3 (discussing Justice Thomas's dissenting opinion and his conclusion that no cross burning can be construed as expression).

304. *Black*, 123 S. Ct. at 1551 (plurality opinion). The Court referred to the burning of a cross at Klan meetings and the burning cross as a representation of the Klan itself. *Id.* (plurality opinion). *See generally supra* Part II.G (discussing the history of cross burning).

305. *Black*, 123 S. Ct. at 1551 (plurality opinion). The Court referred to the use of a burning cross in the movie *Mississippi Burning* and in the stage adaptation of Sir Walter Scott's *The Lady of the Lake*. *Id.* (plurality opinion).

that the statute failed to differentiate between the possible meanings and intentions behind the burning of a cross.[306]

While the Court acknowledged that cross burning may invoke particular feelings of anger or hatred among those people who see a burning cross, it deemed this hatred insufficient to ban all cross burnings.[307] The Court held that because of the nature of the prima facie evidence provision's interpretation and application in Black's case, the prima facie evidence provision was facially unconstitutional.[308] It refused to speculate as to whether there would be any interpretation of the provision that would be consistent with the First Amendment because the Supreme Court of Virginia had yet to make an authoritative interpretation of the provision.[309] However, the Court recognized the possibility of an interpretation that would comply with the Constitution.[310] Because the Court held that the prima facie evidence rendered the Virginia statute unconstitutional, the Court affirmed the reversal of Black's conviction and vacated and remanded with respect to Elliott and O'Mara.[311] A possibility remained for the Commonwealth to try Elliott's and O'Mara's cases under the newly formulated law because the Supreme Court left open the possibility of the legislature severing the prima facie evidence provision.[312]

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306. *Black*, 123 S. Ct. at 1551 (plurality opinion). The prima facie evidence provision "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." *Id.* (plurality opinion); *see supra* notes 228–33 (discussing the Virginia statute as applied in Black's, Elliott's, and O'Mara's cases).

307. *Black*, 123 S. Ct. at 1551 (plurality opinion). "The prima facie evidence provision . . . 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." *Id.*

308. *Id.* at 1551–52 (plurality opinion). For information on the effect of giving an erroneous jury instruction relating to the burden of proof and presumptions, see David B. Sweet, Annotation, *Supreme Court's Views as to Prejudicial Effect in Criminal Case of Erroneous Instructions to Jury Involving Burden of Proof or Presumptions*, 92 L. ED. 2D 862 (2003).

309. *Black*, 123 S. Ct. at 1552 (plurality opinion). The Supreme Court did note that the Virginia Supreme Court stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." *Id.* at 1550 (plurality opinion) (internal quotations omitted); *see infra* notes 349–52 (noting Justice Scalia's discussion of how the Commonwealth of Virginia defines prima facie evidence).

310. *Black*, 123 S. Ct. at 1552 (plurality opinion). "We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that set forth in order to avoid the constitutional objections we have described." *Id.* (plurality opinion).

311. *Id.* (plurality opinion).

312. *Id.* (plurality opinion). On remand, the Supreme Court of Virginia affirmed its prior holding and reiterated its declaration that the prima facie evidence provision rendered the statute overbroad. *See* Elliott v. Virginia, 593 S.E.2d 263, 266 (Va. 2004) (holding that "the instruction

2. Justice Stevens's Concurrence

Justice Stevens agreed with the plurality, yet wrote separately to emphasize what he viewed as most significant to the decision.[313] He explained that Virginia's prohibition on intentionally intimidating cross burning fell into the category of an unprotected threat.[314] Justice Stevens urged that this was sufficient basis for upholding the prohibition against cross burning in the statute even without covering other types of conduct.[315] Justice Stevens stated that prohibiting cross burning as a threat not protected by the First Amendment was sufficient in itself to uphold the Virginia statute's prohibition against cross burning with intent to intimidate.[316]

3. Justice Thomas's Dissent

Justice Thomas began his dissent by acknowledging that people attribute a special meaning to certain things and that these special meanings can include both the sacred and the profane.[317] He described cross burning as an example of profanity.[318] While Justice Thomas agreed with the majority's conclusion that the Constitution permits a ban on cross burning with intent to intimidate, he disagreed that one could find any expressive element in the endeavor.[319] Because the Virginia statute banned only intimidating conduct, Justice Thomas

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given at Black's trial properly interprets the prima facie evidence provision of" the Virginia statute). The Supreme Court of Virginia also held that the prima facie evidence provision was severable. *Id.* at 268. The Virginia court concluded that while the prima facie evidence provision was unconstitutional, it was severable, and "the core provisions of the statute that remain do not violate the First Amendment" or the Virginia Constitution. *Id.* at 270.

313. *Black*, 123 S. Ct. at 1552 (Stevens, J., concurring).

314. *Id.* (Stevens, J., concurring). Cross burning with "'an intent to intimidate' unquestionably qualifies as the kind of threat that is unprotected by the First Amendment." *Id.* (Stevens, J., concurring) (citation omitted); *see supra* Part II.D.2 (discussing the government's compelling interest in prohibiting true threats).

315. *Black*, 123 S. Ct. at 1552 (Stevens, J., concurring). Justice Stevens referred to the separate opinions that he and Justice White wrote in *R.A.V. v. City of St. Paul*. *Id.*; *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 397 (1992) (White, J., concurring); *R.A.V*, 505 U.S. at 416 (Stevens, J., concurring). In their concurrences in *R.A.V. v. City of St. Paul*, Justice Stevens and Justice White advocated that the Court's approach was an abandonment of the First Amendment jurisprudence that allowed the state to prohibit expressive activity that had little or no worth to society. *R.A.V.*, 505 U.S. at 400 (White, J., concurring); *id.* at 417 (Stevens, J., concurring).

316. *Black*, 123 S. Ct. at 1552 (Stevens, J., concurring).

317. *Black*, 123 S. Ct. at 1562 (Thomas, J., dissenting). Justice Thomas noted that the American flag has a sacred meaning. *Id.* (Thomas, J., dissenting).

318. *Id.* (Thomas, J., dissenting). "In every culture, certain things acquire meaning well beyond what outsiders can comprehend . . . . I believe that cross burning is the paradigmatic example of" profanity. *Id.* (Thomas, J., dissenting).

319. *Id.* at 1563 (Thomas, J., dissenting). *See generally supra* Part II.E (discussing symbolic speech).

argued that the Virginia legislature eliminated any expressive quality that cross burning may have by explicitly writing "with intent to intimidate."[320] Thus, he contended that the plurality ignored reality when it concluded that the statute swept beyond prohibition of conduct to regulation of expression.[321]

Next, Justice Thomas emphasized the historical connection between the Klan and violent activity, referring to the Klan as a terrorist organization.[322] He explained that the Klan often uses brutal methods to intimidate those groups that it dislikes.[323] One brutal method of intimidation that the Klan uses is cross burning.[324] Furthermore, he stated that more violence, such as beatings and murders, often follows a cross burning.[325] Justice Thomas also noted that the perception of a burning cross as a threat of impending violence is not unique to African Americans.[326] He maintained that cross burning has been synonymous with mayhem.[327]

Justice Thomas then recognized that Virginia has an extensive history with the Ku Klux Klan.[328] Because Virginia participated in

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320. *Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting).

321. *Id.* (Thomas, J., dissenting). Justice Thomas explained that it "overlooks not only the words of the statute but also reality." *Id.* (Thomas, J., dissenting).

322. *Id.* (Thomas, J., dissenting). Justice Thomas cited to the fact that the Klan "members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." *Id.* (Thomas, J., dissenting) (quoting M. NEWTON & J. NEWTON, THE KU KLUX KLAN: AN ENCYCLOPEDIA, at vii (1991)).

323. *Id.* (Thomas, J., dissenting).

324. *Id.* (Thomas, J., dissenting); *see supra* Part II.G (discussing the history of cross burning).

325. *Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting). Justice Thomas cites a district court's recognition of the effect cross burning can have on individuals. *Id.* at 1564 (Thomas, J., dissenting). Justice Thomas quoted:

> "After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person.' Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder . . . . *Seven months after the accident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*"

Id. (Thomas, J., dissenting) (quoting United States v. Skillman, 922 F.2d 1370, 1378 (9th Cir. 1991)).

326. *Id.* (Thomas, J., dissenting).

327. *Id.* (Thomas, J., dissenting). Justice Thomas explained, "In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence." *Id.* (Thomas, J., dissenting).

328. *Black*, 123 S. Ct. at 1564–65 (Thomas, J., dissenting). Justice Thomas cited to several newspaper articles that described the incidents of cross burning as the Klan's intimidating acts. *See id.* (Thomas, J., dissenting). In 1952, as a result of continual problems with the Klan burning

segregationist practices at the time it enacted legislation that prohibited cross burning, Justice Thomas argued that the Virginia legislature intended to penalize the offensive conduct only.[329] He therefore concluded that the Virginia statute only prohibited the physical activity of burning a cross with the intent to intimidate and did not prohibit any protected expression.[330] Because he concluded that the Virginia statute only regulated conduct, Justice Thomas thus decided that the Court did not need to analyze the statute under any established First Amendment tests.[331]

Justice Thomas then argued that even if the statute applied to protected speech and not mere conduct, the statute did not violate the First Amendment.[332] He contended that, contrary to the plurality's opinion, the statute's grant of permission to a jury to infer intent solely from the act of the cross burning did not create a constitutional problem.[333] To justify why he believed that the prima facie evidence provision was constitutional, Justice Thomas then explained the nature of the presumption at issue and stressed its importance.[334] He pointed out that the Virginia Supreme Court had labeled the prima facie evidence provision as an inference and not a true presumption.[335]

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crosses to intimidate, Virginia's governor sought to pass legislation banning cross burning. *Id.* at 1565 (Thomas, J., dissenting).

329. *Id.* at 1565–66 (Thomas, J., dissenting). Justice Thomas noted that while Virginia did participate in segregation of the races during the time the legislature enacted legislation banning cross burning, "[t]he ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression." *Id.* at 1566 (Thomas, J., dissenting). He explained that it was "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." *Id.* (Thomas, J., dissenting).

330. *Id.* (Thomas, J., dissenting). *See generally supra* Part II.E (discussing symbolic speech protected by the First Amendment).

331. *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting).

332. *Id.* (Thomas, J., dissenting).

333. *Id.* (Thomas, J., dissenting).

334. *Id.* (Thomas, J., dissenting). He quoted: "'The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes.'" *Id.* (Thomas, J., dissenting) (quoting Francis v. Franklin, 471 U.S. 307, 314 (1985)). A presumption is a special device for shifting and allocating burdens. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 772 (2000) (explaining the different types of presumptions and the effects that each particular presumption has on evidence). Justice Thomas explained that "an inference, sometimes loosely referred to as a presumption of fact, does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best." *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting); *see supra* notes 241–46 and accompanying text (discussing the prima facie evidence provision as it affected the jury instructions in Black's and Elliott's trials).

335. *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting).

Under Virginia law, an inference differs from a presumption.[336] Justice Thomas explained that a presumption shifts the burden of producing evidence to the opposing party, who then must rebut the presumption, whereas an inference does not require the jury to reach a certain result.[337] Although the Virginia Supreme Court had labeled the prima facie provision as an inference, Justice Thomas argued that the United States Supreme Court still must examine whether precedent justified labeling the provision as an inference and that in fact it did.[338] Justice Thomas thus contended that the Supreme Court should analyze the Virginia statute based on the constitutional analysis pertinent to inferences.[339]

Justice Thomas also noted that the Supreme Court previously had not used a strict level of scrutiny for mandatory irrebuttable presumptions regarding intent.[340] He explained that some acts, such as cross burning, are so blameworthy that a high scrutiny level is inappropriate; in fact, the government should not even have to prove intent, he argued.[341] Justice Thomas concluded that because the prima facie clause at issue

336. *Id.* (Thomas, J., dissenting) (citing Martin v. Phillips, 369 S.E.2d 397, 399 (Va. 1988)). Justice Thomas defined a presumption as "a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts," whereas an inference does not require a specific conclusion. *Id.* at 1566–67 (Thomas, J., dissenting).

337. *Black*, 123 S. Ct. at 1567 (Thomas, J., dissenting). Justice Thomas explained that "[n]o presumption . . . can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast." *Id.* (Thomas, J., dissenting).

338. *Id.* (Thomas, J., dissenting). He explained that "it is crucial to observe that what Virginia law calls an 'inference' is what our cases have termed 'a permissive inference or presumption.'" *Id.* (Thomas, J., dissenting). *See generally supra* notes 241–46 and accompanying text (discussing the prima facie evidence provision as it affected the jury instructions in Black's and Elliott's trials).

339. *Black*, 123 S. Ct. at 1567 (Thomas, J., dissenting). The Court should use the standard that the statute should raise "no constitutional flags unless 'no rational trier could make a connection permitted by the inference.'" *Id.* (Thomas, J., dissenting) (quoting County Court of Ulster City v. Allen, 442 U.S. 140, 157 (1979)).

340. *Id.* (Thomas, J., dissenting).

341. Justice Thomas described statutory rape as having no scienter requirement. *Id.* at 1567 (Thomas, J., dissenting). "[A] person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent." *Id.* (Thomas, J., dissenting). Because legislatures have found statutory rape to be a reprehensible crime, "the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself." *Id.* at 1568 (Thomas, J., dissenting). Justice Thomas also used the example of statutes prohibiting drug possession with intent to distribute to show that there are other situations in which the legislatures constitutionally may establish irrebuttable presumptions with regard to the defendant's intent. *Id.* (Thomas, J., dissenting).

was an inference, there was basis to sustain it under constitutional precedent.[342]

Justice Thomas then addressed the First Amendment concerns that the plurality had expressed.[343] In response to the plurality's concern that the statute chills expression by permitting the arrest, prosecution, and conviction of a person solely based on the cross burning itself, he first argued that it was unclear whether the inference affected the arrest or the initiation of prosecution.[344] Then, Justice Thomas explained that the presumption was rebuttable.[345] Finally, he contended that the statutory presumption did not chill expression because no conviction occurred unless the jury found each element of the crime beyond a reasonable doubt.[346] Although Justice Thomas vehemently disagreed with the plurality that the Virginia statute prohibited expression, even conceding that the statute warranted First Amendment analysis, he found that it complied with the First Amendment due to the inferential quality of the prima facie evidence provision, and therefore he argued that the statute was constitutional.[347]

4. Justice Scalia's Partial Concurrence and Dissent

Justice Scalia agreed with the Court's finding that the basic prohibition of the Virginia statute was in accordance with the *R.A.V. v. St. Paul* holding;[348] however, he disagreed with the Court's general interpretation of the Virginia statute.[349] Justice Scalia saw it important not only to define prima facie evidence, but also to clarify the meaning that the Commonwealth of Virginia gave prima facie evidence.[350] He

342. *Id.* at 1568 (Thomas, J., dissenting).

343. *Id.* (Thomas, J., dissenting).

344. *Id.* (Thomas, J., dissenting).

345. *Id.* (Thomas, J., dissenting).

346. *Id.* (Thomas, J., dissenting). Further, Justice Thomas observed that the Supreme Court has upheld regulations "where conduct that initially appears culpable, ultimately results in dismissed charges." *Id.* (Thomas, J., dissenting). He cited regulation of pornography as an example of such. *Id.* (Thomas, J., dissenting). Justice Thomas explained that the "chilling" effect on free speech has not "been a cause for grave concern with respect to overbreadth of such statutes among the members of this Court." *Id.* (Thomas, J., dissenting).

347. *Id.* at 1566 (Thomas, J., dissenting).

348. *Id.* at 1552 (Scalia, J., concurring in part and dissenting in part); *see supra* notes 288–93 and accompanying text (explaining the plurality's rationale for finding the statute's prohibition constitutional via one of *R.A.V.*'s enumerated exceptions). *See generally supra* Part II.H (discussing the Court's holding in *R.A.V.*).

349. *Black*, 123 S. Ct. at 1552 (Scalia, J., concurring in part and dissenting in part); *see supra* notes 299–306 and accompanying text (discussing the plurality's interpretation of the Virginia statute).

350. *Black*, 123 S. Ct. at 1552 (Scalia, J., concurring in part and dissenting in part). Justice Scalia defined prima facie evidence as

thus noted that Virginia used the conventional definition of prima facie evidence.[351] Justice Scalia stated that while Virginia was free to interpret prima facie evidence in a nontraditional way or in different ways in different statutes, Virginia had not done so.[352]

Justice Scalia emphasized the Supreme Court of Virginia's lack of suggestion that a jury may ignore rebuttal evidence against the prima facie provision and further stated that the Virginia Supreme Court distorted the meaning of the provision because the jury did not fully comprehend the provision's purpose.[353] He also pointed out that the Supreme Court of Virginia interpreted the provision in a very limited way, concluding that the provision meant that evidence that the accused burned a cross is automatically enough to support an assumption of intimidation.[354] Therefore, Justice Scalia interpreted the issue as whether the Virginia statute was constitutional given the Supreme Court of Virginia's definition of prima facie evidence.[355] Justice Scalia then analyzed the overbreadth rationale the Virginia Supreme Court used to declare the cross burning statute unconstitutional.[356] Justice Scalia

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> [s]uch evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence.

Id. (Scalia, J., concurring in part and dissenting in part) (quotations omitted) (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)).

351. *Id.* at 1553 (Scalia, J., concurring in part and dissenting in part). Justice Scalia cited to several cases that show that Virginia uses the traditional definition of prima facie evidence. *Id.* (Scalia, J., concurring in part and dissenting in part); *see* Babbitt v. Miller, 64 S.E.2d 718, 722 (Va. 1951) (defining prima facie evidence as that "which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted"). *See generally supra* Part III.C (discussing the decision of the Supreme Court of Virginia).

352. *Black*, 123 S. Ct. at 1554 (Scalia, J., concurring in part and dissenting in part). Justice Scalia cited the Supreme Court of Virginia's interpretation of the term in the prior history of the case: "'[T]he act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.'" *Id.* (Scalia, J., concurring in part and dissenting in part) (quoting Black v. Virginia, 553 S.E.2d 738, 746 (Va. 2001)).

353. *Id.* (Scalia, J., concurring in part and dissenting in part); *see supra* Part III.C (discussing the decision of the Supreme Court of Virginia).

354. *Black*, 123 S. Ct. at 1554 (Scalia, J., concurring in part and dissenting in part). Justice Scalia explained that it was it crucial that the court did not say "that the presentation of prima facie evidence is always sufficient to get a case to a jury." *Id.* (Scalia, J., concurring in part and dissenting in part). He explained that "presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal." *Id.* (Scalia, J., concurring in part and dissenting in part).

355. *Id.* (Scalia, J., concurring in part and dissenting in part).

356. *Id.* (Scalia, J., concurring in part and dissenting in part). *See generally supra* note 261 and accompanying text (discussing the Supreme Court of Virginia's overbreadth analysis).

declared that the Virginia Supreme Court's approach to the overbreadth analysis was unfounded because United States Supreme Court precedent had never rendered a statute unconstitutional merely because of the possibility of arrest and prosecution.[357]

He clarified that the United States Supreme Court had focused on whether a state may convict an individual, rather than whether a state may arrest and prosecute.[358] He argued that the plurality correctly focused on the question of conviction because the state may convict some individuals who engage in protected speech.[359] Justice Scalia further agreed with the plurality that an individual may use cross burning as a form of expression and that the state may not ban non-intimidating cross burning.[360] However, Justice Scalia explained that the plurality made an irrational conclusion that the possibility of conviction substantiated a facial invalidation of the statute based on the overbreadth doctrine.[361] In looking at the statute's principal prohibition, Justice Scalia found that it did not capture any protected conduct.[362] He claimed that the plurality wrongly focused on the prima facie evidence provision rather than the fundamental proscription of the statute.[363] Justice Scalia explained that the plurality even conceded that the only way that the state might be able to convict a person successfully based solely on the prima facie evidence provision would be if that person failed to present a defense.[364] He claimed that this

357. *Black*, 123 S. Ct. at 1554 (Scalia, J., concurring in part and dissenting in part). Justice Scalia explained that the Supreme Court has "never held that the mere threat that individuals that engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad." *Id.* (Scalia, J., concurring in part and dissenting in part).

358. *Id.* (Scalia, J., concurring in part and dissenting in part). Justice Scalia explained that the overbreadth analysis has focused on the prohibitory terms of a statute. *Id.* (Scalia, J., concurring in part and dissenting in part).

359. *Id.* (Scalia, J., concurring in part and dissenting in part).

360. *Id.* (Scalia, J., concurring in part and dissenting in part). *See generally supra* Part II.E (discussing symbolic speech).

361. *Black*, 123 S. Ct. at 1554–55 (Scalia, J., concurring in part and dissenting in part). With regard to the overbreadth doctrine, Justice Scalia noted "that 'in a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'" *Id.* at 1555 (Scalia, J., concurring in part and dissenting in part) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)). *See generally supra* Part II.C.2 (discussing overbreadth analysis).

362. *Black*, 123 S. Ct. at 1555 (Scalia, J., concurring in part and dissenting in part).

363. *Id.* (Scalia, J., concurring in part and dissenting in part). "In order to identify *any* protected conduct . . . , the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury." *Id.* (Scalia, J., concurring in part and dissenting in part).

364. *Id.* (Scalia, J., concurring in part and dissenting in part).

weakened the plurality's argument and that the core provision of the statute was limited to unprotected conduct—cross burning with the intent to intimidate.[365]

However, Justice Scalia did concede that, hypothetically, there is a rare class of persons who burn a cross without intent to intimidate, whom the state then prosecutes, and who fail to present a defense, leading to an impermissible conviction.[366] He concluded, nevertheless, that this hypothetical class of persons could not give rise to a facial challenge, even with the assistance of the overbreadth doctrine, because this class is not large enough to render the Virginia statute substantially overbroad.[367] Therefore, Justice Scalia contended that these potential improper convictions did not call for a facial invalidation of the statute.[368]

Justice Scalia also found it troubling that the plurality based its understanding of the prima facie evidence provision on varying jury instructions because no precedent exists for facially invalidating an ambiguous statute based on a jury instruction.[369] Further, he advocated that because the Virginia Supreme Court had interpreted the statute in accordance with the traditional notion of prima facie evidence, it was inappropriate for the plurality to invalidate the statute due to its prima facie evidence provision.[370] Justice Scalia found the plurality's statement—that the Supreme Court of Virginia had not interpreted the meaning of the prima facie evidence provision and therefore one could interpret the statute in a manner that would be constitutional—

365. *Id.* (Scalia, J., concurring in part and dissenting in part).

366. *Id.* (Scalia, J., concurring in part and dissenting in part). "The class of persons that the plurality contemplates could impermissibly be convicted . . . 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." *Id.* (Scalia, J., concurring in part and dissenting in part).

367. *Id.* (Scalia, J., concurring in part and dissenting in part). Justice Scalia clarified that the statute's reach does not cause the statute to be unconstitutional unless its overbreadth is substantial and real. *Id.* at 1555–56 (Scalia, J., concurring in part and dissenting in part) (citing Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

368. *Black*, 123 S. Ct. at 1556 (Scalia, J., concurring in part and dissenting in part). *See generally supra* note 258 (defining facially unconstitutional).

369. *Black*, 123 S. Ct. at 1556–57 (Scalia, J., concurring in part and dissenting in part). *See generally supra* note 258 (defining facially unconstitutional); *supra* notes 299–302 and accompanying text (analyzing the plurality's basis of understanding of the prima facie evidence provision on jury instructions given in Black's trial). This lack of precedent did not surprise Justice Scalia because treating jury instructions as binding would vest a large amount of power to trial court judges. *Black*, 123 S. Ct. at 1557 (Scalia, J., concurring in part and dissenting in part).

370. *Black*, 123 S. Ct. at 1557–58 (Scalia, J., concurring in part and dissenting in part). *See generally supra* notes 259–61 and accompanying text (discussing the Supreme Court of Virginia's rationale for declaring the Virginia statute unconstitutional).

particularly baffling.[371] He explained that if one could interpret the statute in a constitutional way, then facial invalidation was clearly inappropriate.[372]

Although Justice Scalia believed that the prima facie evidence provision was constitutional, he partially concurred with the plurality decision[373] because the Virginia Supreme Court had yet to interpret that provision authoritatively.[374] However, Justice Scalia refused to concur in the Court's decision to reverse Black's conviction because he believed that the Virginia Supreme Court had made an erroneous conclusion based on an irrational overbreadth analysis, believing that the constitutional defect was in the jury instruction.[375]

The plurality's facial invalidation troubled Justice Scalia because the plurality had conceded that it based its comprehension of the prima facie evidence provision on the jury instructions given in Black's case.[376] He argued that treating jury instructions as binding in an area in which a state law is ambiguous would give too much power to trial court judges because a specific judge's reading of a state statute could cause its invalidation.[377] Justice Scalia also found it troubling that the legislature had not promulgated the jury instructions used in Black's trial and that the Virginia Supreme Court had not adopted the instructions officially, yet the plurality had taken the instructions to be sufficiently binding to render the statute facially unconstitutional.[378] In addition, he argued that the plurality should have reached the opposite result because of the doctrine that provides that when there are two possible interpretations of a statute, one constitutional and the other not,

371. *Id.* at 1558 (Scalia, J., concurring in part and dissenting in part). *See generally supra* notes 299–302 and accompanying text (discussing the plurality's understanding of the prima facie evidence provision based on jury instructions given in Black's trial).

372. *Black*, 123 S. Ct. at 1558 (Scalia, J., concurring in part and dissenting in part). "So, what appears to have happened is that the plurality has facially invalidated . . . its own hypothetical version of [the statute] and has remanded to the Virginia Supreme Court to learn the *actual* interpretation of [the statute]. Words cannot express my wonderment at this virtuoso performance." *Id.* (Scalia, J., concurring in part and dissenting in part).

373. *Black*, 123 S. Ct. at 1558 (Scalia, J., concurring in part and dissenting in part). Justice Scalia agreed that the convictions of Elliott and O'Mara should be vacated and remanded and that the conviction of Black could not stand. *Id.* (Scalia, J., concurring in part and dissenting in part).

374. *Id.* (Scalia, J., concurring in part and dissenting in part); *see supra* Part III.C (discussing the decision of the Supreme Court of Virginia).

375. *Black*, 123 S. Ct. at 1558 (Scalia, J., concurring in part and dissenting in part); *see supra* Part III.C (discussing the decision of the Supreme Court of Virginia).

376. *Black*, 123 S. Ct. at 1556 (Scalia, J., concurring in part and dissenting in part); *see supra* note 241 (discussing the jury instructions given in Black's trial).

377. *Black*, 123 S. Ct. at 1557 (Scalia, J., concurring in part and dissenting in part).

378. *Id.* (Scalia, J., concurring in part and dissenting in part).

the court should adopt the reading that renders the statute constitutional.[379]

Justice Scalia also found it incredible that the plurality facially invalidated the Virginia statute, yet held out the possibility that the Virginia Supreme Court could interpret the statute in a constitutional way because it had declared the entire statute facially unconstitutional.[380] He accused the plurality of invalidating its own version of the Virginia statute while remanding the issue to the Virginia Supreme Court to discover the actual interpretation.[381] Thus, Justice Scalia agreed that the plurality correctly upheld a state's ability to ban cross burning with the intent to intimidate, yet disagreed as to the means the plurality had taken to declare the Virginia statute facially invalid.

5. Justice Souter's Partial Concurrence and Dissent

Justice Souter agreed with the Court's finding that the Virginia statute made a content-based distinction.[382] Moreover, he agreed that the constitutional problem with the statute lay in its prima facie evidence provision.[383] Yet, he disagreed that the statute fell within one of the exceptions from *R.A.V. v. City of St. Paul* that permit content-based distinctions[384] and explained that an understanding of the prima facie evidence provision demonstrated why the statute did not fall into one of the *R.A.V.* exceptions.[385] Justice Souter argued that although the

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379. *Id.* (Scalia, J., concurring in part and dissenting in part). Justice Scalia referred to the maxim "*ut res magis valeat quam pereat.*" *Id.* (Scalia, J., concurring in part and dissenting in part). This maxim means that "when there are two possible interpretations, the one which gives the [statute] proper effect should be applied." Leigh Ann Kennedy, *Jurisdiction in Violation of an Extradition Treaty:* United States v. Alvarez-Machain, 27 CREIGHTON L. REV. 1105, 1119 (1994).

380. *Black*, 123 S. Ct. at 1557 (Scalia, J., concurring in part and dissenting in part). *See generally supra* note 90 (contrasting facial challenges and as-applied challenges).

381. *Black*, 123 S. Ct. at 1558 (Scalia, J., concurring in part and dissenting in part).

382. *Id.* at 1559 (Souter, J., concurring in part and dissenting in part). This distinction is "within the category of punishable intimidating or threatening expression." *Id.* (Souter, J., concurring in part and dissenting in part).

383. *Id.* at 1562 (Souter, J., concurring in part and dissenting in part). Justice Souter explained that the "provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression." *Id.* at 1561–62 (Souter, J., concurring in part and dissenting in part).

384. *Id.* at 1559 (Souter, J., concurring in part and dissenting in part). *See generally supra* Part II.C.1 (discussing the distinction between content-based and content-neutral statutes and this distinction's significance in First Amendment analysis); *supra* notes 205–08 and accompanying text (discussing the *R.A.V.* exceptions).

385. *Black*, 123 S. Ct. at 1560 (Souter, J., concurring in part and dissenting in part). Justice Souter discussed each of the *R.A.V.* exceptions and found that the Virginia statute did not fit into any exception. *See id.* (Souter, J., concurring in part and dissenting in part). Justice Souter explained:

Virginia statute did not contain express categories of individuals who might be affected by a cross burning as did the statute in *R.A.V.*, a burning cross is a symbol with an identifiable content, and therefore regulations of cross burning are by their very nature content-based.[386] He therefore saw the issue before the Court as whether the Virginia statute fell into one of the exceptions to the general prohibition of content-based restrictions set forth in *R.A.V. v. St. Paul*.[387]

While the plurality held that the statute fit into the particularly virulent exception, Justice Souter disagreed.[388] This exception from *R.A.V.* meant that a state could proscribe content if it based its prohibition on the reason that the entire class of speech was proscribable.[389] Justice Souter contended that the statute did not fit into the particularly virulent category because he viewed the Virginia statute as prohibiting a specific viewpoint.[390] Further, creating additional practical interpretations based on *R.A.V.* exceptions would not allow for the survival of a statute that created a high probability of the suppression of ideas.[391] Justice Souter argued that the prima facie evidence provision created this high probability and therefore the statute did not fall into an exception.[392]

> The majority's approach could be taken as recognizing an exception to *R.A.V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others.

Id. (Souter, J., concurring in part and dissenting in part)

386. *Id.* at 1559 (Souter, J., concurring in part and dissenting in part). Further, "even when the symbolic act [of cross burning] is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy." *Id.* (Souter, J., concurring in part and dissenting in part). *See generally supra* Part II.E (discussing symbolic speech).

387. *Black*, 123 S. Ct. at 1560 (Souter, J., concurring in part and dissenting in part). Justice Souter found that the *R.A.V.* exception that the Court mostly likely would find applicable to the Virginia statute was the "particularly virulent" proscribable expression exception. *Id.* (Souter, J., concurring in part and dissenting in part). *See generally supra* notes 205–08 and accompanying text (discussing the exceptions that the Court set forth in *R.A.V. v. City of St. Paul*).

388. *Black*, 123 S. Ct. at 1559–60 (Souter, J., concurring in part and dissenting in part); *see supra* note 292 and accompanying text (discussing the plurality's finding that the Virginia statute fit into the particularly virulent exception); *supra* note 206 (explaining the particularly virulent exception in *R.A.V.*).

389. *Black*, 123 S. Ct. at 1560 (Souter, J., concurring in part and dissenting in part).

390. *Id.* (Souter, J., concurring in part and dissenting in part). Justice Souter read the *R.A.V.* examples as covering those prohibitions that did not clearly associate with a particular viewpoint. *Id.* (Souter, J., concurring in part and dissenting in part).

391. *Id.* at 1561 (Souter, J., concurring in part and dissenting in part).

392. *Id.* (Souter, J., concurring in part and dissenting in part). *See generally supra* Part II.H (discussing the Court's holding in *R.A.V.* and its confusing precedent).

Justice Souter viewed the evidentiary provision as a way to distort the jury's deliberations toward a conviction,[393] thus persuading the jury to err on the side of conviction.[394] He argued that this distortion was hard to remedy[395] because it pulled protected symbolic speech within the realm of the prohibition in the statute.[396] Justice Souter asserted that because the statute skewed prosecutions, it would result in the suppression of ideas.[397] He also found the *R.A.V.* exception into which the majority placed the Virginia statute inapplicable because the statute may suppress ideas.[398] Moreover, because he did not find the statute to fit within an *R.A.V.* exception, Justice Souter declared that the Court should have used strict scrutiny to analyze the statute.[399] Using strict scrutiny analysis, he therefore concluded that the content-based statute was invalid at the time all defendants were arrested and that severance of the prima facie evidence provision would not save the statute.[400]

IV. ANALYSIS

The Supreme Court in *Virginia v. Black* incorrectly held that the Virginia statute was unconstitutional.[401] However, the Court properly noted that it is possible for a state to ban cross burning with intent to intimidate in accordance with the Constitution.[402] This Part first argues that the Court was incorrect in finding the Virginia statute

393. *Black*, 123 S. Ct. at 1561 (Souter, J., concurring in part and dissenting in part). While one can view the symbolic act of cross burning as a form of intimidation based on the surrounding circumstances, Justice Souter argued that the jury always will be able to find some sort of circumstance that substantiates intimidation. *Id.* (Souter, J., concurring in part and dissenting in part). *See generally supra* notes 241–46 and accompanying text (discussing the prima facie evidence provision as it affected the jury instructions in Black's and Elliott's trials).

394. *Black*, 123 S. Ct. at 1561 (Souter, J., concurring in part and dissenting in part). *See generally supra* notes 241–46 and accompanying text (discussing the prima facie evidence provision as it affected the jury instructions in Black's and Elliott's trials).

395. *Black*, 123 S. Ct. at 1561 (Souter, J., concurring in part and dissenting in part).

396. *Id.* at 1561–62 (Souter, J., concurring in part and dissenting in part). *See generally supra* Part II.E (discussing symbolic speech).

397. *Black*, 123 S. Ct. at 1562 (Souter, J., concurring in part and dissenting in part).

398. *Id.* (Souter, J., concurring in part and dissenting in part).

399. *Id.* (Souter, J., concurring in part and dissenting in part). The statute could "only survive if narrowly tailored to serve a compelling state interest." *Id.* (Souter, J., concurring in part and dissenting in part).

400. *Id.* (Souter, J., concurring in part and dissenting in part). *See generally supra* Part II.C.1 (discussing the distinction between content-based and content-neutral statutes and this distinction's significance in First Amendment analysis).

401. *See Black*, 123 S. Ct. at 1552 (plurality opinion) (setting out the holding of the case).

402. *Id.* at 1550 (plurality opinion).

unconstitutional because of its prima facie evidence provision.[403] Next, this Part contends that while the Court correctly noted that statutes may ban cross burning with the intent to intimidate without violating the Constitution, the Court reached this conclusion incorrectly.[404] This Part then argues that statutes may prohibit cross burning with the intent to intimidate without violating the First Amendment because such statutes merely regulate conduct that has no expressive value.[405]

A. The Court Incorrectly Found the Virginia Statute Unconstitutional by Reason of Its Prima Facie Evidence Provision

The Supreme Court incorrectly held that the prima facie evidence provision rendered the entire statute unconstitutional.[406] Even the plurality recognized that it had not based its decision upon an authoritative interpretation of the provision because the Supreme Court of Virginia had yet to firmly clarify the meaning of the provision.[407] Generally, the United States Supreme Court requires an authoritative interpretation of a state statute by a state court before it will render the statute unconstitutional.[408] Therefore, the Supreme Court should have remanded the case to a Virginia court for an authoritative interpretation of the provision before determining the constitutionality of the statute in its entirety.[409]

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403. *See infra* Part IV.A (disputing the Supreme Court's holding that the prima facie evidence provision rendered the entire statute unconstitutional).

404. *See infra* Part IV.B (arguing that the plurality reached the conclusion that a state may constitutionally ban cross burning with the intent to intimidate by erroneous means).

405. *See infra* Part IV.B (agreeing with Justice Thomas's assertion that cross burning with the intent to intimidate is conduct and has no expressive value).

406. *Black*, 123 S. Ct. at 1550 (plurality opinion). The prima facie evidence provision provided that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." VA. CODE ANN. § 18.2-423 (Michie 1996). *See generally supra* note 14 and accompanying text (defining prima facie evidence). The Court explained, "[A]ll we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point." *Black*, 123 S. Ct. at 1552 (plurality opinion).

407. *Black*, 123 S. Ct. at 1552 (plurality opinion).

408. *See id.* at 1558 (Scalia, J., concurring in part and dissenting in part) (discussing Justice Scalia's incredulity as to the plurality's holding absent an authoritative interpretation of the prima facie evidence provision).

409. While the Supreme Court has not analyzed whether it can sever a part of a state statute that it deems unconstitutional, it has evaluated this issue with regard to federal statutes. *See* Field & Co. v. Clark, 143 U.S. 649, 697 (1891) (holding that "a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid"). Finding the prima facie evidence provision as severable and striking it as an unconstitutional part of an otherwise constitutional statute could have been an option for the Supreme Court to examine instead of declaring that the prima facie evidence provision facially violated the statute. The United States Supreme Court noted that the Supreme Court of Virginia

Alternatively, even if the Supreme Court properly analyzed the statute without an authoritative interpretation of the evidence provision by the state supreme court, the prima facie evidence provision still does not render the statute unconstitutional because the provision created an inference, not a presumption.[410] In his dissenting opinion, Justice Thomas saw no reason to analyze the statute under First Amendment grounds but did, however, choose to scrutinize the prima facie evidence provision.[411] His explanation of a presumption versus an inference is useful for determining whether the prima facie provision is constitutional.[412] Clearly, the allowance of a rebuttal renders the provision constitutional.[413] An inference does not compel the jury to reach a particular conclusion and applies to the probative value of the evidence.[414] This means that the defendant can rebut the inference and the jury is not bound to reach a particular outcome.[415] As Justice Thomas wrote, the statute should not be constitutionally problematic unless no reasonable trier could make the permitted connection.[416]

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never reached the issue of whether the provision was severable from the rest of the statute under Virginia law. *Black*, 123 S. Ct. at 1550 (plurality opinion); *see* VA. CODE ANN. § 1-17.1 (Michie 1996) (allowing provisions to be severed from statutes).

> The provisions of statutes in this Code or the application thereof to any person or circumstances which are held invalid shall not affect the validity of other statutes, provisions or applications of this Code which can be given effect without the invalid provisions or applications. The provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another.

VA. CODE ANN. § 1-17.1. Thus the Supreme Court could have remanded back to the lower court for a determination of whether the prima facie evidence provision was severable and did not have to declare the entire statute unconstitutional.

410. *Black*, 123 S. Ct. at 1566–67 (Thomas, J., dissenting); *see also supra* notes 332–39 and accompanying text (discussing Justice Thomas's distinction between presumptions and inferences).

411. *See supra* notes 332–39 and accompanying text (explaining Justice Thomas's differentiation between inferences and presumptions).

412. *See supra* notes 332–39 and accompanying text (explaining Justice Thomas's differentiation between inferences and presumptions).

413. *See supra* notes 353–55 and accompanying text (stating that the Virginia Supreme Court never suggested that the jury may ignore rebuttal evidence against the presumption of intimidation).

414. *Black*, 123 S. Ct. at 1566–67 (Thomas, J., dissenting); *see also supra* notes 332–39 and accompanying text (discussing Justice Thomas's distinction between presumptions and inferences).

415. *Black*, 123 S. Ct. at 1566–67 (Thomas, J., dissenting).

416. *Id.* at 1567 (Thomas, J., dissenting). Justice Thomas noted that the jury instructions in Black's trial required the jury to find "guilt beyond a reasonable doubt both as to the fact that 'the defendant burned or caused to burn a cross in a public place' and that 'he did so with the intent to intimidate any person or persons.'" *Id.* (quoting the jury instructions in *Black v. Virginia*, 553 S.E.2d 738, 796 (Va. 2001)).

Because the defendant has the opportunity to present a defense and thus rebut the presumption of intimidation, the Supreme Court should rely on the ability of the jury to weigh the credibility of each side's case and make an informed decision.[417]

Moreover, the Court improperly found that the statute was unconstitutional due to the prima facie evidence provision by relying on the statute's effect on a very improbable hypothetical class of persons.[418] This imaginary class of persons engages in a cross burning without intent to intimidate, is prosecuted by the state, and fails to present a defense.[419] As Justice Scalia correctly argued, unless there was no way of interpreting the statute in a constitutional manner, it was inappropriate to facially invalidate the statute.[420] A constitutional way to interpret the statute in this case did exist; the Court should have noted the possibility that even if the state convicted a person from this unlikely group under the Virginia statute, that accused person could challenge the statute as applied in his particular case.[421] Therefore, the Court erred by focusing its analysis on this implausible hypothetical class of persons.[422]

Finally, the Court improperly found that the statute was unconstitutional due to the prima facie evidence provision because, when determining the constitutionality of the statute, the Court should have focused on the fundamental prohibition and not the evidentiary provision.[423] Justice Scalia correctly contended that to ascertain the constitutionality of the statute, the Court should have focused on the

417. *See supra* notes 353–55 and accompanying text. Justice Scalia justified his approach by means of the rebuttal available to the defense. *Black*, 123 S. Ct. at 1554 (Scalia, J., concurring in part and dissenting in part). Justice Souter's assertion that the distortion of jury deliberations would lead to the suppression of ideas is also unfounded. *See supra* notes 393–98 and accompanying text (outlining Justice Souter's contention that the prima facie evidence provision would distort jury deliberations and result in improper convictions).

418. *See Black*, 123 S. Ct. at 1550 (plurality opinion); *see also supra* notes 300–02 and accompanying text (discussing the plurality's analysis of the prima facie evidence provision); *supra* notes 366–68 and accompanying text (explaining Justice Scalia's hypothetical class of persons).

419. *See supra* note 366 and accompanying text (discussing this theoretical class of persons).

420. *See supra* note 372 and accompanying text (discussing Justice Scalia's finding that facial invalidation of the Virginia statute was inappropriate in this case).

421. *See supra* note 366 and accompanying text (discussing this small hypothetical class of persons); *supra* note 90 and accompanying text (differentiating facial and as-applied challenges).

422. *See supra* note 297 and accompanying text (explaining the plurality's concern with the possibility that a state may convict a defendant if he refuses to set forth a defense against the intimidation component of the Virginia statute).

423. *Black*, 123 S. Ct. at 1555 (Scalia, J., concurring in part and dissenting in part).

fundamental prohibition.[424] Virginia limited the fundamental prohibition of the statute to reach only conduct that the Supreme Court deemed permissible when it declared that the prohibition of cross burning with the intent to intimidate was constitutional.[425] This basic prohibition thus did not reach a substantial amount of protected speech.[426] Because the general prohibition did not infringe on a substantial amount of protected speech, the plurality improperly focused on the prima facie evidence provision as applied via the jury instructions in Black's trial to declare the statute facially invalid.[427]

In short, the plurality wrongly held the Virginia statute facially unconstitutional based on the prima facie evidence provision.[428] The United States Supreme Court should not have considered the prima facie evidence provision because the Supreme Court of Virginia did not set forth an authoritative interpretation of the provision.[429] Further, the prima facie evidence provision created a rebuttable inference that would allow a jury to use its judgment in determining whether the accused intended to intimidate.[430] The United States Supreme Court also wrongly emphasized an implausible hypothetical class of persons who may be wrongly convicted under the statute.[431] Finally, the Supreme Court wrongly concentrated on the evidentiary provision in its analysis of the Virginia statute rather than focusing on the specific prohibition that it deemed constitutional—cross burning with the intent to intimidate.[432]

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424. *Id.* (Scalia, J., concurring in part and dissenting in part); *see supra* note 409 and accompanying text (suggesting that the Supreme Court should have considered severing the prima facie evidence provision and should not have declared the entire statute facially unconstitutional).

425. *Black*, 123 S. Ct. at 1555 (Scalia, J., concurring in part and dissenting in part).

426. *Id.* at 1555 n.2 (Scalia, J., concurring in part and dissenting in part). *See generally supra* Part II.C.2 (discussing the overbreadth doctrine and facial challenges thereto).

427. *See Black*, 123 S. Ct. at 1551–52 (plurality opinion).

428. *See supra* notes 406–28 and accompanying text (explaining why the plurality incorrectly held the Virginia statute to be facially unconstitutional because of its prima facie evidence provision).

429. *See supra* notes 406–09 and accompanying text (explaining why the plurality incorrectly concluded that the statute was invalid and suggesting that a remand to a lower court for further interpretation was appropriate).

430. *See supra* notes 410–17 and accompanying text (contending that because the prima facie evidence provision created an inference and not a presumption, the court should permit the jury to use its judgment in weighing all the evidence).

431. *See supra* notes 418–21 and accompanying text (arguing that the plurality impermissibly focused on a hypothetical class of persons who could facially challenge the Virginia law).

432. *See supra* notes 423–27 and accompanying text (claiming that in assessing the statute's facial validity, the plurality should have focused on the general prohibition in the statute rather than the prima facie evidence provision).

B. The Court Correctly Concluded That a State May Ban Cross Burning with the Intent To Intimidate, but Reached This Conclusion for the Wrong Reasons

The plurality correctly held that a state may ban cross burning with the intent to intimidate.[433] While the Court reached the appropriate result—that the statute's prohibition did not violate the First Amendment—it incorrectly used the *R.A.V.* framework to reach this conclusion.[434] Its analysis under *R.A.V.* and the exceptions therein was inappropriate because the Virginia statute in *Virginia v. Black* regulated non-expressive conduct only and thus did not implicate the analysis of content-based restrictions.[435] Instead, the Virginia cross burning statute and others like it may ban cross burning with the intent to intimidate without violating the First Amendment because such statutes do not regulate speech; they regulate non-expressive conduct.[436]

The Virginia statute, along with other cross burning statutes similarly written, only regulated non-expressive conduct.[437] Justice Thomas did not analyze the *R.A.V.* framework in his dissenting opinion because he argued that the statute did not regulate any expressive conduct.[438] Justice Thomas rightly advocated that the Virginia legislature had removed all expressive components when it added the intention clause.[439] Justice Thomas viewed this effort by the legislature as

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433. *See* Virginia v. Black, 123 S. Ct. 1536, 1549 (2003) (plurality opinion). "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* (plurality opinion).

434. *See Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting); *supra* Part II.H (discussing the Court's holding in *R.A.V.* and the confusing precedent it set); *supra* notes 288–93 (describing the plurality's use of the *R.A.V.* exception).

435. *See Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting); *see supra* Part II.H (discussing the Court's holding in *R.A.V.* and the confusing precedent it set); *supra* notes 288–93 (describing the plurality's use of the *R.A.V.* exception).

436. *See Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting).

437. *See* VA. CODE ANN. § 18.2-423 (Michie 1996) (delineating statutory intent); *infra* note 438 (quoting Justice Thomas on the non-expressive nature of the statute).

438. *Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting). "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." *Id.* (Thomas, J., dissenting).

439. *See Black*, 123 S. Ct. at 1563 (Thomas, J., dissenting); *see also* Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178, 189–191 (1993) (arguing that courts incorrectly have distinguished between motive and intent in holding that punishing motive was equivalent to punishing thought). Grannis sets forth the idea that motive and intent are the same thing and, therefore, creating penalty-enhancing statutes is not unconstitutional. Grannis, *supra*, at 189–91; *see* Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993) (finding that the penalty-enhancing provision of a Wisconsin statute did not violate the defendant's First Amendment rights); Dobbins v. State, 605 So. 2d 922, 925 (Fla. Dist. Ct. App. 1992) (finding that the statute did not punish opinion, but rather punished acts of discrimination).

significant because of the segregation laws in place at the time the Virginia statute was enacted.[440] Justice Thomas further concluded that to rationalize the cross burning law with the laws of segregation in place at the time, one must conclude that Virginia's interest must have been penalizing especially brutal conduct.[441] Other courts similarly have found that cross burning statutes do not regulate expressive conduct.[442]

While burning a cross on one's own private property as a way of expressing oneself might be offensive, clearly the Virginia statute would not allow for conviction for this activity.[443] In such a scenario, there is no element of intimidation, and the conduct is purely expressive.[444] However, when an individual sets afire a cross in a neighbor's yard to scare or intimidate that person, the Virginia statute would apply because the element of intimidation would exist.[445] The element of intimidation removes all expression from the cross burning

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440. *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting). Justice Thomas explained, "It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message." *Id.* (Thomas, J., dissenting).

441. *Black*, 123 S. Ct. at 1566 (Thomas, J., dissenting). Justice Thomas explained:

> 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.

Id. (Thomas, J., dissenting).

442. *E.g.*, United States v. Stewart, 65 F.3d 918, 928 (11th Cir. 1995) (holding that convicting defendants of burning a cross was not in violation of the First Amendment because the defendants were engaging in an activity); *see supra* note 217 (discussing cases in which cross burning statutes were upheld). For example, a California court found that the California cross burning statute regulated only malicious cross burning, which implicated the true threats and fighting words doctrines. *See In re* Steven S. v. People, 25 Cal. App. 4th 598, 607 (Ct. App. 1994) (finding that the fighting words and true threats doctrines applied to the California cross burning statute). A Florida court similarly found that its cross burning statute did not infringe upon expressive conduct because the cross burning prohibited fell into the true threats and fighting words doctrines of unprotected speech. State v. T.B.D., 656 So. 2d 479, 480–81 (Fla. 1995) (finding that the fighting words and true threats doctrines applied to a similar Florida cross burning statute). *See generally supra* Part II.D.2–3 (discussing the true threats and fighting words doctrines).

443. *Black*, 123 S. Ct. at 1542 (plurality opinion). This was the setting for Barry Black's cross burning. *Id.*; *see supra* notes 234–41 and accompanying text (laying out the facts for Barry Black's conviction under the Virginia statute).

444. *See Black*, 123 S. Ct. at 1552 (plurality opinion) (finding that the jury instructions regarding the prima facie evidence provision were erroneous in Barry Black's case and overturning his conviction).

445. *See id.* at 1543 (plurality opinion) (depicting the emotions of a family after someone burned a cross in the family's yard as a threat).

and unambiguously represents a criminal act not unlike sexual assault.[446]

While the plurality claimed that the Virginia prohibition was constitutional because the prohibition fit into the particularly virulent exception under *R.A.V.*, the plurality did not look to the wording of the statute.[447] In fact, the plurality called the cross burning a particularly virulent form of intimidation, not speech.[448] Further, the statute does not prohibit all cross burnings.[449] It prohibits those only that are done with the intent to intimidate.[450] This added element of intent removes the expressive component that may exist in cross burning, and therefore the statute is drawn in a sufficiently narrow manner to regulate only conduct.[451]

In his partial concurrence and partial dissent, Justice Souter erroneously declared that the Virginia statute was a content-based statute that did not fall within one of the *R.A.V.* exceptions.[452] He claimed that prohibiting cross burning with the intent to intimidate selects a symbol with a particular content.[453] However, the statute prohibited the *act* of burning a cross with the *intent* to intimidate, not the act of cross burning with no qualifying objective.[454] Because the statute did not infringe upon protected speech, the Court correctly declared that its basic prohibition was constitutional.[455]

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446. *See* VA. CODE ANN. § 18.2-427 (Michie 1996) (stating the intimidation requirement in a statute); *cf. id.* § 18.2-61(A)(i) (criminalizing sexual intercourse "against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person").

447. *Black*, 123 S. Ct. at 1549 (plurality opinion).

448. *Id.* (plurality opinion).

449. *See* VA. CODE ANN. § 18.2-423.01 (setting forth Virginia's cross burning statute at issue in *Black*); *see supra* notes 228–46 and accompanying text (discussing the Virginia statute as applied in Black's, Elliott's, and O'Mara's cases).

450. VA. CODE ANN. § 18.2-423; *see supra* notes 228–46 and accompanying text (discussing the Virginia statute as applied in Black's, Elliott's, and O'Mara's cases).

451. *See* VA. CODE ANN. § 18.2-423 (providing the intent element).

452. *See Black*, 123 S. Ct. at 1559 (Souter, J., concurring in part and dissenting in part). Justice Souter unambiguously declared, "I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R.A.V.* or any acceptable variation of it." *Id.* (Souter, J., concurring in part and dissenting in part).

453. *Id.* (Souter, J., concurring in part and dissenting in part). This idea could be supported by *Texas v. Johnson*, in which the Court held that although one might find flag burning offensive or intimidating, its offensiveness is not enough to render it unconstitutional under the First Amendment. Texas v. Johnson, 491 U.S. 397, 400 (1989); *see supra* notes 172–78 and accompanying text (stating the Court's holding and rationale in *Texas v. Johnson*).

454. VA. CODE ANN. § 18.2-423 (stating the limitations in the law); *see supra* notes 228–46 and accompanying text (discussing the Virginia statute as applied in Black's, Elliott's, and O'Mara's cases).

455. *See Black*, 123 S. Ct. at 1549 (plurality opinion).

In short, the Supreme Court correctly concluded that a state may ban cross burning with the intent to intimidate.[456] However, the Supreme Court incorrectly applied the *R.A.V.* framework in so holding because the Virginia statute did not implicate a First Amendment analysis.[457] The Virginia statute regulated pure conduct with no expressive component.[458] Thus the Virginia statute would not prohibit all cross burnings and would not allow the Commonwealth to punish those persons who burn a cross for purely expressive reasons.[459]

V. IMPACT

The most important effect of *Virginia v. Black* is the Court's affirmation of a state's ability to ban cross burning with the intent to intimidate.[460] This means that a state can prohibit the burning of a cross with the intent to intimidate without violating the First Amendment.[461] However, given the fragmented nature of the opinion and the widely varying opinions of the Justices, many believe that the case did not leave clear precedent for courts regarding the constitutionality of similar statutes.[462] This Part therefore first discusses the case's uncertain impact on First Amendment jurisprudence.[463] Then, this Part discusses the public perception of the case.[464]

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456. *See id.* (plurality opinion).

457. *See id.* 1563 (Thomas, J., dissenting); *supra* notes 281–93 and accompanying text (describing the plurality's use of the *R.A.V.* exception).

458. *See* VA. CODE ANN. § 18.2-423 (delineating statutory intent); *supra* text accompanying note 319 (noting Justice Thomas's opinion on the non-expressive nature of the statute).

459. *Black*, 123 S. Ct. at 1542 (plurality opinion).

460. *See id.* (plurality opinion); *see also supra* Part III.D.1 (detailing the plurality's reasoning that a ban on cross burning with the intent to intimidate does not violate the First Amendment).

461. *See supra* Part III.D.1 (discussing the plurality's conclusion that a ban on cross burning with the intent to intimidate may not violate the First Amendment). *But see infra* notes 490–94 and accompanying text (describing the failed Utah bill seeking to make cross burning a separate crime from existing hate crimes statutes in the state).

462. *See* Editorial, *A Compromise on Cross Burning*, ST. PETERSBURG TIMES, Apr. 10, 2003, at 20A, *available at* 2003 WL 18341508. The editorial noted:

> [Justice O'Connor's] decision failed to stand firmly either for the freedom of individuals to speak symbolically through the burning of a cross, or for the right of the state to end this noxious practice . . . . It was a fair compromise that does some damage to free speech jurisprudence, but not an excessive amount.

Id.

463. *See infra* Part V.A (examining the case's potential effects on First Amendment jurisprudence).

464. *See infra* Part V.B (discussing public perception of this case).

A. *Impact on First Amendment Jurisprudence*

In *Virginia v. Black*, the Justices of the Supreme Court impacted three areas of First Amendment jurisprudence: (1) symbolic speech, (2) overbreadth doctrine, and (3) content-based regulations.[465] In prior cases, the Supreme Court has protected many different forms of symbolic speech.[466] However, the Court always has provided that to determine the level of protection afforded symbolic speech, it must examine the scrutinized conduct in the context in which the conduct occurs.[467] The result in *Virginia v. Black* appears to uphold this idea of protection with regard to the context in which the conduct occurs: burning a cross on one's private property for expressive purposes will remain protected under the First Amendment, whereas burning a cross on a neighbor's lawn to scare him will not be protected, and states will be able to regulate such activity.[468] Taking the conduct in the context in which it occurs, burning a cross for expression generally will not intimidate an individual, unlike burning a cross in a neighbor's yard without permission.[469] However, given the fragmented nature of the opinion and the widely varying opinions of the Justices, it is possible that this view of symbolic speech and the level of protections afforded it by the Constitution could change.[470]

Virginia v. Black, through the opinion of Justice Scalia, also impacted the First Amendment doctrine of overbreadth.[471] Justice Scalia explained that the Court's first duty in a constitutional challenge based on the overbreadth doctrine is to determine whether the regulation

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465. *See generally* Virginia v. Black, 123 S. Ct. 1536 (2003).

466. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding flag burning to be protected symbolic speech). *See generally supra* Part II.E (discussing the Court's analysis of symbolic speech).

467. *See supra* Part II.E (discussing the Court's analysis of symbolic speech).

468. *Black*, 123 S. Ct. at 1549 (plurality opinion). It follows from this that an absolute ban on cross burning would be invalid. *See id.* (plurality opinion).

469. *See supra* notes 438–41 (arguing that the Virginia legislature omitted the regulation of any expressive component under its cross burning statute when it added "with intent to intimidate" and further that the Virginia statute would not allow for the prosecution of cross burning for expressive purposes that contain no element of intimidation).

470. *See* James Weinstein, *Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY 151–52 (Thomas R. Hensley ed., 2001). Weinstein examines the Canadian ban on hate speech and declares that it certainly would be held unconstitutional in the United States because of an explicit viewpoint content-based discrimination. *Id.* He uses the Court's analysis in *R.A.V. v. City of St. Paul* to analyze the Canadian statute. *Id.*

471. *Black*, 123 S. Ct. at 1552 (Scalia, J., concurring in part and dissenting in part).

reaches a substantial amount of constitutionally protected conduct.[472] However, he cautioned against the way in which the Supreme Court of Virginia used the overbreadth doctrine because the Virginia court focused on an evidentiary statute rather than the basic prohibition.[473] *Black* created a broader usage of the overbreadth doctrine in that courts now may consider evidentiary provisions in addition to the supposed speech being suppressed in the statute when determining whether the statute complies with First Amendment guarantees.[474] In future cases, the United States Supreme Court may take a more cautious approach in its application of this doctrine and make certain that it focuses on the likelihood of conviction when examining an evidentiary provision, not the likelihood of arrest and prosecution.[475]

Finally, *Virginia v. Black* also may affect First Amendment analysis and the distinction between content-based statutes and content-neutral statutes.[476] This distinction of content is a fundamental determination in First Amendment doctrine, albeit a complex one.[477] However, the plurality did not analyze whether the statute was content-based or content-neutral.[478] The Justices did not discuss this distinction between content-based and content-neutral statutes in the context of the Virginia statute because they deemed cross burning an activity with a specific

472. *See supra* note 361 and accompanying text (explaining Justice Scalia's take on the overbreadth doctrine); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (holding that for a successful overbreadth challenge, the statute's overbreadth must be both real and substantial). *See generally supra* Part II.C.2 (discussing the overbreadth doctrine and facial challenges thereto).

473. *See supra* note 357 and accompanying text (explaining Justice Scalia's analysis that the Virginia court's use of the overbreadth doctrine was inappropriate).

474. *See supra* notes 361–68 and accompanying text (outlining Justice Scalia's criticism of the plurality's overbreadth analysis).

475. *See supra* note 357 and accompanying text (explaining Justice Scalia's analysis that the Court had never before found the threat of arrest and prosecution to be enough to render a statute overbroad); *see also supra* Part II.C.2 (discussing overbreadth analysis as a means by which the Court has analyzed First Amendment challenges). *But see* N.C. Right to Life, Inc. v. Leake, 344 F.3d 418, 432–33 (4th Cir. 2003) (finding that the presumption in a campaign finance law rendered the statute overbroad).

476. *See generally* Part II.C.1 (explaining the differences between content-based and content-neutral statutes and the differences in the way the Court interprets the two types of statutes).

477. *See* Jacobs, *supra* note 82, at 622 (stating that the differences between content-based, content-neutral, and viewpoint-based statutes are confusing and are often confused).

478. *See supra* note 292 and accompanying text (noting the Court's conclusion without analysis that the statute was content-based).

message of hatred.[479] Perhaps this shows a new direction for courts in First Amendment analysis.[480]

B. Public Perception

The decision additionally left the public confused as to what the case's holding meant.[481] The media seemed to emphasize the Court's upholding of the basic prohibition without realizing that the Court's final holding deemed the Virginia statute facially unconstitutional.[482]

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479. *See supra* note 292 and accompanying text (discussing the Court's conclusion that the statute was content-based and its lack of extensive analysis).

480. *See* Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197, 211 (2d Cir. 2004) (finding a New York "anti-mask" statute constitutional because it regulated the conduct of wearing a mask, not the expression behind the mask). At trial, the New York court did not employ a content-based analysis of the statute. *Id.* at 203–211. *But see* Sheehan v. Gregoire, 272 F. Supp. 2d 1135, 1145–47 (W.D. Wash. 2003) (analyzing a statute via content-based and content-neutral distinctions). The district court distinguished the holding in *Virginia v. Black* in *Sheehan v. Gregoire* and held that not all forms of intimidating speech constitute a threat. *Id.* at 1143. In *Black*, the Supreme Court relied on the fact that cross burning has had a "long and pernicious history as a signal of impending violence" and therefore held that it could ban cross burning. Virginia v. Black, 123 S. Ct. 1536, 1549 (2003) (plurality opinion). However, *Sheehan* dealt with the prohibition of the intentionally intimidating distribution of phone numbers and addresses of a "law enforcement-related, corrections officer-related, or court-related employee or volunteer." *Sheehan*, 272 F. Supp. 2d at 1139. The district court held that since the speech at issue did not have a similar history of impending violence, there was no support for the defendants' argument that "subjective intent alone transforms such pure speech into a true threat" and therefore the statute at issue was fundamentally different from the prohibition in *Virginia v. Black*. *Id.* at 1142.

481. One commentator argues that the Court should have made a distinction between public and private property. *See The Cross-burning Decision: This Wasn't Supposed To Happen Here*, ISSUES & VIEWS, Apr. 21, 2003, http://www.issues-views.com/index.php/sect/21000/article/21059. This commentator asserts that the First Amendment is rooted in the protection of property and that the cases of Elliott and O'Mara clearly involved criminal trespass. *Id.* However, in Black's case, the defendant was on private property. *Id.* This commentator sees their property violations as something the Court missed. *Id.*

482. *See* David Tell, *Soon To Be a Major New York Times Correction: A New York Times Editorial Gets a Supreme Court Decision Exactly Wrong*, THE DAILY STANDARD, Apr. 10, 2003, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/002/520igsbz.asp (last visited June 15, 2004). Tell noted that the leading line of the *New York Times* story the day following the Court decision read: "The Supreme Court upheld a Virginia statute yesterday that makes it illegal for Ku Klux Klansmen and others to burn crosses." *Id.* (quoting Editorial, *A Decision on Cross Burning*, N.Y. TIMES, Apr. 8, 2003, at A22). However, other newspapers got the holding correct and proceeded to explain how the statute could pass constitutional muster. *See Court Hit the Mark on Cross-burning Ban; If the Act Is Meant To Intimidate or Incite Violence, It Is Not Protected Expression*, SAN ANTONIO EXPRESS-NEWS, Apr. 13, 2003, at 2H, *available at* 2003 WL 15639118. This Texas newspaper reported that "the key is to write it in such a way that it becomes a felony to burn a cross with the intent of intimidating any person or group." *Id.* Although Texas does not have a cross burning law, the article noted that the federal government punishes similar activities under federal law. *Id.*; *see supra* note 183 and accompanying text (describing the statute enacted by the federal government to punish cross burners).

Some reporters praised Justice O'Connor's opinion for being balanced and fair.[483] Some advocates also noted the importance of this decision to First Amendment jurisprudence.[484]

However, many people now contrast the apparently different result in *Black* from that in *R.A.V. v. St. Paul*.[485] Both statutes had the same basic prohibition, although each was worded quite differently.[486] Some commentators have claimed that the decision in *Virginia v. Black* is a retreat from *R.A.V.*[487] Some fear that this ruling will lead to over-zealous legislation regulating other controversial symbols such as swastikas and flag burning.[488]

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483. *See, e.g.*, Editorial, *A Decision on Cross Burning*, N.Y. TIMES, Apr. 8, 2003, at A22 (stating that the Court's opinion "sounds a welcome note of caution"), *available at* LEXIS, News Library, The New York Times File.

484. The National Director of the Anti-Defamation League, Abraham H. Foxman, issued the following statement following the Court's decision:

> The burning cross is a symbol of hate, one that is inextricably linked to this nation's racist and segregationist past. In upholding Virginia's statute, the Supreme Court rightfully recognizes that the government has the clear power to outlaw the use of this particularly hateful symbol when the intent is to intimidate or threaten another person. Today's decision confirms what we have argued repeatedly—that threats are not constitutionally protected free speech. A burning cross that is erected with the intent to intimidate or instill fear does not deserve the same protection as other expressions of speech.
>
> Cross-burning statutes do not necessarily run afoul of the First Amendment, as long as they are carefully drafted to outlaw only criminal acts and not unpopular political ideas. We believe that the Virginia statute does not attempt to criminalize racial hatred. It criminalizes the use of a burning cross as a means of intimidation.

Press Release, Anti-Defamation League, ADL Welcomes Supreme Court Decision Upholding Virginia State Ban on Cross Burning (Apr. 7, 2003), *available at* http://adl.org/PresRele/CvlRt_32/4249_33.htm (last visited May 10, 2004).

485. One reporter wrote that "it seems clear that the *R.A.V.* decision was a narrow ruling by which the court did not mean that cross burning could not be treated as a crime." Linda Greenhouse, *Justices Allow Bans on Cross Burnings Intended as Threats*, N.Y. TIMES, Apr. 8, 2003, at A1, *available at* LEXIS, News Library, The New York Times File.

486. *See supra* notes 11, 197 and accompanying text (highlighting the relevant provisions of the Virginia statute in *Virginia v. Black* and the St. Paul ordinance in *R.A.V.*). Both statutes prohibited cross burning with intent to intimidate, although the St. Paul ordinance included other forms of harassment and did not include a prima facie provision. *Id.*

487. *See, e.g.*, Tony Mauro, *Justices Uphold Cross-burning Ban*, THE LEGAL INTELLIGENCER, Apr. 8, 2003, at 4, *available at* LEXIS, News Library, The Legal Intelligencer File.

488. *Id.* The author quotes Joshua Wheeler, a lawyer at the Thomas Jefferson Center for the Protection of Free Expression in Charlottesville, Virginia: "'Our concern is how much the language in the decision would lend itself to being used in other contexts . . . . Even if the court intended its ruling to be limited to cross burning, the potential always exists for legislators to go beyond that.'" *Id. But see* VA. CODE ANN. § 18.2-423.01 (Michie 1996) (providing expressly for the punishment of "any person, who, with the intent of intimidating any person or group of persons, burns an object on the private property of another without permission").

After *Black*, other states proposed legislation to outlaw cross burning with the intent to intimidate.[489] For instance, fifth-graders in a Utah school saw the problem posed by cross burning and persuaded a representative to sponsor a bill outlawing cross burning in their state.[490] This bill would have made it a third degree felony to burn a cross on public property with the intent to intimidate.[491] Those arguing against the bill maintained that the government could prosecute cross burners under already-existing laws.[492] Proponents of the bill argued that cross burning is a more serious offense than those crimes under which the state currently could prosecute a cross burner.[493] Unfortunately for these fifth-graders, the Utah bill did not pass the state House, and the legislature did not enact the bill.[494] However, the federal government can continue to prosecute individuals for cross burning and the effects thereof under federal law.[495]

VI. CONCLUSION

In *Virginia v. Black*, the Supreme Court established the important principle that legislatures may prohibit cross burning with the intent to intimidate. However, the Court ultimately held the Virginia law

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489. *See* H.B. 1074, 92d Gen. Assemb., 2d Reg. Sess. (Mo. 2003) (summarizing Missouri's proposed cross burning statute), *available at* http://www.house.state.mo.us/bills041/bilsum/intro/sHB1074I.htm (last visited Mar. 25, 2004). This bill proposes legislation that would make it a crime to burn a cross with the intent to intimidate any person. *Id.*

490. Marin Decker, *Fifth-graders, Legislator's Bill Would Ban Burning Crosses To Intimidate*, THE SALT LAKE TRIB., Feb. 2, 2004, at B2, *available at* 2003 WL 57839650. One of the students commented, "'We thought that it wasn't fair . . . . I think it's bad because it scares a lot of people. It hurts and scares them, and people don't like being scared.'" *Id.*

491. *Id.*

492. Jennifer Dobner, *Measure on Cross Burning Defeated*, DESERET MORNING NEWS, Feb. 13, 2004, at A2 (quoting State Representative LaVar Christensen as stating that while "no one sanctions cross burning, . . . the crime can already be prosecuted as a third-degree felony under other sections of Utah law"), *available at* 2004 WL 67074178.

493. *Id.* Another representative noted that cross burning is "'a message crime'" and "'[i]f we had a specific law like (HB246) passed or an enforceable hate crimes law,'" the state could address message crimes such as cross burning. *Id.* He added that the legislature could address this crime, which he noted was "more serious than a trespass, or a vandalism or an arson.'" *Id.*

494. *Id.* The vote was 51–22 and mostly divided on party lines, with Republicans voting for the bill and Democrats voting against the bill. *Id.*; *see also* Utah State Legislature, H.B. 246: Prohibition of Cross Burning on Property (providing the language of the failed Utah bill), *available at* http://www.le.state.ut.us/~2004/bills/hbillint/hb0246.htm (last visited June 15, 2004).

495. *See* Dep't of Justice, *Macomb, Illinois Man Sentenced for Cross Burning Targeting Interracial Couple*, REG. INTELLIGENCE DATABASE, Feb. 9, 2004, *available at* 2004 WL 250178 (discussing the prosecution of bias-induced crimes under federal law). "Since 2001, the [Civil Rights] Division has prosecuted 35 cases, charging 50 defendants involved in cross burnings." *Id. See generally supra* note 183 and accompanying text (discussing the federal statute under which the government has convicted cross burners).

unconstitutional, thus showing that the Supreme Court remains reluctant to uphold legislation restricting expression of any kind. Moreover, the Court did not definitively determine how a statute may constitutionally prohibit controversial conduct. Therefore, it is highly likely that the Supreme Court will face once again a constitutional challenge to a statute that regulates controversial conduct.