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The Shortcomings of the Supreme Court's Viewpoint Discrimination Analysis in Virginia v. Black

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THE SHORTCOMINGS OF THE SUPREME COURT'S VIEWPOINT DISCRIMINATION ANALYSIS IN *VIRGINIA V. BLACK*

INTRODUCTION

In 1998, a group of men in Virginia Beach, Virginia, burned a homemade, wooden cross on a black family's lawn.[1] The vengeful act put the family in fear of what would happen next.[2] The family called the police, which led to the arrest and conviction of two men under the state's law against cross burning.[3] However, the convictions were subsequently vacated by the Virginia Supreme Court because the cross-burning statute was found unconstitutional.[4] Attempts to construct constitutional cross-burning regulations are commendable, but unfortunately for proponents, First Amendment jurisprudence has often posed an insurmountable obstacle.[5] In 2003, however, the United States Supreme Court, in *Virginia v. Black*, cleared some of the historical roadblocks by allowing states to prohibit cross burning with intent to intimidate.[6] Though seemingly recognizing the harms associated with cross burning, the *Black* ruling itself raises constitutional concerns and is not as laudable as it may appear. First, the ruling confuses the method of analysis on viewpoint discrimination. Second, the ruling contradicts the Court's earlier decision of *R.A.V. v. City of St. Paul*.[7] In light of *Black*'s recognition of a harm, there may still be a way to limit cross burning without burdening speech protected under the First Amendment.[8] Thus, this Comment discusses the practical and precedential dilemma created by the *Black* holding and offers a constitutional answer to the evident problem of cross burning.

Part I of this Comment discusses the facts leading up to the *Black* decision. Part II outlines the analysis of speech under the First Amendment and explains the exceptions to constitutionally protected speech. Part II also illustrates the strong link between cross burning and the Ku Klux Klan. Finally, Part II outlines the Court's decision in *R.A.V.*, an

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1. Black v. Commonwealth, 553 S.E.2d 738, 740 (Va. 2001), *aff'd in part, vacated in part sub nom.* Virginia v. Black, 123 S. Ct. 1536 (2003).

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

3. O'Mara v. Commonwealth, 535 S.E.2d 175, 177 (Va. Ct. App. 2000), *rev'd*, Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), *aff'd in part, vacated in part sub nom.* Virginia v. Black, 123 S. Ct. 1536 (2003).

4. *Black*, 553 S.E.2d at 740, 746.

5. *See* Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551, 569-70 (2002).

6. *Black*, 123 S. Ct. at 1541. The Court invalidated the Virginia statute on other grounds. *Id.*

7. 505 U.S. 377 (1992).

8. *See* Smolla, *supra* note 5, at 570.

important prelude to the *Black* decision. Part III discusses the *Black* decision itself, including concurring and dissenting opinions. Part IV suggests that the Supreme Court's method of analysis in *Black* was incorrect, and that the Court's decision on viewpoint discrimination is inconsistent with precedent. Part IV then proposes a constitutional answer to the problem of cross burning. Finally, Part IV argues that proscribing cross burning under existing laws, rather than under specific cross-burning regulations, would accomplish the dual goals of punishing those who burn crosses to intimidate others, and preserving free speech under the First Amendment.

I. FACTS

Under Virginia's cross-burning statute, it was 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."[9] The statute also established that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ."[10] Richard Elliot, Jonathan O'Mara and Barry Elton Black were each convicted separately of violating the Virginia statute, and each challenged its constitutionality.[11]

A. Richard Elliot & Jonathan O'Mara

On May 2, 1998, two of the defendants, Elliot and O'Mara, attempted to burn a cross on the property of James Jubilee, Elliot's next-door neighbor.[12] The defendants' alleged motivation for burning the cross was revenge.[13] Before the cross burning, Jubilee questioned Elliot's mother about gun shots he heard fired from behind the Elliot home.[14] Elliot's mother informed the neighbor that shooting firearms was a hobby of her son's.[15] On the night of May 2, the defendants and another individual made a wooden cross and took it to Jubilee's property.[16] Elliot gave the cross to O'Mara, who set the cross on fire.[17] While taking the cross to Jubilee's home, Elliot called Jubilee a racial epithet.[18] Jubilee, an African-American, said he was "very nervous" when he saw the burned cross on his property the next morning.[19] The defendants were not affili-

9. VA. CODE ANN. § 18.2-423 (Michie 1996).
10. *Id.*
11. Virginia v. Black, 123 S. Ct. 1536, 1541 (2003).
12. *Black*, 123 S. Ct. at 1542-43.
13. *Id.* at 1543.
14. *Id.* The respondents, Elliot and O'Mara, saw this questioning as a complaint by Jubilee. *Id.*
15. *Id.*
16. O'Mara v. Commonwealth, 535 S.E.2d 175, 177 (Va. Ct. App. 2000).
17. *O'Mara*, 535 S.E.2d at 177.
18. Black v. Commonwealth, 553 S.E.2d 738, 740 (Va. 2001).
19. *Black*, 123 S. Ct. at 1542-43. Jubilee said he "didn't know what would be the next phase," and "a cross burned in your yard . . . tells you that it's just the first round." *Id.* at 1543.

ated with the Klan.[20] At trial, O'Mara pleaded guilty to attempted cross burning,[21] and Elliot was convicted by a jury of the same charge.[22]

B. Barry Elton Black

On August 22, 1998, the third defendant, Black, headed a Ku Klux Klan rally where a cross was burned as part of the ceremony.[23] The rally and the cross burning occurred on private property but within sight of a public highway.[24] The county sheriff observed the rally from the side of the road and reported that a few cars out of the forty or fifty that passed the site stopped and inquired about the activity on the property.[25] In addition, Rebecca Sechrist, who lived in the area, watched the rally from her in-laws' yard.[26] Sechrist testified that the content of Klan members' speeches during the rally made her "very . . . scared."[27] At the end of the rally, the Klan members burned a twenty-five to thirty foot cross, an event that Sechrist said "made her feel 'awful' and 'terrible.'"[28] When the sheriff saw the cross burning, he approached the rally attendees and asked those gathered "who was responsible for burning the cross."[29] Black claimed responsibility and was arrested by the sheriff.[30] At trial, Black was convicted of burning a cross with intent to intimidate under the Virginia statute.[31]

II. BACKGROUND

A. The First Amendment

The First Amendment[32] concept of free speech is based on the principle that all ideas, even the offensive and distasteful, should be heard.[33] "Speech," in the context of this freedom, is not limited to the spoken word.[34] Courts have established that the First Amendment also guaran-

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20. *Id.* at 1543.
21. *Id.* O'Mara also pleaded guilty to the charge of conspiracy to commit cross burning. *Id.* Elliot was acquitted on that charge. *Id.*
22. *Id.* Each respondent was sentenced to ninety days in jail and ordered to pay a $2,500 fine. *Id.* In O'Mara's case, the judge suspended forty-five days of the sentence and $1,000 of the fine. *Id.*
23. *Id.* at 1542.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* Black was sentenced to a fine of $2,500. *Id.*
32. U.S. CONST. amend. I ("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.").
33. *See, e.g.*, Virginia v. Black, 123 S. Ct. 1536, 1547 (2003) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Texas v. Johnson, 491 U.S. 397, 414 (1989)).
34. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citing *Johnson*, 491 U.S. at 406).

tees freedom of expression, which is conduct that contains an element of communication.[35] For example, wearing black armbands to protest the Vietnam war[36] and desecrating an American flag[37] are forms of expression. On the other hand, some conduct is considered non-expressive. In deciding whether an action is protected under the First Amendment, courts must determine whether "[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[38] Most agree that cross burning is considered speech because although setting a cross on fire is conduct, the purpose of burning a cross is to convey a message.[39]

Freedom of speech is not absolute.[40] There are several categories of speech that are considered unprotected by the First Amendment, such as obscenity,[41] "fighting words" [42] and "true threats."[43] The government may limit speech in these categories without violating the First Amendment.[44] These categories are considered constitutionally proscribable because they 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."[45] In other words, society is not harmed by the suppression of such speech. Fighting words are those that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[46] Fighting words are unprotected speech because they are not considered an essential part of the expression of ideas.[47] True threats are also unprotected.[48] A true threat is a communication that expresses an "intent to commit an act of unlawful violence."[49] For exam-

35. *See Johnson*, 491 U.S. at 406.
36. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).
37. Street v. New York, 394 U.S. 576, 594 (1969).
38. Spence v. Washington, 418 U.S. 405, 410-11 (1974).
39. *See Black*, 123 S. Ct. at 1548. There has been some controversy about whether burning a cross is speech or conduct for the purposes of the Virginia cross-burning statute. *See id.* at 1548 n.2. For example, Justice Thomas, in his dissent in *Black*, argues that the legislative intent behind the Virginia statute was to end intimidation, not to end the expression of a white supremacist ideology. *Id.* at 1566 (Thomas, J., dissenting). For this reason, he argues, the statute limits conduct, not expression, and therefore does not enjoy First Amendment protection. *Id.*
40. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (citing Schenck v. United States, 249 U.S. 47 (1919), Whitney v. California, 274 U.S. 357 (1927), Stromberg v. California, 283 U.S. 359 (1931), Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), De Jonge v. Oregon, 299 U.S. 353 (1937), Herndon v. Lowry, 301 U.S. 242 (1937), Cantwell v. Connecticut, 310 U.S. 296 (1940)).
41. Roth v. United States, 354 U.S. 476, 485 (1957).
42. *Chaplinsky*, 315 U.S. at 571-72.
43. *Black*, 123 S. Ct. at 1547 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).
44. *Chaplinsky*, 315 U.S. at 571-72.
45. *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky*, 315 U.S. at 572).
46. *Chaplinsky*, 315 U.S. at 572.
47. *Id.*
48. *Black*, 123 S. Ct. at 1547 (citing *Watts*, 394 U.S. at 708).
49. *Id.* at 1548.

ple, a threat directed at a person with intent to put that person in fear of bodily harm is a true threat.[50]

Although the government may limit or completely prohibit speech fitting into the categories discussed above, the government may not limit speech based on viewpoint.[51] In other words, regulating speech based on one content element—the fact that it contains obscenity—does not mean it can be limited based on other content elements.[52] Limitations on speech generally are required to be content-neutral to ensure that the government does not use its power to silence speech on disfavored topics.[53] Content discrimination "'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[54] Thus, content-based limitations are presumptively invalid.[55] And, although the government may limit obscenity as a category, it must limit obscenity in a viewpoint-neutral manner.[56] For example, the government may prohibit obscenity on television, but the government may not only prohibit obscenities aimed at the government, thereby favoring a pro-government viewpoint.[57]

There are two exceptions to the prohibition of viewpoint discrimination within a category of proscribable speech.[58] First, regulations may be based on viewpoint when the basis for the "discrimination consists entirely of the very reason the entire class of speech at issue is proscribable . . . ."[59] The idea behind this exception is that, if the reason for the subcategory limitation is the same as the reason for the category limitation, there is no danger of idea or viewpoint discrimination.[60] In other words, the reason for the categorical limitation has already been deemed neutral, so if a sub-category is limited for the same reason, it follows that the subcategory limitation is neutral as well.[61] For example, the government may limit obscenity that is "most patently offensive *in its prurience*"[62] because the reason the entire category of obscenity is proscribable is because it appeals to the prurient interest.[63] A second exception to the general prohibition of viewpoint discrimination exists within a category of proscribable speech when the regulation focuses only on "secondary

50. *Id.*
51. *See R.A.V.*, 505 U.S. at 391.
52. *Id.* at 386.
53. *Id.* at 382.
54. *Id.* at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).
55. *Id.* at 382.
56. *See id.* at 385-86.
57. *See id.* at 384.
58. *See id.* at 388-89.
59. *Id.* at 388.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Roth*, 354 U.S. at 487.

effects" of the speech rather than the content of the speech.[64] For example, the government may prohibit adult theaters in certain neighborhoods if the focus of the limitation is not on the content of the entertainment but on the effect such entertainment would have on the surrounding community.[65] Viewpoint discrimination within these exceptions is constitutional because such discrimination does not present the threat of governmental suppression of ideas.[66]

The distinction between content-neutral and content-based limitation matters because regulations of speech in each category must pass different levels of scrutiny.[67] Content-neutral limitations of speech in generally unprotected categories must satisfy only intermediate scrutiny.[68] In analyzing content-neutral limitations, courts consider whether the regulation is narrowly tailored to satisfy a legitimate and substantial government interest.[69] On the other hand, content-based limitations, even within categories of traditionally unprotected speech, must pass strict scrutiny.[70] Strict scrutiny requires that limitations on speech be narrowly tailored to achieving a compelling government interest.[71] Content-based limitations must pass a higher level of scrutiny because, in those instances, it is more likely that the government is trying to suppress ideas.[72] One criticism of the method of analysis described above is that less valued speech that fits under an exception ends up being treated the same as high-level speech.[73] For example, fighting words, which are considered valueless, are on "equal constitutional footing" with political speech, which has the greatest social value.[74]

If nothing else is clear in the tangle of First Amendment jurisprudence, the constitutionality of any speech regulation turns largely on the Court's interpretation of a regulation as content-based or content-neutral.

B. Cross Burning in the United States

Cross burning has a long, disturbing history in the United States, one which is historically and permanently linked with the Ku Klux Klan.[75] The Klan promotes white supremacy and uses a burning cross to

64. *R.A.V.*, 505 U.S. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).
65. *See Renton*, 475 U.S. at 48.
66. *See R.A.V.*, 505 U.S. at 388.
67. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).
68. *Turner Broad.*, 512 U.S. at 642.
69. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").
70. *Turner Broad.*, 512 U.S. at 642.
71. *R.A.V.*, 505 U.S at 400.
72. *Turner Broad.*, 512 U.S. at 642.
73. *See R.A.V.*, 505 U.S. at 403 (White, J., concurring).
74. *Id.*
75. *See, e.g., Black*, 123 S. Ct. at 1544-45.

carry out and symbolize that goal.[76] As one Klan publication noted, "We avow the distinction between races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things."[77] In fact, the association between cross burning and the Klan was solidified with the release of the movie *The Birth of a Nation* in 1915.[78] In the movie, Klan members burned a cross to celebrate the execution of former slaves.[79] The ritual of cross burning is "strongly associated with bigotry and violence."[80] Cross burnings are often followed by property damage, threatening phone calls, shootings, and bombings.[81] Historically, the Klan's victims have included blacks and other minorities, as well as whites who disagree with the Klan's message.[82] Whether directed toward a group or an individual, a burning cross "understandably instills in its victims well-grounded fear of physical violence."[83]

However, a burning cross is also a symbol of ideology and solidarity and has become the climax of Klan rallies and initiations.[84] The act is often accompanied by a hymn, such as "Amazing Grace" or "The Old Rugged Cross."[85] In 1960, a burning cross was even used by the Klan as propaganda.[86] In an attempt to recruit ten million members, the Klan circulated a poster depicting a burning cross.[87] Additionally, there have been cases where individuals who were not associated with the Klan used a burning cross to intimidate another individual.[88] This method of intimidation was chosen because of the association between a burning cross and violence.[89]

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76. *Id.*

77. *Id.* at 1545 (quoting WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 147-48 (1987)).

78. *Id.* at 1544-45. The movie, directed by D.W. Griffith, was based on the book: THOMAS DIXON, JR., THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (1905). *Black*, 123 S. Ct. at 1544-45. The book and movie portrayed Klan members as heroes. *Id.* at 1544. Around the time *The Birth of a Nation* was made, the second Klan formed. *Id.* at 1545. The first Klan, which began in 1866, started as a social club and then became a force against Reconstruction and against allowing freed blacks to be part of the political process. *Id.* at 1544. The Klan's violence included whippings, threats, and murder. *Id.* (citing to WADE, *supra* note 77, at 48-49). In response, Congress passed the Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985(3) (1988)), which was used to suppress the Klan's activities. *Black*, 123 S. Ct. at 1544. By 1877, the first Klan ceased to exist. *Id.*

79. *Black*, 123 S. Ct. at 1544; *see also* WADE, *supra* note 77, at 324-26.

80. Smolla, *supra* note 5, at 568.

81. *See Black*, 123 S. Ct. at 1564 n.1 (Thomas, J., dissenting).

82. *Id.* at 1544.

83. *Id.* at 1564 (Thomas, J., dissenting).

84. *Id.* at 1546.

85. Smolla, *supra* note 5, at 568.

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

87. *Id.*

88. *See id.*

89. *See id.* at 1546-47.

The history of cross burning supports the conclusion that a burning cross is a serious threat and the possibility of injury or death is real.[90] The great social harm of intimidation from cross burnings has prompted many states, including Virginia, to pass laws specifically prohibiting cross burning.[91] The first version of Virginia's cross-burning statute was prompted by incidents of cross burning after WWI.[92] The governor pledged that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan . . . ."[93]

Though Virginia's most recent cross-burning statute was at issue in *Black*,[94] the case was not the Court's first opportunity to consider the constitutionality of states' regulation of cross burning. A decade before the United States Supreme Court granted certiorari to consider Virginia's cross-burning statute, the Court invalidated a Minnesota statute that punished cross burning and other hate speech.[95] The opinion declaring the Minnesota statute unconstitutional was an important precursor to the *Black* decision.

C. R.A.V. v. City of St. Paul

The St. Paul, Minnesota, ordinance at issue in *R.A.V.* declared it unlawful to display a symbol one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[96] The defendant in *R.A.V.*, along with several other teenagers, allegedly burned a cross in a neighbor's yard.[97] The cross, made out of broken chair legs, was burned on the lawn of a black family living across the street from the defendant.[98] The defendant, charged under St. Paul's Bias-Motivated Crime Ordinance,[99] claimed the ordinance was overbroad, impermissibly content-based and, therefore, facially unconstitutional.[100] The trial court agreed and dismissed the charges.[101]

The Minnesota Supreme Court reversed.[102] The state supreme court found that, by limiting its reach to fighting words, the ordinance was not

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90. *Id.* at 1546.
91. *See, e.g.*, Mark S. Enslin, *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, 193-98 (2002).
92. *Black*, 123 S. Ct. at 1545.
93. *Id.* (quoting DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 333 (1981)).
94. *Id.* at 1541.
95. *R.A.V.*, 505 U.S. at 391.
96. *Id.* at 380 (quoting ST. PAUL, MINN. LEGIS. CODE § 290.02 (1990)).
97. *Id.* at 379.
98. *Id.*
99. ST. PAUL, MINN. LEGIS. CODE § 290.02 (1990).
100. *R.A.V.*, 505 U.S. at 380.
101. *Id.*
102. *In re* Welfare of R.A.V., 464 N.W.2d 507, 511 (Minn. 1991).

overbroad.[103] In other words, the expression covered by the ordinance was outside of First Amendment protection.[104] Further, the Minnesota Supreme Court said the ordinance served a compelling state interest in protecting society from threats and, therefore, was not impermissibly content-based.[105]

1. The Majority Opinion

The United States Supreme Court granted certiorari to R.A.V. and reversed the Minnesota Supreme Court decision.[106] The United States Supreme Court found the ordinance impermissibly content-based and, therefore, facially unconstitutional.[107] The Court recognized that it was bound by the state supreme court's interpretation of the ordinance, which limited the ordinance's reach to fighting words,[108] a constitutionally unprotected category of speech.[109] However, the Court reasoned that the ordinance prohibited fighting words based on their content, banning only those fighting words that provoked violence on the basis of race, color, creed, etc.[110] In support of this conclusion, the Court noted that the ordinance did not prohibit bias-motivated messages directed at other groups, such as homosexuals.[111] In short, the Court determined that the First Amendment did not permit the government to "impose special prohibitions on those speakers who express views on disfavored subjects."[112]

Further, the Court found that the ordinance not only discriminated based on content, but discriminated based on viewpoint as well.[113] The Court explained that the ordinance would allow fighting words that did not invoke race to be used by *proponents* of racial equality, but perhaps not by *opponents* of racial equality.[114]

Finally, the Court found that the St. Paul ordinance did not fit under any exception allowing viewpoint discrimination within an area of proscribable speech.[115] The *R.A.V.* Court articulated two exceptions to the general rule that regulation cannot discriminate based on viewpoint, even within otherwise proscribable categories of speech.[116] Under the Court's

103. *R.A.V.*, 464 N.W.2d at 511.
104. *Id.*
105. *Id.*
106. *R.A.V.*, 505 U.S. at 396.
107. *Id.* at 381.
108. *Id.*
109. *Id.* at 386.
110. *Id.* at 391.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *See id.* at 393.
116. *Id.* at 388-89.

exceptions, what would normally be considered viewpoint discrimination becomes viewpoint neutral.[117]

The first instance is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable . . . ."[118] According to the Court, the St. Paul ordinance did not fit under this exception because St. Paul did not prohibit only the most threatening fighting words.[119] Rather, the St. Paul ordinance prohibited fighting words based on their message.[120] The second instance is when the subclass of proscribable speech is regulated based on its "secondary effects."[121] The St. Paul ordinance did not fit under this exception because the prohibition of fighting words was to protect victimization of vulnerable people.[122] Listeners' reactions are not "secondary effects."[123] In *R.A.V.*, the ordinance was aimed at primary effects.[124]

Lastly, the Court briefly described an additional situation where proscribable speech may be limited based on content—when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[125] The Minnesota statute did not fit under this exception, according to the Court, because there was "ample basis" for a suspicion of idea suppression.[126]

After finding the regulation was content-based, the Court next, under the rubric of strict scrutiny, rejected St. Paul's contention that the ordinance's alleged content discrimination was justified because the ordinance served a compelling state interest.[127] The Court declined to accept St. Paul's explanation, finding instead that a compelling interest is only valid where the ordinance is *necessary* to serve the compelling state interest.[128] The Court found that, although ensuring the basic human rights of people subject to discrimination was a compelling interest, the ordinance was not necessary to serve the interest.[129] More specifically, the Court noted that content-neutral alternatives existed, making content discrimination not "reasonably necessary" to serve St. Paul's compelling interest.[130]

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117. *Id.* at 388.
118. *Id.*
119. *Id.* at 393.
120. *Id.* at 393-94.
121. *Id.* at 389.
122. *Id.* at 394.
123. *Id.* (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).
124. *Id.* at 394 n.7.
125. *Id.* at 390.
126. *Id.* at 395.
127. *Id.* at 395-96.
128. *Id.* at 395 (citing Burson v. Freeman, 504 U.S. 191, 199 (1992) (plurality opinion)).
129. *Id.* 395-96.
130. *Id.*

2. The Concurring Opinion

Justice White, in his concurring opinion, agreed with the outcome of the majority—that the ordinance was unconstitutional—but under different reasoning.[131] Justice White criticized the majority for adopting an "untried theory," and for finding the ordinance unconstitutional on "a ground that requires serious departures from the teaching of prior cases . . . ."[132] In short, Justice White believed the majority unnecessarily rewrote First Amendment law.[133] Justice White noted that the *R.A.V.* decision abandoned the traditional categorical approach to the First Amendment, putting in its place a great inconsistency.[134] For example, Justice White explained that fighting words are categorically proscribable, but under the majority opinion, some fighting words deserve constitutional protection.[135]

Justice White argued instead that the Minnesota ordinance was facially unconstitutional under the traditional doctrine of overbreadth.[136] Justice White explained that the statute was overbroad because it limited protected speech in addition to unprotected speech.[137] Justice White further argued that the Court ignored strict scrutiny analysis as if it were irrelevant.[138] Had the Court considered strict scrutiny analysis, Justice White explained, it would have found a compelling state interest in restricting hate speech.[139]

With these issues in mind, the Supreme Court granted certiorari to determine whether Virginia's cross-burning statute was constitutional.

III. *VIRGINIA V. BLACK*

A. Procedural History

The two defendants who burned a cross on the lawn of a neighbor—O'Mara and Elliot— unsuccessfully challenged the constitutionality of the Virginia cross-burning statute at trial.[140] The Virginia Court of Appeals affirmed O'Mara's and Elliot's convictions under Virginia's cross-burning statute and rejected the defendants' contention that the statute was an impermissible infringement on expression and "plainly unconsti-

131. *Id.* at 411 (White, J., concurring).

132. *Id.* at 398 (White, J., concurring). In fact, Justice White noted that the ground on which the Minnesota ordinance was found unconstitutional by the majority was not even presented to the Court, nor was it briefed by the parties. *Id.*

133. *Id.* at 411 (White, J., concurring).

134. *Id.* at 401 (White, J., concurring).

135. *Id.*

136. *Id.* at 397 (White, J., concurring).

137. *Id.*

138. *Id.* at 403 (White, J., concurring).

139. *Id.* at 407 (White, J., concurring). In fact, as Justice White pointed out, the majority did concede that there was compelling interest in ensuring human rights of people who have been discriminated against. *Id.* at 403 (White, J., concurring).

140. O'Mara v. Commonwealth, 535 S.E.2d 175, 177 (Va. Ct. App. 2000).

tutional."[141] The court interpreted the statute as proscribing true threats and fighting words, categories of speech not protected by the First Amendment.[142] The Virginia Court of Appeals distinguished the Virginia statute from the ordinance in *R.A.V.*[143] The court said that although the *R.A.V.* ordinance proscribed fighting words, such proscribable areas of speech could not be made "the vehicles for content discrimination . . . ."[144] Therefore, the court explained, although the cross-burning statute "unavoidably implicates content," it did not do so "'solely on the basis of the subjects the speech addresses . . . .'"[145] The Virginia Court of Appeals also determined that the statute was neither overbroad nor underinclusive, as the defendants had contended.[146] The other defendant, Black, who burned a cross at a Ku Klux Klan rally, was convicted under the Virginia cross-burning statute.[147] The Virginia Court of Appeals affirmed Black's conviction.[148]

The Virginia Supreme Court consolidated the cases of O'Mara and Elliot with the Black case and found the Virginia statute facially unconstitutional.[149] The court agreed with the defendants' contention that the statute prohibited speech based on content.[150] The court found that the Virginia statute was indistinguishable from the statute in *R.A.V.*, which the United States Supreme Court previously had found unconstitutional.[151] Although the Virginia statute did not mention content in the same way as the *R.A.V.* statute, the Virginia statute specifically mentioned cross burning.[152] The fact that the statute regulated cross burning, and not other forms of intimidation, was evidence that the Commonwealth's purpose for enacting the statute was to limit expression: "[T]he Commonwealth seeks to proscribe expressive conduct that is intimidating in nature, but selectively chooses only cross burning because of its distinctive message."[153]

In keeping with *R.A.V.*, the Virginia Supreme Court next considered whether the Virginia statute regulated speech and expression based on

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141. *O'Mara*, 535 S.E.2d at 177.
142. *Id.* at 179.
143. *Id.* at 179-80.
144. *Id.* at 180.
145. *Id.* at 179-80 (quoting R.A.V. v. Commonwealth, 505 U.S. 377, 381 (1992)).
146. *Id.* at 180-81.
147. Black v. Commonwealth, 553 S.E.2d 738, 741 (Va. 2001).
148. *Black*, 553 S.E.2d at 741.
149. *Id.* at 740.
150. *Id.* at 744.
151. *Id.* at 742-43.
152. *Compare* VA. CODE ANN. § 18.2-423 (Michie 1996) (where it was 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"), *with* ST. PAUL, MINN. LEGIS. CODE § 290.02 (1990) (where, under this "Bias-Motivated Crime Ordinance," it was unlawful to display a symbol one knew or had reason to know caused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").
153. *Black*, 553 S.E.2d at 743-44.

"secondary effects."[154] When a statue regulates the secondary effects of constitutionally proscribable speech, the statute is considered content-neutral.[155] However, the court found that because the Virginia statute focused on expressive conduct—cross burning—and included a provision allowing an inference of intent to intimidate, the statute did not regulate secondary effects and, therefore, was impermissibly content-based.[156]

The Virginia Supreme Court additionally found that the statute was overbroad because of the increased probability of prosecution due to the evidence provision, which made the act of burning a cross prima facie evidence of intent to intimidate.[157]

The United States Supreme Court granted certiorari to review the consolidated cases of Richard Elliot, Jonathan O'Mara, and Barry Elton Black.[158] The Court focused on two issues: (1) whether the Virginia cross-burning statute was impermissibly content-based; and (2) whether the prima facie evidence provision invalidated the statute.[159]

B. The Court's Holding

The United States Supreme Court disagreed, in part, with Virginia Supreme Court, finding that the Virginia statute was viewpoint neutral.[160] The Supreme Court agreed, however, that the prima facie evidence provision rendered the statute unconstitutional.[161] The analysis section of this Comment focuses on the concept of viewpoint discrimination and the Court's analysis of that issue. However, the Court's finding as to the prima facie evidence provision was essential to the ruling and is therefore discussed briefly at the end of this section.[162] Justice O'Connor wrote for the Court, joined by Chief Justice Rehnquist, Justice Stevens, Justice Scalia, and Justice Breyer on the issue of viewpoint discrimination.[163]

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154. *Id.* at 745.
155. *R.A.V.*, 505 U.S. at 389 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).
156. *Black*, 553 S.E.2d at 745.
157. *Id.* at 746.
158. Virginia v. Black, 123 S. Ct. 1536, 1543 (2003).
159. *See Black*, 123 S. Ct. at 1541.
160. *See id.* at 1549.
161. *Id.* at 1541.
162. *See infra* Part III.B.2.
163. *Black*, 123 S. Ct. at 1541. Justice Scalia did not join the other four Justices of the majority on the issue of the prima facie evidence provision, making the Court's opinion regarding that provision a plurality. *Id.* at 1552 (Scalia, J. concurring in part and dissenting in part).

1. The Majority Opinion Regarding Viewpoint Discrimination

The Court determined that Virginia's ban on cross burning with intent to intimidate did not present a First Amendment problem.[164] There were essentially three steps to the Court's analysis of this issue.[165]

First, the Court recognized that cross burning was a type of "true threat."[166] True threats constitute a category of constitutionally unprotected speech, meaning the government may limit or ban threats of violence.[167] The Court defined true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[168] The Court reasoned that intimidation is a type of true threat and cross burning fits within the meaning of intimidation.[169] In other words, the Court placed cross burning with intent to intimidate within a category of constitutionally proscribable speech.[170]

Second, the Court decided that Virginia's cross-burning statute was viewpoint neutral because the statute prohibited all cross burnings with intent to intimidate, regardless of the actor's message.[171] For example, the Virginia statute did not specifically ban cross burnings motivated by race or religion.[172] The Court distinguished the Virginia statute from the statute in *R.A.V.* on this characteristic.[173] The statute in *R.A.V.* banned symbolic conduct, such as cross burning, when done with knowledge that the conduct would cause anger, alarm, or resentment "on the basis of race, color, creed, religion or gender . . . ."[174] The Court reasoned that the *R.A.V.* statute discriminated on the basis of content because it regulated expression only on certain disfavored topics, but did not, for example, prohibit symbolic conduct that could cause anger based on political affiliation or sexual orientation.[175] Conversely, the Virginia statute prohibited all cross burnings done with intent to intimidate and did not permit the state to selectively regulate cross burnings only when the speech expressed disfavored views.[176]

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164. *Id.* at 1549.
165. *See id.* at 1548-49.
166. *Id.* at 1548.
167. *See id.*
168. *Id.*
169. *Id.*
170. *See id.*
171. *Id.* at 1549.
172. *See* VA. CODE ANN. § 18.2-423 (Michie 1996) (It was 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.").
173. *See Black*, 123 S. Ct. at 1548-49.
174. *R.A.V.*, 505 U.S. at 308 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).
175. *Black*, 123 S. Ct. at 1548.
176. *Id.* at 1549.

The Court's third step focused on the *R.A.V.* exceptions.[177] The Court analyzed the statute under the exceptions to the general rule that content-based regulation within categories of proscribable speech is prohibited.[178] The relevant exception, the Court determined, was the so-called "virulence exception."[179] The virulence exception, established in *R.A.V.*, applies where the underlying reason for the regulation is the reason why the entire category of speech is proscribable.[180] The Court explained that cross burning is a particularly virulent form of intimidation—a form of intimidation "most likely to inspire fear of bodily harm"—and, therefore, fit under the exception.[181] In other words, based on the history of cross burning, when a cross is burned with intent to intimidate, the act is one of the worst types of intimidation.[182] Therefore, the Court said, Virginia may regulate this "subset of intimidating messages" just as the state may regulate the most prurient material in the category of obscenity.[183]

The United States Supreme Court disagreed with the Virginia Supreme Court's viewpoint analysis but agreed with the Virginia Supreme Court that the statute was unconstitutional.[184] The United States Supreme Court invalidated the statute on the prima facie evidence provision.[185]

2. The Plurality Opinion[186] Regarding the Prima Facie Evidence Provision

After noting that the Virginia Supreme Court had not yet ruled on the meaning of the prima facie evidence provision in the cross-burning statute,[187] the Court analyzed the provision as interpreted by the state's jury instruction.[188] The Court found the provision unconstitutional because it "strips away the very reason why a State may ban cross burning

177. *See id.* at 1549-50.
178. *Id.*
179. *Id.* at 1549-50.
180. *Id.* at 1549 (quoting *R.A.V.*, 505 U.S. at 388).
181. *Id.* at 1549-50.
182. *See id.*
183. *Id.* at 1549.
184. *Id.* at 1541, 1549.
185. *Id.* at 1541.
186. *See* discussion *supra* note 163 and accompanying text.
187. VA. CODE ANN. § 18.2-423 (Michie 1996) (stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate").
188. *Black*, 123 S. Ct. at 1550. The jury instruction was used only at defendant Black's trial. *Id.* In Elliot and O'Mara's case, the judge instructed the jury that the commonwealth must prove: (1) intent to commit cross burning; (2) a direct act toward the commission of the crime; and (3) that the intent of the defendant was to intimidate a person or group of persons. *Id.* at 1543. The judge did not inform the jury about the prima facie evidence part of the statute. *Id.* In Black's case, the judge did instruct the jury on the definition of intent to intimidate and the prima facie evidence provision. *Id.* at 1542. The jury was instructed that intent to intimidate means "the motivation to intentionally put a person or group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.* Further, the jury was told that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Id.*

with the intent to intimidate."[189] The Court went on to explain that the provision allowed a jury to convict in every case where a defendant exercised his right to not put on a defense.[190] Moreover, the Court reasoned that the provision increased the likelihood that intent to intimidate will be found within the facts of a case.[191] The Court stated that the provision chilled constitutionally protected speech because it was more likely that a person engaging in political speech would be prosecuted and convicted under the statute: "The prima facie provision . . . does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim."[192] Based on the fear that jury decisions would be skewed toward convictions, the Court found the provision unconstitutional.[193] The Court ended its opinion with a disclaimer, recognizing that the Virginia Supreme Court may interpret the provision differently and that the possibility exists that the provision is severable.[194]

C. Concurring and Dissenting Opinions

1. Justice Scalia's Opinion

Justice Scalia agreed with the plurality that a state may ban cross burning with intent to intimidate without infringing on the First Amendment.[195] He disagreed, however, with the facial invalidation of the Virginia statute based on the evidence provision.[196] Justice Scalia argued that the Court was not justified in finding the Virginia statute overbroad[197] or in basing its decision on a "constitutionally troubling" jury instruction.[198]

Justice Scalia explained that the prima facie evidence provision, a mere inference, did not give the prosecution so large an advantage to render the statute *substantially* overbroad.[199] Based on the orthodox meaning of prima facie evidence, which was adopted by Virginia, prima facie evidence is evidence that may establish a fact only if it goes unre-

189. *Id.* at 1550.
190. *Id.*
191. *Id.*
192. *Id.* at 1551.
193. *Id.* The majority agreed with Justice Souter's opinion and stated "that the prima facie evidence provision can 'skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.'" *Id.* (quoting *id.* at 1561 (Souter, J., concurring in part and dissenting in part)).
194. *Id.* at 1552.
195. *Id.* (Scalia, J., concurring in part and dissenting in part).
196. *Id.*
197. *Id.* at 1554 (Scalia, J., concurring in part and dissenting in part).
198. *Id.* at 1556-58 (Scalia, J., concurring in part and dissenting in part).
199. *Id.* at 1555 (Scalia, J., concurring in part and dissenting in part). When a statute regulates expression, it is not overbroad unless the overbreadth is "'not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 1556 (Scalia, J., concurring in part and dissenting in part) (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

butted.[200] The Virginia Supreme Court found that the evidence provision insulated "'the Commonwealth from a motion to strike the evidence at the end of its case-in-chief,'" and nothing more.[201] Justice Scalia argued that those defendants who choose not to put on a defense are in the minority.[202] In other words, the *possibility* of conviction did not render the statute overbroad and, therefore, did not warrant facial invalidation.[203] Justice Scalia also criticized the majority for invalidating an ambiguous statute based on a constitutionally questionable jury instruction.[204] The Court, he said, should have followed precedent and given a saving construction of the statute.[205]

2. Justice Souter's Opinion

Justice Souter agreed with the Court's discussion of content-based discrimination in the context of the Virginia statute.[206] However, Justice Souter argued that the statute did not fit within any of the exceptions to *R.A.V.*'s "general condemnation of limited content-based proscription within a broader category of expression proscribable generally."[207] In order to prove this assertion, Justice Souter analyzed the statute under the most probable of the *R.A.V.* exceptions—the virulence exception—which provided that content discrimination is allowable when the basis for the discrimination is the reason the entire category of speech is proscribable.[208] In *R.A.V.*, the Court offered examples of the virulence exception—threats against the president and unusually offensive obscenity.[209] These two examples are situations in which a subcategory of proscribable speech may be regulated.[210] Justice Souter distinguished these examples from cross burning, arguing that unlike cross burning, the examples given in *R.A.V.* did not single out a particular viewpoint.[211] Because the Virginia statute did not fit under any exception, Justice Souter explained, it could survive only if it served a compelling state interest, a strict test the statute failed.[212]

Justice Souter agreed with the Court that the prima facie evidence provision would increase the likelihood of conviction and was therefore unconstitutional: "To the extent the prima facie evidence provision

200. *Id.* at 1553 (Scalia, J., concurring in part and dissenting in part).
201. *Id.* (quoting *Black*, 553 S.E.2d at 746).
202. *Id.* at 1555-56 (Scalia, J., concurring in part and dissenting in part).
203. *Id.* at 1554 (Scalia, J., concurring in part and dissenting in part).
204. *Id.* at 1557-58 (Scalia, J., concurring in part and dissenting in part).
205. *Id.*
206. *Id.* at 1559 (Souter, J., concurring in part and dissenting in part).
207. *Id.*
208. *Id.* at 1559-60 (Souter, J., concurring in part and dissenting in part).
209. *R.A.V.*, 505 U.S. at 388.
210. *See Black*, 123 S. Ct. at 1560-61(Souter, J., concurring in part and dissenting in part).
211. *Id.* at 1560 (Souter, J., concurring in part and dissenting in part).
212. *Id.* at 1562 (Souter, J., concurring in part and dissenting in part).

skews prosecutions, then, it skews the statute toward suppressing ideas."[213]

3. Justice Thomas's Opinion

Justice Thomas dissented, arguing that cross burning, for the purposes of the Virginia statute, should have been classified as conduct, not expression, and, therefore, should not have been considered under the First Amendment.[214] Justice Thomas supported his argument with a discussion of the progression of the meaning of cross burning in the United States: "Because the modern Klan expanded the list of its enemies . . . to include Catholics, Jews, most immigrants, and labor unions, . . . a burning cross is now widely viewed as a signal of impending terror and lawlessness."[215]

However, Justice Thomas's primary disagreement with the plurality was that, in his view, the prima facie evidence provision did not present a constitutional problem.[216] The evidence provision was valid, Justice Thomas explained, because an inference is rebuttable, and the jury instructions still required the jury to establish each element of the statute.[217] Moreover, he wrote, the risk of chilled expression due to an inference had not been of much concern to the Court in the past.[218]

IV. ANALYSIS

In the past decade, the Supreme Court has issued two major decisions on the effect of content discrimination within a category of constitutionally unprotected speech.[219] In *R.A.V.*, the Court found that the government could not limit unprotected speech based on viewpoint unless the limitation fit within an exception.[220] A decade later, in *Black*, the Court applied the method of analysis set out in *R.A.V.* and found that banning cross burning with intent to intimidate does not constitute viewpoint discrimination.[221]

When the Court granted certiorari in *Black*, critics saw an opportunity for the Court to clarify its holding in *R.A.V.*[222] Instead, the *Black* Court compounded the confusion by over analyzing the Virginia stat-

213. *Id.*
214. *Id.* at 1563 (Thomas, J., dissenting).
215. *Id.* at 1564 (Thomas, J., dissenting).
216. *Id.* at 1566 (Thomas, J., dissenting).
217. *Id.* at 1568 (Thomas, J., dissenting).
218. *Id.* (citing Hill v. Colorado, 530 U.S. 703, 708 (2000) (upholding restriction on protests near abortion clinics since the state had a legitimate interest in protecting those attending such facilities "from unwanted advice" and "unwanted communication").
219. Virginia v. Black, 123 S. Ct. 1536 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
220. *See R.A.V.*, 505 U.S. at 387-91.
221. *See Black*, 123 S. Ct. at 1541.
222. Enslin, *supra* note 91, at 199.

ute.[223] Further, the *Black* Court erred in distinguishing the Virginia statute from the statute in *R.A.V.*[224] Similar to the *R.A.V.* statute, the Virginia cross-burning statute constituted viewpoint discrimination which made it unconstitutional.[225] Thus, the *Black* Court's opinion, while engaging to proponents of cross-burning regulation, only confounded First Amendment analysis and established precedent that severely undermines free speech.

A. A Confusing Method of Analysis

The primary shortcoming of the *Black* decision was the Court's analysis of viewpoint discrimination based on the Virginia statute. The Court concluded that the Virginia statute did not discriminate based on viewpoint and supported its decision by following the analysis previously set out in *R.A.V.*[226] However, the Court did not follow *R.A.V.* as closely as it could have. The Court in *Black* meant to clarify *R.A.V.*,[227] but instead weakened the prior decision by taking an unnecessary analytical step.

First, the Court suggested that cross burning with intent to intimidate was a type of true threat.[228] Second, the Court decided that the statute was viewpoint neutral—that it did not "single out for opprobrium only that speech directed toward" a disfavored topic.[229] The Court's finding that the statute did not discriminate based on viewpoint should have ended the analysis under *R.A.V.* If the regulation did not discriminate on viewpoint, and cross burning is categorized as low value speech, then Virginia's statute banning cross burning was constitutional. As the Court established in *R.A.V.*, if a regulation within a proscribable area of speech, such as true threats, does not discriminate based on viewpoint, the regulation does not present a First Amendment problem.[230]

However, the Court went on to analyze the Virginia statute under *R.A.V.*'s exceptions to the general rule that the government cannot regulate proscribable speech based on viewpoint.[231] Because the Court had already decided that the statute did not limit speech based on viewpoint, the discussion of the exceptions was unnecessary and superfluous.[232] Under the Court's own reasoning in *R.A.V.*, the exceptions are only relevant when a statute *does* discriminate based on viewpoint.[233] Thus, dis-

223. *See Black*, 123 S. Ct. at 1548-52.
224. *See id.* at 1548-50.
225. *See* Smolla, *supra* note 5, at 569.
226. *See Black*, 123 S. Ct. at 1548-49.
227. *See id.*
228. *Id.* at 1548.
229. *Id.* at 1549.
230. *R.A.V.*, 505 U.S. at 383-84.
231. *See Black*, 123 S. Ct. at 1549-50.
232. *See id.* at 1549.
233. *See R.A.V.*, 505 U.S. at 387-89.

cussion of the exceptions after already concluding that the Virginia statute was not viewpoint discriminatory only adds confusion to an already unsettled area of the law. In fact, by applying the *R.A.V.* exceptions unnecessarily, the *Black* Court did little to remedy Justice White's prediction that the *R.A.V.* Court's approach to the First Amendment would only result in confusion, particularly in the lower courts.[234] After *Black*, it appears that the *R.A.V.* decision not only confused lower courts and commentators, but perhaps even at least six justices of the Supreme Court as well.

After *R.A.V.*, several states invalidated their cross-burning statutes.[235] The Maryland Court of Appeals declared its cross-burning statute unconstitutional.[236] The Maryland court reasoned that because the statute prohibited cross burning as opposed to other types of burnings, it discriminated based on content.[237] The South Carolina Supreme Court reversed a previous decision and determined that the state's cross-burning statute violated the First Amendment.[238] However, as Justice White had predicted, not all states agreed on what the *R.A.V.* decision meant. Florida, for example, upheld its cross-burning statute, explaining that the statute was content neutral and prohibited only "threats of violence."[239]

The Court further confused the issue of what is important in First Amendment analysis in its *Black* decision. The lack of a clear method of analysis threatens the First Amendment by increasing the likelihood that courts will make inconsistent decisions.[240] Under *R.A.V.*, the Court provided two ways for states to regulate cross burning. First, states may regulate cross burning as a true threat, provided the regulation is not viewpoint discriminatory.[241] Second, even if a cross-burning regulation appears to be viewpoint-based, regulations still may be constitutional if: (1) the reason for the viewpoint discrimination is the same as the reason the entire category is procribable; or (2) the regulation focuses on the secondary effects of the speech.[242] While proponents of cross-burning regulation may laud the *Black* Court's conclusion, the decision is unlikely to lead to positive results in future cases because First Amendment analysis is now even more unclear than after *R.A.V.* It is important to note that the outcome of *Black* would have been the same even if the Court had followed its *R.A.V.* analysis more closely. The Court determined that the statute did not present a First Amendment problem before

234. *Id.* at 415 (White, J., concurring).
235. Enslin, *supra* note 91, at 193-94 (noting that since the *R.A.V.* decision, Virginia, Maryland, and South Carolina have struck down their cross-burning statutes).
236. State v. Sheldon, 629 A.2d 753, 763 (Md. 1993).
237. *Sheldon*, 629 A.2d at 759-60.
238. State v. Ramsey, 430 S.E.2d 511, 514-16 (S.C. 1993).
239. State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995).
240. *See* Enslin, *supra* note 91, at 194-95.
241. *Black*, 123 S. Ct. at 1547-48.
242. These exceptions were set out in *R.A.V. See* discussion *supra* notes 58-66.

taking the extra analytical step.[243] That step was, therefore, an unnecessary and confusing alternative basis for finding Virginia's statute constitutional. However, beyond the mere results, the *Black* Court's confusion of analysis undermines the First Amendment and will likely have a negative effect on future cases that, unlike *Black*, lack an attractive outcome to a difficult constitutional problem.

B. The Statutes Are Indistinguishable

In addition to confusing First Amendment analysis, the *Black* Court also failed to recognize that the Virginia statute, like the ordinance in *R.A.V.*, was implicitly viewpoint discriminatory.[244] Like the *R.A.V.* ordinance, the Court should have found the Virginia statute to discriminate on viewpoint because cross-burning regulations single out the white supremacist viewpoint.[245] In short, the regulations at issue in *R.A.V.* and *Black* are indistinguishable.

States have a legitimate interest in banning cross burning because burning a cross is a "symbol of hate."[246] Few would object, it seems, to making cross burning illegal. However, such laws raise constitutional problems.[247] Most importantly, such laws are likely to violate the First Amendment because cross burning almost always carries a message and, therefore, is a form of expression—symbolic speech.[248] The fact that cross burning is carried out to promote white supremacy and embodies a message of hate does not give the government an unfettered right to ban the burning of a cross.[249] As Rodney Smolla, law professor and Bill of Rights expert, said of cross-burning bans, "the ends are admirable but the means unconstitutional."[250]

The Court should have found the Virginia statute unconstitutional because it singled out the white supremacist viewpoint.[251] In *R.A.V.* the St. Paul ordinance was invalidated because it singled out particular viewpoints.[252] Conversely, in *Black*, the Court found that, unlike the *R.A.V.* ordinance, which singled out symbols that aroused fear based on "race, color, creed, religion or gender," the Virginia statute did not discriminate among viewpoints because it did not regulate cross burnings done only for religious or racial reasons but banned all cross burnings

243. *Black*, 123 S. Ct. at 1549-51.
244. *See id.* at 1541.
245. *See* Smolla, *supra* note 5, at 566.
246. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S.753, 771 (1995) (Thomas, J., concurring).
247. *See* Smolla, *supra* note 5, at 566.
248. *See id.*
249. *See id.*
250. *Id.* at 570.
251. Although cross burning is used to threaten groups for reasons other than race, history suggests that the major message associated with such conduct is one of white supremacy. *See, e.g.*, *Black*, 123 S. Ct. at 1544.
252. *R.A.V.*, 505 U.S. at 381.

done with intent to intimidate.[253] The Court supported its view that banning cross burning does not favor a viewpoint reasoning that, "as a factual matter," cross burners do not direct their conduct only toward racial or religious minorities.[254]

The Court failed to recognize the inherent link between cross burning and promotion of white supremacy. Banning cross burning is comparable to banning symbols of white supremacy. The Court's own description of the history of cross burning in the United States suggests this very fact.[255] Although the Virginia statute did not specifically distinguish between crosses burned for racial reasons and crosses burned for religious reasons in its text, the statute did not have to do so to be unconstitutional.[256] The Virginia statute, like the *R.A.V.* ordinance, was thinly veiled viewpoint discrimination and, therefore, was a violation of the First Amendment.[257]

C. Solutions

In the United States, a burning cross has been a symbol of white supremacy and an expression of hate for most of the last century.[258] Because of this undeniable history, cross-burning laws admittedly serve a noble purpose—to protect individuals and groups from a very real fear of violence.[259] However, banning cross burning presents a dilemma. On one hand, society is well served by punishing those who place burning crosses on the lawns of their neighbors with messages of hate and intimidation. On the other hand, society is well served by the preservation of freedom of expression. The question of whether to allow the government to punish cross burning is impossible to answer without harming society in some way. In the end, although regulation seems right, the expense is too great.

Two solutions have been offered to punish cross burning without infringing on freedom of expression. In fact, both solutions avoid the First Amendment issue altogether. The first, offered by scholars and the Court, is to punish cross burning through existing laws.[260] The second, offered by Justice Thomas, is to characterize cross burning as conduct

253. *Black*, 123 S. Ct. at 1548-49 (quoting ST. PAUL, MINN. LEGIS. CODE § 290.02 (1990)).
254. *Id.* at 1549.
255. *See id.* at 1544-46.
256. *See id.* at 1559 (Souter, J., concurring in part and dissenting in part); *see also* Smolla, *supra* note 5, at 566 ("In my estimation *no* cross-burning law . . . will ever escape the viewpoint-discrimination problem . . . simply and completely because it *is* a cross-burning law.").
257. *See Black*, 123 S. Ct. at 1562 (Souter, J., concurring in part and dissenting in part).
258. *See id.* at 1544-46; *see also supra* Part II.B.
259. *See, e.g.*, Smolla, *supra* note 5, at 568 (stating that "any American with even a passing sense of our national history knows that cross burning is a ritual strongly associated with bigotry and violence").
260. *See R.A.V.*, 505 U.S. at 379-80.

rather than speech.[261] Although both solutions seem to preserve freedom of expression, as we will see, the first is more workable than the second.

1. Use Existing Laws

One way to protect citizens from the terrible fear cross burning instills, while preserving freedom of speech, is to abolish all laws specifically banning cross burning and punish those who maliciously burn crosses under existing laws.[262] For example, a law against burning objects on the property of another with intent to intimidate would have the same legal effect as a specific cross-burning statute, without the First Amendment problem.[263] Such a law would catch within its net all those who burn crosses on the lawns of their neighbors as a threat. Likewise, it would leave well alone those who burn crosses at rallies on private property.

Law professor Rodney Smolla suggests combating cross burning with laws such as "breach of peace," "communication of threats," or "incitement to lawless action."[264] Moreover, it seems the Supreme Court, at least in *R.A.V.*, supports the idea of punishing cross burning under existing laws.[265] The *R.A.V.* Court explicitly noted that the individual who burned a cross in that case might have been punished under "any of a number of laws . . . ."[266] The Court specifically mentioned laws against threats, arson, and property damage.[267]

The Virginia Supreme Court also recognized other laws under which the defendants could have been punished: "Neutrally expressed statutes prohibiting vandalism, assault, and trespass may have vitality for the prosecution of particularly offensive conduct."[268] Additionally, Justice Souter argued, in *Black*, that a statute banning intimidation would satisfy the same goal without infringing on the First Amendment rights of the speaker.[269]

The downfall of this simple solution is that alternative laws may not carry the weight of specific cross-burning laws, and arguably, cross burning victims deserve to have laws that punish hate speech specifically. However, the existing laws are not necessarily weaker. For example, under the Virginia statute, the three defendants were sentenced to ninety

261. *Black*, 123 S. Ct. at 1562 (Thomas, J., dissenting).
262. *See R.A.V.*, 505 U.S. at 379-80.
263. *See Black*, 123 S. Ct. at 1562 (Souter, J., concurring in part and dissenting in part) (suggesting that "a content-neutral statute banning intimidation would achieve the same object without singling out particular content").
264. Smolla, *supra* note 5, at 570.
265. *See R.A.V.*, 505 U.S. at 379-80.
266. *Id.*
267. *Id.* at 381 n.1.
268. Black v. Commonwealth, 553 S.E.2d 738, 746 (Va. 2001).
269. *Black*, 123 S. Ct. at 1562 (Souter, J., concurring in part and dissenting in part).

days in jail and ordered to pay a $2,500 fine,[270] However, in *R.A.V.*, the Court said the defendant could have been punished under a threat statute carrying a punishment of up to five years in prison, an arson statute with a penalty of up to five years in prison and a $10,000 fine, or a criminal damage to property law with a penalty of up to one year in prison and a $3,000 fine.[271] Any of these punishments would have been more harsh than those handed down under the Virginia statute.

2. Classify Cross Burning as Conduct

Justice Thomas's analysis in his *Black* dissent also avoided the First Amendment issue.[272] Justice Thomas argued that for purposes of the Virginia statute, cross burning is conduct, not speech, and, therefore, not controlled by the First Amendment.[273] This solution, similar to the one suggested above, eliminates the necessity of further First Amendment analysis.[274] Justice Thomas argued that the legislative intent of the Virginia statute was to end intimidation, not limit expression of white supremacy.[275] He stated that "whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means."[276]

However, even if this were the legislature's intent, it is impossible to separate the conduct and expression in an act such as cross burning.[277] Simply adding an intent to intimidate requirement does not filter out expression.[278] When a member of the Ku Klux Klan burns a cross on the lawn of an African-American family as a warning of future violence, the messages of intimidation and white supremacy cannot be separated from the physical act of burning the cross.[279] Therefore, although categorizing cross burning with intent to intimidate as conduct would avoid the First Amendment issue, such an approach is misguided.[280]

V. CONCLUSION

In *R.A.V.*, the Court altered First Amendment analysis and was criticized for rewriting First Amendment law.[281] Following the decision, lower courts were confused, causing some to invalidate and others to uphold their individual state cross-burning statutes.[282] Although the

270. *Id.* at 1543.
271. *R.A.V.*, 505 U.S. at 380 n.1.
272. *See Black*, 123 S. Ct. at 1562 (Thomas, J., dissenting).
273. *Id.* at 1566 (Thomas, J., dissenting).
274. *Id.*
275. *Id.*
276. *Id.* at 1563 (Thomas, J., dissenting).
277. *See id.* at 1548 n.2.
278. *Id.* at 1548.
279. *See id.*
280. *See id.*
281. *See R.A.V.*, 505 U.S. at 411 (White, J., concurring).
282. Enslin, *supra* note 91, at 193-94.

Court attempted to clarify its *R.A.V.* ruling in *Black*, the proper method of analysis remains unclear. This lack of clarity is likely to further confuse lower courts, thereby weakening the First Amendment.

Additionally, the Court's decision in *Black* is inconsistent with its own precedent on viewpoint discrimination. The Court in *Black* distinguished the Virginia statute from the ordinance in *R.A.V.*, finding that regulating cross burning is not viewpoint discrimination.[283] However, the *Black* Court clearly recognized the inherent link between cross burning and white supremacy.[284] This link should have led to the conclusion that regulating cross burning is a regulation of the white supremacist viewpoint and a violation of the First Amendment.

Several obstacles prevent efficient punishment of cross burning and threaten the protection of the First Amendment. However, by punishing cross burning under existing laws, courts can regulate cross burning without threatening freedom of speech. This alternative is a balance between the right of freedom of speech and the right of individuals to live without fear of violence. The balance is delicate. Those who burn crosses with intent to intimidate tip the scale in favor of limiting expression, while those who do the same act without such intent tip the scale toward protecting expression. The question of whether to allow the government to punish cross burning is impossible to answer without harming society in some way. In the end, although regulation seems right, the expense is too great.

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283. *Black*, 123 S. Ct. at 1541.
284. *Id.* at 1546.

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