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CROSS BURNING—HATE SPEECH AS FREE SPEECH: A COMMENT ON VIRGINIA V. BLACK

Roger C. Hartley*

“It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”

I. INTRODUCTION

This Article concerns the criminalization of cross burning. This act of symbolic expression sometimes communicates hate, inspires fear of impending bodily harm, expresses an ideology and solidarity with others, or encompasses combinations of these. In 1991, Edward Cleary defended a White juvenile, known in court documents as R.A.V., who had burned a cross on the lawn of a Black family. In that litigation, Cleary began his oral argument to the Supreme Court by posing this question: To what degree does abhorrence of cross burning justify banning it? That question still baffles us. Establishing appropriate boundaries for the protection of speech that can both intimidate and express an ideology constitutes a profound challenge for a progressive society committed to the twin goals of free expression and civil order.

When it was decided in 1992, R.A.V. v. City of St. Paul became the most recent in a line of cases, reaching back six decades, that invited the Court to demarcate the limits of the First Amendment’s protection for

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   Each generation must reaffirm the guarantee of the First Amendment with the hard cases. The framers understood the dangers of orthodoxy and standardized thought and chose liberty.
   We are once again faced with a case that will demonstrate whether or not there is room for the freedom for the thought that we hate, whether there is room for the eternal vigilance necessary for the opinions that we loathe.

Id.
4. See Thomas Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 217-18 (1972) (explaining that this challenge arises at least in part because protecting freedom of expression sometimes conflicts with government’s prerogative and duty to enact laws designed to deter and punish threats of substantial harm to another).
hate speech in general and "true 'threat[s]'" in particular. As it had so often in the past, the Court in *R.A.V.* avoided the most difficult First Amendment questions. Indeed, for half a century the Court has resisted confronting the web of constitutional and political complexity hate speech creates—that is, until its 2003 decision in *Virginia v. Black.*

Through five separate opinions, none of which commanded a majority, the Court in *Black* upheld in part and struck down in part the Virginia ban on cross burning with an intent to intimidate. While hardly a model of clarity, the decisions in *Black* provide our best understanding yet of the constitutional protection accorded hate speech.

The oral argument in *Black* has been described as "the justices engag[ing] in an intense debate, interrupting each other in a frenzy of

6. *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), and *Beauharnais v. Illinois,* 343 U.S. 250 (1952), were the two most important early cases. Subsequently, questions regarding the constitutional protection afforded hate speech and threats have arisen frequently in varying contexts. See, e.g., *Wisconsin v. Mitchell,* 508 U.S. 476, 490 (1993) (upholding a penalty-enhancement hate-crime law applicable to conduct unrelated to expression); *R.A.V.*** 505 U.S. at 380, 388 (declaring in dictum that "threats of violence are outside the First Amendment" but holding unconstitutional a local ordinance banning certain symbolic speech, including cross burning, when done with the knowledge that such conduct would "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." due to the ordinance's content discrimination); *Rankin v. McPherson,* 483 U.S. 378, 386-92 (1987) (stating that a threat against the President is not protected speech but a public employee is engaged in protected speech when expression of desire that next assassination attempt on President Reagan be successful was made in private and in context of speaker not intending or able to take action consistent with expressed desire); *Nat'l Socialist Party of Am. v. Vill. of Skokie,* 432 U.S. 43, 43-44 (1977) (holding that the First Amendment shields marching, walking, or parading in uniforms displaying the swastika); *Watts v. United States,* 394 U.S. 705, 708 (1969) (stating in dicta that the First Amendment permits a state to ban "true threat[s]" but speech at issue found to be "political hyperbole" and not a "true threat").

7. In *R.A.V.,* the ordinance banned certain symbolic speech, including cross burning, when done with the knowledge that such conduct would "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. Although the ordinance had been interpreted as limited to "fighting words," it nevertheless was unconstitutional because it discriminated by criminalizing content-based subclasses of otherwise proscribable speech. *Id.* at 380-91; see discussion *infra* notes 111-14 and accompanying text. By dispatching the ordinance on this basis, the Court in *R.A.V.* avoided reaching the complex question of what if the ordinance had not so discriminated?


9. VA. CODE ANN. § 18.2-423 (Michie 1996). It provides:

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 [punishable by jail time and a heavy fine].

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons. *Id.*
Solomon-like, the Court in the end pursued a middle course in Black. It upheld Virginia’s right to criminalize cross burning on the property of another with an intent to intimidate, but struck down a provision in Virginia law that made the act of cross burning prima facie evidence of such an intent. The mass media has endorsed this as a “sensible balancing act.” Civil liberties organizations have praised the decision as “striking the right balance, protecting 1st Amendment values and purely expressive conduct, while also allowing the government to protect its citizens.” Even the attorney who represented the accused in Black concluded that “this is a sound compromise that a substantial part of the country, and maybe a majority, can accept.” I advance a different view of Black in this Article. I argue that the decision represents a commendable but ultimately flawed effort to balance the interests at stake in regulating cross burning.

Those, like me, who would find fault with Black easily could miss the decision’s many virtues. First, Black raises a staunch defense of the Constitution’s protection of unpopular viewpoints, even when they may inflict psychic pain. The Court rejected the notion that cross burning can have but one intent—the intent to intimidate—recognizing that cross burning sometimes is engaged in to communicate an ideology, albeit an ideology of hate. The Constitution protects the expression of that ideology by operation of the “bedrock principle” that government never may censor speech simply because of society’s abhorrence of the ideas expressed. By upholding the right to express any viewpoint, including

10. See Patty Reinert, High Court Upholds Cross-Burning Ban, HOUS. CHRON., Apr. 8, 2003, at 1A, available at 2003 WL 3250609. During oral argument, Justice Thomas gave what has been characterized as an “exasperated outburst” when he presented “an impassioned tutorial on the history of cross burnings and sham[ed] a government lawyer for underestimating their significance.”
12. Id. at 364-65.
14. See Jan Crawford Greenburg, High Court Limits Ban on Burning of Crosses: As Scare Tactic, No; At Rallies, Yes, CHI. TRIB., Apr. 8, 2003, at 1, available at 2003 WL 18165827 (quoting John Whitehead, President of the Rutherford Institute, a Virginia-based civil liberties group).
16. See 538 U.S. at 358.
17. Id. at 356-57.
18. See Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).
one as appalling to most of us as the viewpoint of racism and White supremacy, *Black* may have struck a blow at the aged dictum in *Chaplinsky v. New Hampshire* 19 and *Beauharnais v. Illinois* 20 that the First Amendment provides no protection to speech that "by [its] very utterance inflict[s] injury." 21 How serious a blow *Black* struck warrants close examination. 22

Moreover, *Black* deserves commendation for its implicit reaffirmation of the speech-protective principle that even when speech can be regulated because it creates a substantial evil such as intimidation, the state may not suppress it merely because it has that tendency. The speaker must intend that result. 23 This confirmation of the intent precondition to the criminalization of the content of speech replenishes a fundamental First Amendment principle that was hard-fought and, as is true of so many First Amendment freedoms, always is vulnerable to dilution. 24

Finally, the *Black* decision deserves a hearty "well done" for its rejection of Virginia's attempt to satisfy its burden of proving intent to intimidate by making cross burning prima facie evidence of such intent. 25 This holding checks an effort to introduce a "shortcut" 26 that, if permitted, would have eroded the efficacy of the constitutional protection the intent requirement is designed to provide. 27

Yet no friend of the First Amendment ought to breathe easily after reading this decision. The middle ground staked out by *Black* may initially appear appealing. After all, the decisions in *Black* hold "merely" that Virginia (and her sister states) now may criminalize cross burning intended to intimidate; that intent to intimidate "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"; 28 that the state must prove this intent; and that the jury may not infer such an intent simply

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22. See discussion infra notes 277-79 and accompanying text.
23. See discussion infra notes 204-11 and accompanying text.
24. See Nat Hentoff, *Introduction* to EDWARD J. CLEARY, BEYOND THE BURNING CROSS, at xviii, xviii (1994) ("There have been victories from time to time protecting freedom of speech, but there are always those—legislators, public officials, school boards, and indignant citizens—ready and eager to cut down the First Amendment, so the fight has to be waged over and over again.").
25. 538 U.S. at 364.
26. See id. at 367.
27. See discussion infra notes 204-11 and accompanying text.
28. 538 U.S. at 359.
from the act of burning a cross.\textsuperscript{29} What's not to like about a statute that sends people to prison and fines them only if they burn a cross on the property of another with an intent to intimidate when the state has the burden to prove that intent? Where is the mischief?

Mischief can be found first in the Court's willingness in \textit{Black} to uphold Virginia's choice to single out for regulation an act of symbolic expression that carries a particular message when Virginia had available to it wholly adequate, less restrictive, content-neutral options that it chose not to employ.\textsuperscript{30} The Court concluded that cross burning is "'a symbol of hate'"\textsuperscript{31} that a state may single out for selective proscription but only because its long historical use as a tool of intimidation has established it as "'a particularly virulent form of intimidation.'"\textsuperscript{32} Left for another day are the questions of what other symbols may a state so selectively regulate and what standards ought to be employed to determine whether they too are "'a particularly virulent form of intimidation.'"\textsuperscript{33} These questions will arise, for example, when the swastika, the Confederate flag, the Star of David, a picture of a fetus, or a raised clenched fist is next singled out for selective proscription.\textsuperscript{34}

Second, the decision in \textit{Black} is unconvincing because there remains a real and substantial danger that the decision inadequately protects against the punishment of unpopular views. There is a great risk that our fully justified collective abhorrence of the viewpoint of racism, bigotry, and expressions of White supremacy (the prevalent views cross burning expresses) will lull us into accepting the compromise the Court crafted in \textit{Black}. That abhorrence makes it all too easy to look the other way and believe that, in actual operation, the decision in \textit{Black} will not create an unacceptable risk that police in fact will arrest and juries in fact will convict ideological cross burners having no intent to intimidate anyone. But there is scant basis for such confidence. In this Article, I demonstrate that there remains an unacceptably high probability that unsympathetic juries will find an intent to intimidate in criminal trials of those who have no intent other than to communicate through the act of cross burning views that most jurors will find reprehensible. Our better nature, that part of us that permits us to take the long view, knows we

\textsuperscript{29} See id. at 366.
\textsuperscript{30} For adequate alternatives to content-based selective proscription, see discussion infra note 97.
\textsuperscript{31} 538 U.S. at 357 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).
\textsuperscript{32} Id. at 363.
\textsuperscript{33} Id.
\textsuperscript{34} See discussion infra notes 151-73 and accompanying text.
must examine honestly, and understand completely, how *Black* creates excessive risks of viewpoint retaliation.\(^{35}\)

In short, there is much to admire in the *Black* decision as well as much to criticize. In the following discussion, I explain why in more detail.

**II. CROSS BURNING GENERATES THREE CRIMINAL CONVICTIONS**

On the evening of August 22, 1998, Barry Black led a peaceful Ku Klux Klan rally in Cana, Virginia (Carroll County) in an open field on private property with permission of the owner, who was in attendance.\(^{36}\) Between twenty-five and thirty people attended the rally, which could be seen from a Virginia state highway, 300 to 350 yards away, over which forty to fifty cars traveled during the time the rally was held.\(^{37}\) There are eight or ten houses in the vicinity of the open field on which the rally was held, and from at least one the rally could be observed.\(^{38}\) During this rally, some attendees gave speeches that contained White supremacy viewpoints.\(^{39}\) There was negative talk about Blacks and Mexicans.\(^{40}\) Bill and Hillary Clinton were criticized for their part in directing tax money for the benefit of Black people.\(^{41}\) One speaker stated he would "'love to take a .30/.30 and just randomly shoot the blacks.'"\(^{42}\) At the end of the rally, the group circled around a twenty to thirty foot cross which was then burned as the Klan played "Amazing Grace" over the loudspeakers.\(^{43}\)

The county sheriff had been on the state road observing all of this.\(^{44}\) Not until the cross was burned did he enter the property.\(^{45}\) He arrested Barry Black, informing him, "'[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for..."

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35. *See* discussion *infra* notes 132-47 and accompanying text.
36. *Black*, 538 U.S. at 348. A county sheriff who monitored the rally "testified that there were no overtly threatening gestures or signs" by the rally participants. *Brief on Merits for Respondents* at 2, *Black* (No. 01-1107). Nor did he observe any weapons. *Id.*
38. *Id.* at 348.
39. *Id.* at 348-49.
40. *Id.* at 349.
41. *Id.*
42. *Id.* (alteration in original).
43. *Id.* Klan cross burnings often begin with a prayer and the singing of the hymn "Onward Christian Soldiers" and, following the lighting of the cross, end with the attendees pointing their raised left arm toward the burning cross and singing "The Old Rugged Cross." *See id.* at 356.
44. *Id.* at 348.
45. *Id.* at 349.
Black was convicted of violating Virginia’s cross-burning statute and fined $2,500. The jury was instructed that “intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm.” The jury was further instructed that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.”

On May 2, 1998, Richard Elliott and Jonathan O’Mara burned (rather attempted to burn) a cross in the yard of James Jubilee, an African-American and Elliott’s next-door neighbor in Virginia Beach, Virginia. Neither Elliott nor O’Mara was affiliated in any way with the Klan. Jubilee had just four months earlier moved his family from California to this home in Virginia Beach. Sometime prior to the cross burning, Jubilee had heard the sound of gunshots coming from Elliott’s property. He went to the Elliott home to inquire, and Elliott’s mother explained that shooting firearms was Elliott’s hobby and he used the back yard as a firing range. In order to “get back” at Jubilee for complaining to his mother concerning Elliott’s use of his backyard as a firing range, Elliott, O’Mara, and a third unnamed person drove a truck onto Jubilee’s property, placed a cross twenty feet from Jubilee’s house, and set it afire. The cross only partially burned, and apparently the activity was not noticed by anyone in the Jubilee household at the time because, as the Court found, only the next morning, as Jubilee was pulling his car out of the driveway, did he “notice[] the partially burned cross.” Jubilee expressed distress at seeing this partially burned cross, because he “didn’t know what would be the next phase” and because “a cross burned in your yard... tells you that it’s just the first round.”

46. *Id.* The sheriff was mistaken. Virginia law barred not all cross burning but only cross burning with the intent to intimidate. See discussion supra note 9. This critical distinction apparently was lost on this local law enforcement official.

47. *Black*, 538 U.S. at 350.

48. *Id.* at 349.

49. *Id.*

50. *Id.* at 350.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.; see also* Brief on Merits for Respondent at 3, *Black* (No. 01-1107) (“No one in the Jubilee family actually witnessed the burning of the cross.”).

57. *Black*, 538 U.S. at 350. Newspaper accounts reported much distress in the Jubilee household following this cross-burning incident.

James [Jubilee], the father, paced the halls of his Virginia Beach house at night with his gun nearby. His wife, Susan, ceased early-morning walks and recalled movie scenes featuring KKK rallies. Their 8-year old boy was given security
Elliott and O'Mara were convicted of violating the Virginia cross-burning statute (actually attempted cross burning). Each was sentenced to ninety days in jail and a $2,500 fine. The jury was never instructed as to what “intimidate” means. Nor was the jury told, as was the jury in Barry Black's case, that the burning of a cross by itself is sufficient evidence from which the jury could infer the requisite intent to intimidate.

The Virginia Supreme Court consolidated these three criminal convictions and ruled (three justices dissenting) that the Virginia cross-burning statute was unconstitutional on its face for two independent reasons. First, because the statute does not prohibit all acts engaged in with the intent to intimidate, but rather “selectively chooses only cross burning because of its distinctive [racist] message,” the statute “is analytically indistinguishable” from an ordinance the Supreme Court had held unconstitutional in R.A.V. v. City of St. Paul. Second, in any event, the statute is unconstitutional because it permits the jury to infer the intent to discriminate simply from the fact that one burned a cross. This creates an unacceptable risk that persons who burn crosses with no intent to intimidate will get convicted.

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59. “The penalty for a violation included up to five years in prison.” Brief of Petitioner, Black (No. 01-1107), 2002 WL 1885898, at *23 n.13 (citing VA. CODE ANN. § 18-349.4 (Michie 1952)). Half the jail time and $1000 of the fine were suspended for O'Mara, who pleaded guilty but reserved the right to challenge the Virginia cross-burning statute on free speech grounds. Black, 538 U.S. at 350.
60. Id., 538 U.S. at 351.
61. Id.
63. Id. at 742, 744.
64. 505 U.S. 377, 380 (1992) (declaring unconstitutional, because of content discrimination, ordinance banning certain symbolic speech, including cross burning, done with the knowledge that such conduct would “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).
65. Black, 538 S.E.2d at 746.
66. See id.
The United States Supreme Court affirmed in part and reversed in part. The Court splintered into four blocs. First, Justice O'Connor, joined by the Chief Justice and Justices Stevens and Breyer, wrote the plurality "Opinion of the Court" concluding that the First Amendment protects cross burning when there is no intent to intimidate, that the state may criminalize cross burning that is intended to intimidate, but Virginia could not use the act of burning a cross as prima facie evidence of such an intent. An opinion written by Justice Souter, and joined by Justices Kennedy and Ginsberg, argued for striking down virtually any law that singled out cross burning for regulation because such laws entail impermissible content discrimination. Justice Thomas, dissenting, argued to uphold the entire Virginia cross-burning statute on the ground that it does not implicate First Amendment issues since it "prohibits only conduct, not expression." Justice Scalia, charting yet a fourth course, agreed with the plurality opinion that the First Amendment offers different protections for burning a cross depending on whether it is done to express a viewpoint or to intimidate. Justice Scalia, agreeing with the plurality with respect to the prima facie treatment Virginia had assigned to cross burning, concluding that Virginia could make the act of cross burning prima facie evidence of an intent to intimidate.

III. CLEARING AWAY THE BRUSH: IS THE REGULATION OF CROSS BURNING THE REGULATION OF THE CONTENT OF SPEECH?

Constitutional analysis of efforts to regulate expressive conduct such as cross burning proceeds through three levels. It must be determined initially whether the nonverbal act of cross burning is speech. If yes, the scope of judicial review of the state's regulation of it is established by examining whether Virginia's interest in regulating cross burning is

67. See Black, 538 U.S. at 363, 367. Justice Stevens wrote a short concurring opinion stating that "[c]ross burning with 'an intent to intimidate' . . . unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. . . . [T]hat simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct." Id. at 368 (Stevens, J., concurring).

68. Id. at 380-81 (Souter, J., concurring in the judgment in part and dissenting in part).

69. Id. at 394-95 (Thomas, J., dissenting).

70. Id. at 368, 370 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Thomas joined Justice Scalia's opinion with respect to the prima facie implications Virginia had assigned to the act of cross burning. Id. at 368.

related to the expressive content of the act.\textsuperscript{72} The resolution of these issues ushers in the third step of applying the appropriate constitutional standard to the facts.

It might be useful initially to clear away the brush in the sense of disposing of the first two questions fairly quickly—is cross burning speech and if so is Virginia's criminalization of it the regulation of the content of speech? We need not linger over these questions because well-established First Amendment principles readily demonstrate that the Virginia statute regulates the content of speech—as eight of the members of the Court in \textit{Black} concluded.\textsuperscript{73} Yet it would not do to skip this inquiry altogether since Virginia strenuously argued the content-neutrality of its legislation,\textsuperscript{74} and Justice Thomas voted to uphold the Virginia cross-burning statute on the ground that it regulates conduct, not speech.\textsuperscript{75}

The nonverbal act of cross burning is speech that implicates First Amendment considerations. In \textit{Spence v. Washington},\textsuperscript{76} the Court advanced a two-part test for determining when nonverbal conduct constitutes speech.\textsuperscript{77} Perhaps because cross burning had been established as symbolic speech in \textit{R.A.V.},\textsuperscript{78} none of the decisions in \textit{Black} explicitly evaluated each prong of this two-part test. The \textit{Black} plurality opinion of the Court did review extensively the history of cross burning, however, concluding that “the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else’s lawn, is that the burning cross represents the message that the speaker wishes to communicate.”\textsuperscript{79} In either case, “the burning of a cross is a ‘symbol of hate.’”\textsuperscript{80} “[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And

\textsuperscript{72} See \textit{O'Brien v. United States}, 391 U.S. 367, 377 (1968) (stating that courts must inquire into whether the state’s interest is “unrelated to the suppression of free expression”).

\textsuperscript{73} 538 U.S. at 347-48, 368, 380-81.

\textsuperscript{74} \textit{See Brief of Petitioner, Black} (No. 01-1107), 2002 WL 1885898, at *11-17.

\textsuperscript{75} \textit{Black}, 538 U.S. at 388 (Thomas, J., dissenting).

\textsuperscript{76} 418 U.S. 405 (1974).

\textsuperscript{77} \textit{Id.} at 410-11. As refined in subsequent litigation, the test entails an inquiry into the intent and context of the non-verbal activity: “[W]hether [a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.” \textit{Texas v. Johnson}, 491 U.S. 397, 404 (1989) (alterations in original) (quoting \textit{Spence}, 418 U.S. at 410-11).

\textsuperscript{78} \textit{See} 505 U.S. 377, 382 (1992).

\textsuperscript{79} \textit{Black}, 538 U.S. at 360; \textit{accord id.} at 354 (concluding that cross burning has “been used to communicate both threats of violence and messages of shared ideology”).

\textsuperscript{80} \textit{Id.} at 357 (quoting \textit{Capitol Square Review & Advisory Bd. v. Pinette}, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).
when a cross burning is used to intimidate, few if any messages are more powerful.”

Cross burning is an act of symbolic speech, and no member of the Court thought otherwise.

But did Virginia’s criminalization of this nonverbal speech, when engaged in with the intent to intimidate, constitute the regulation of the content of speech? On this answer rides the standard of judicial review for determining the constitutionality of Virginia’s cross-burning statute. Ever since United States v. O’Brien, the established method for determining whether the regulation of expressive symbols warrants strict judicial scrutiny has required an inquiry into whether the government’s regulatory interest is “[r]elated to the suppression of free expression.” Virginia argued that since “the interest asserted by Virginia is preventing an egregious form of intimidation” and since intimidation is not a form of free expression, “[s]uch an interest is not related to the suppression of free expression.” Justice Thomas, alone on the Court, endorsed a close variation of this argument. He reasoned that

[i]t strains credulity to suggest that [the early 1950s Virginia] state legislature[,] which had] adopted a litany of segregationist laws[,] self-contradictorily intended to squelch the segregationist message [when adopting the cross-burning statute in 1952].... It is simply beyond belief that, in passing the [cross-burning statute], the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression.

Both Virginia’s argument, and Justice Thomas’s adoption of a variation of it, share a common analytical misstep, one that John Hart Ely warned against as early as 1975. Both evaluate whether the state’s interest in regulating expressive symbols is “unrelated to the suppression of free expression” by focusing on the state’s ultimate objective—eradication of intimidation. But as Professor Ely explains:

81. Id.
82. See Texas v. Johnson, 491 U.S. 397, 412 (1989) (holding that the regulation of the content of symbolic expression is to be subjected to “the most exacting scrutiny” (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))).
84. Id. at 377.
85. Brief of Petitioner, Black (No. 01-1107), 2002 WL 1885898, at *18.
86. Black, 538 U.S. at 394 (Thomas, J., dissenting).
Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message . . . . The reference [in O'Brien to a governmental interest that is unrelated to the suppression of free expression] is . . . not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts. If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is . . . that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of O'Brien[] . . . . The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message . . . .

Texas v. Johnson, the Court's 1989 flag-burning case, leaves no doubt regarding the validity of Professor Ely's analysis for evaluating whether the state's interest is related to the suppression of free expression. One reason Texas had banned flag burning was to advance its interest in "preserving the flag as a symbol of nationhood and national unity." That interest, the Court held, is "related to the suppression of free expression within the meaning of O'Brien" because the State has "proscribe[d] particular conduct because it has expressive elements." "These concerns [of Texas] blossom only when a person's treatment of the flag communicates some message . . . ." Johnson thus confirms, as Professor Ely correctly explained many years previously, that the crucial question is not the ultimate objective of the state but whether the harm the state seeks to avert arises from the "likely communicative impact" on the viewer of the expressive symbol being regulated. In Black, the harm Virginia sought to avert by regulating cross burning—intimidation—arose entirely from the threatening message that cross

88. Id.
89. 491 U.S. 397 (1989).
90. Id. at 410.
91. Id. at 411 (emphasis added) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
92. Id. at 406.
93. Id. at 410. The Court in Johnson also explained this same point by stating that the O'Brien question is answered by inquiring whether the governmental interest "is directly related to expression in the context of activity." Id. (quoting Spence v. Washington, 418 U.S. 405, 414 (1974)).
94. Id. at 411.
burning sometimes communicates. Since Virginia regulated cross burning "because it has expressive elements," its interest was related to the suppression of the content of speech. Virginia's regulation of the content of speech thus had to meet the "the most exacting scrutiny." Because of this "exact scrutiny," states desiring to regulate nonverbal conduct because of its expressive elements face two formidable constitutional restrictions. The first is avoiding discrimination. In Black, Virginia did not criminalize all acts of intimidation or even all speech engaged in with the intent to intimidate. It chose instead to single out cross burning for regulation, a symbolic expression that carries the particular message of hate, when Virginia had available to it adequate, less restrictive, content-neutral options that it chose not to employ. The Virginia Supreme Court held that this choice by Virginia to single out cross burning constituted unlawful content discrimination by operation of the principle in R.A.V. v. City of St. Paul. This issue, which dominated the litigation before the Court in Black, is taken up next in Part IV.

But even when state regulation of symbolic expression due to its content does not violate the R.A.V. non-discrimination principle, it must also surmount a second hurdle—overbreadth. A criminal statute proscribing speech suffers unconstitutional overbreadth when the standards employed to convict create a real and substantial risk of punishing constitutionally protected conduct. The prima facie treatment of cross burning provided for in the Virginia statute constituted such overbreadth. This was the conclusion of both the Virginia and United States Supreme Courts. This is discussed fully

95. Id. at 406.
96. Id. at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
97. Instead of signaling its disagreement with the merits of the viewpoints from which threats can spring, Virginia could have relied on general laws against arson, trespass, assault, extortion, reckless endangerment, felony terrorist threats, vandalism, etc. None of the briefs in Black demonstrated that there is any governmental interest underlying a ban on cross burning that cannot be protected through such content-neutral criminal laws. See, e.g., Brief for the United States as Amicus Curiae, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107), 2002 WL 1885887, at *13-20 (discussing how the United States protects against intimidation inflicted by cross burning through content-neutral federal statutes). Nor need the otherwise modest penalties provided for in content-neutral statutes deter their use to address intimidation generated by cross burning. The Court's ruling in Wisconsin v. Mitchell permits states to enhance punishment for violation of content-neutral statutes when motivated by racial bias. 508 U.S. 476, 479 (1993).
98. See discussion supra notes 62-64 and accompanying text.
101. See Black, 538 U.S. at 367.
below in Part V. Even without the prima facie evidence provision, however, the Virginia cross-burning statute is still overbroad in the sense of creating a real and substantial risk of punishing those who burn a cross—not to intimidate but to express an ideology. The Black case did not discuss this overbreadth and that lapse represents one of its great failings, as also discussed in Part V. 103

IV. THE R.A.V. ISSUE: CRIMINALIZING CONTENT-BASED SUBCLASSES OF OTHERWISE PROSCRIBABLE SPEECH

"[E]qual liberty of expression," as Kenneth Karst first labeled it, is a core First Amendment principle.104 Enshrined in cases such as Police Department v. Mosley105 and Schacht v. United States,106 the equal liberty of expression principle stands as a barrier against government ranking "the social utility of speech."107 Among other things, this prevents law from distorting the public debate by proscribing speech on only one side of that debate.108

It was a violation of this equal liberty of expression principle that brought down the cross-burning ordinance in R.A.V. v. City of St. Paul.109 There, a local ordinance banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "'arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"110 Although the Minnesota Supreme

102. See discussion infra Part V.A.
103. See discussion infra Part V.B.
105. 408 U.S. 92, 93-94 (1972) (holding that it is unconstitutional to prohibit picketing within 150 feet of a school during school hours but exempting "'peaceful picketing of any school involved in a labor dispute'" (citation omitted)).
106. 398 U.S. 58, 60, 63 (1970) (holding that it is unconstitutional to prohibit wearing an army uniform without authorization except in theatrical performances "'if the portrayal does not tend to discredit'" the armed forces).
109. 505 U.S. at 391.
110. Id. at 380.
Court had interpreted the ordinance as limited to “fighting words,”\textsuperscript{111} the Court held the ordinance unconstitutional because it targeted only individuals who “provoke violence” by means of speech that conveys ideas specifically disapproved of in the law.\textsuperscript{112} The ordinance did not cover “[t]hose who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.”\textsuperscript{113} The St. Paul ordinance in \textit{R.A.V.} was unconstitutional then because it violated the “equal liberty of expression” principle: it “impose[d] special prohibitions on those speakers who express views on disfavored subjects.”\textsuperscript{114}

The \textit{Black} case presented an opportunity to illuminate the boundaries of the \textit{R.A.V.} equality principle. The Court was presented with many options. The Virginia Supreme Court had held that the Virginia cross-burning statute was “analytically indistinguishable” from the St. Paul ordinance struck down in \textit{R.A.V.}\textsuperscript{115} Before the United States Supreme Court, Virginia argued that its law does not handicap the expression of particular viewpoints contrary to established First Amendment principles barring discrimination based on the content and viewpoint of speech because the law “applies to anyone who burns a cross with the intent to intimidate anyone for any reason.”\textsuperscript{116} Respondents countered that a state violates the \textit{R.A.V.} non-discrimination principle when it appropriates a particular symbol for banishment from the public discourse.\textsuperscript{117} It is not necessary that the statute also include language that singles out particular viewpoints.\textsuperscript{118} To interpret \textit{R.A.V.} otherwise, respondents argued, “[is]

\begin{itemize}
\item \textsuperscript{112} \textit{R.A.V.}, 505 U.S. at 391.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} As the Court explained, “The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.” \textit{Id.} at 386. This is what St. Paul did through its ordinance. As the Court explained, “Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use ‘fighting words’ in connection with . . . ideas [not regulated by the St. Paul ordinance] are not covered.” \textit{Id.} at 391.
\item \textsuperscript{116} \textit{Brief of Petitioner, Virginia v. Black}, 538 U.S. 343 (2003) (No. 01-1107), 2002 WL 1885898, at *9; \textit{accord id. at *10} (“The statute only reaches speech that can be constitutionally proscribed and does so with language that is content-neutral.”). Later, Virginia argued that the statute “applies to all acts of cross burning with intent to intimidate, regardless of the views of the perpetrator. Thus, it satisfies the level of neutrality required by this Court’s precedents.” \textit{Id.} at *21.
\item \textsuperscript{117} \textit{Brief on Merits for Respondents at 3, Virginia v. Black}, 538 U.S. 343 (2003) (No. 01-1107).
\item \textsuperscript{118} \textit{Id.}
\end{itemize}
perilous business . . . And it is but a short step from the banning of offending symbols such as burning crosses or flags to the banning of offending words. A word is, after all, but a symbol itself."

The Court chose to adopt none of these views. Disagreeing with Virginia, the Court concluded that the cross-burning statute does indeed make content-based distinctions within the category of proscribable speech (here, intimidating or threatening expression). Cross burning, the Court reasoned, does carry a distinctive, but not necessarily racist, message. Whether used to intimidate or as "a potent symbol[] of shared group identity and ideology," "the burning of a cross is a 'symbol of hate.'" By singling out this "symbol of hate" for selective treatment, Virginia has selected a symbol with particular content from the field of all proscribable expression meant to intimidate. This constitutes content-based (subject matter-based) discrimination within the meaning of the R.A.V. decision. But also disagreeing with both the Virginia Supreme Court and the respondents, the Court held that this content-based (subject matter-based) discrimination does not violate the R.A.V. equality principle. This is because the long history of employing cross burning as a tool of intimidation has established cross burning as "a particularly virulent form of intimidation." Selective regulation of cross burning is thus permissible, the Court concluded, because the regulation falls within the so-called "particularly virulent" exception to the R.A.V. equality principle.

119. Id. at 11.
121. The Court pointed out that cross burning is used to express hate and intimidation by persons other than members of the Ku Klux Klan. See id. at 360. Moreover, the Klan has directed its cross burning to persons other than racial minorities. Early on, "[t]he Klan's victims included blacks, southern whites who disagreed with the Klan, and 'carpetbagger' northern whites." Id. at 353. In more recent times, the Klan has used cross burning against a union leader on the eve of a union election and otherwise against anyone engaging in behavior "deemed antithetical to its goals." Id. at 355.
122. Id. at 356.
123. Id. at 357 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (Thomas, J., concurring)).
124. The best evidence, perhaps, that the Court understood the Virginia statute as employing content discrimination within the meaning of R.A.V. is that, otherwise, there would have been no need to save the statute from the R.A.V. rule by deploying an exception to that rule. See discussion infra notes 127-29 and accompanying text.
125. Black, 538 U.S. at 363.
126. Id.
127. In R.A.V., the Court acknowledged that some content discrimination among various subcategories within a class of proscribable speech does not raise the specter of government effectively driving certain ideas or viewpoints from the marketplace. 505 U.S. 377, 387-88 (1992). As an example, the Court posited that the federal government lawfully could prohibit threats directed against the President "since the reasons why threats of
One wonders how the Court will cabin this "particularly virulent" exception to avoid having it consume the R.A.V. rule. What other powerful expressive symbols may be regulated selectively without violating R.A.V. because they too are a "particularly virulent" example of some category of speech that is proscribable? What are the principled bases for determining "particularly virulent"? From whose point of view? One is reminded of the Court's observation in West Virginia Board of Education v. Barnette, that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." Black left all of these questions for another day, that day when government chooses the next symbol for selective regulation.

One might be more inclined to excuse the Court for adding yet another level of uncertainty to First Amendment theory if it had no better option. But it did. In fact it had two. First, R.A.V.'s exceptions apply, if at all, only if the statute in question does not discriminate based on viewpoint. The Court in Black went to great lengths to demonstrate that while the statute there should be understood as content (subject matter) discrimination, it did not constitute viewpoint discrimination. That conclusion, however, suffers

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128. 319 U.S. 624 (1943).
129. Id. at 632-33. This absence of principled bases for drawing lines on what speech to suppress struck the Court in Cohen v. California as a sufficient reason to abandon the task since "one man's vulgarity is another's lyric." 403 U.S. 15, 25 (1971).
130. Kenneth Karst's discussion of Justice Brennan's willingness to agree that obscenity enjoys no constitutional protection may also help explain the Court's decision in Black to dispose of the case through the "particularly virulent" exception. Karst has made the insightful observation that in the 1957 obscenity litigation, Justice Brennan traded away some First Amendment protection by defining obscenity outside the protection of the First Amendment, and "[i]f he assumed that the courts would allow some regulation of literature in the name of preserving public morals, the strategy [of trading away some 'low value' speech in order to preserve other forms of speech] was plausible." Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL. L. REV. 95, 141-42 (1990). A similarly plausible argument can be made that deployment of the "particularly virulent" exception in Black represents a pragmatic response to the reality of strong societal demands, and demands within the Court, that the states be accorded some degree of autonomy to regulate cross burning.
131. 505 U.S. at 390 n.6.
132. See Black, 538 U.S. at 355 (stating that the Klan burned a cross in front of a union leader's home and directed cross burning to threaten anyone "deemed antithetical to its
from a fatal non sequitur. The Court argues that Virginia does not engage in viewpoint discrimination because "it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities." That may be, but this is immaterial to the question of whether a cross-burning ban regulates viewpoint. The proper question is whether cross burning conveys a sufficiently particularized point of view that regulating it is the functional equivalent of regulating viewpoint. The Court's non sequitur conveniently avoids its having to address this question. But the answer seems clear. Cross burning is not like wearing a black armband, which may communicate any one of a thousand viewpoints. It strains credulity to deny that the message of hate that cross burning communicates is other than hate based on the

goals"); accord id. at 362-63 (stating that "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities" and citing examples of "cross burnings directed at union members" and a cross burning by a "defendant . . . in the yard of the lawyer who had previously represented him and who was currently prosecuting him" and also conjecturing that "in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned the cross due to racial animus").

133. Id. at 362.

134. The Court did obliquely suggest that the viewpoint expressed by cross burning may not always be the viewpoint of racial intolerance. The Court's lead opinion includes the conjecture that

in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus . . . [since Elliott and O'Mara] "were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus."

Id. at 363 (quoting Black v. Commonwealth, 553 S.E.2d 738, 753 (Va. 2001) (Hassell, J., dissenting), aff'd in part, vacated in part, and remanded sub nom. Virginia v. Black, 538 U.S. 343 (2003)). This extraordinary assertion requires one to believe that Elliott and O'Mara, two White teenagers who had been drinking beer at a party, would have burned a cross in the yard of their neighbor to protest his complaining about the backyard shooting range even if that neighbor had been White. Very few persons, one strongly suspects, would care to gamble their ability to earn a living by being paid for each American that could be persuaded to agree with that conclusion. By choosing the burning cross, rather than, for example, a brick through the living room window, these two White boys were communicating a protest to their Black neighbor regarding his complaining that included some message reminding the neighbor that he was Black and they were White. This type of reminder of relative racial status is exactly what White supremacy is all about.

But the absurdity of the suggestion that racial animus was absent in Elliott and O'Mara's cross burning is exceeded only by the implicit legal principle the assertion suggests—that the regulation of an expressive symbol that is closely associated with a particular point of view is not viewpoint regulation if there is any evidence that the symbol sporadically has been used to express any other viewpoint. Such a rule creates the specter of the Court permitting a state, desiring to suppress a particular viewpoint, to regulate instead the predominate symbol used to convey that viewpoint and avoid a finding of viewpoint discrimination if the state is able to show that the symbol had been used sometime in the past to express any other idea.
The viewpoint of White, Protestant, nativist supremacy. The Court’s non sequitur that focuses on the intended audience rather than on the implicit viewpoint communicated by cross burning thus permits the Court to avoid the dissent’s unassailable argument that whether used to threaten or used to express an ideology, cross burning involves communication generally associated with the “particular” message of “white Protestant supremacy.” Cross burning is the signature expressive act of those advancing that viewpoint. Justice Thomas himself had come to that conclusion prior to Black. Lower courts have come to that conclusion. The Virginia Supreme Court found that the use of cross burning as a threat of racially motivated violence precipitated enactment of the Virginia cross-burning statute. This viewpoint focus of the Virginia statute is further reinforced by the prima facie treatment of cross burning, added in 1968, as one amicus brief in Black explained. It argued that

the real target of [the Virginia cross-burning statute] is all cross burnings and the racist values they have come to symbolize. As the court below observed, “[w]hen asked how the

135. One commentator’s mocking reaction was: “Oh, please. Virginia’s law was obviously aimed at cross-burners who express particular views. That is why Virginia’s Supreme Court said it violates the First Amendment.” George Will, High Court Chips Away at Free Speech Rights, CHI. SUN-TIMES, Apr. 10, 2003, at 37, available at 2003 WL 9548192. Akhil Reed Amar makes the point that if one thinks that an “evenhanded” rule against cross burning targets no particular set of viewpoints, one need only consider the congressional gag rule of the 1830s that “evenhandedly” prevented any member from raising the slavery issue. In practice, of course, the ban worked to disadvantage the anti-slavery critics of the pro-slavery status quo.” Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 154 (1992).

136. Black, 538 U.S. at 381 (Souter, J., concurring in the judgment in part and dissenting in part); see also Cody Lowe, For Far Too Long, Klan Co-opted a Sacred Symbol, ROANOKE TIMES, Apr. 13, 2003, at 1, available at 2003 WL 5797594 (reporting that a White, forty years ago, as a ten year-old child, observed cross burning in Virginia directed at some who were not racial or religious minorities but the common denominator was “[t]hey would try to intimidate everyone who stood against them and their warped ideas” (emphasis added)).


138. See, e.g., State v. Ramsey, 430 S.E.2d 511, 514 (S.C. 1993) (applying R.A.V. to strike down a ban on cross burning and concluding that “[t]he government may not selectively limit speech that communicates, as does burning a cross, messages of racial or religious intolerance”).

139. See Black, 553 S.E.2d at 745 (concluding that “[i]n an atmosphere of racial, ethnic, and religious intolerance, the General Assembly acted to combat a particular form of intimidating symbolic speech—the burning of a cross”).

140. Black, 538 U.S. at 363 (reporting that “[t]he Commonwealth added the prima facie provision to the statute in 1968”).
Commonwealth could justify the inference of intimidation provided in the last sentence of the statute, the Commonwealth relied upon the historical context of cross burning.  

Black thus deserves criticism for its failure to recognize the viewpoint discrimination implicit in Virginia's decision to ban cross burning.

But even if the Court were correct not to interpret the Virginia statute as viewpoint discrimination, it still ought not to have resolved the case by deploying the awkward "particularly virulent" exception. The Court need only have added to R.A.V. the limiting principle that no exception to R.A.V. is appropriate when a state selectively regulates an expressive symbol that is closely associated with a distinctive idea. The dissent in Black attempted to steer such a course. The dissent argued that no exception to R.A.V. is warranted because cross burning "may . . . have been singled out because of disapproval of its message of white supremacy." Evidence that a "communication generally [is] associated with a particular message" can establish an undue risk of such motivation. Such evidence deprives a statute of eligibility for an exception to R.A.V. because of the unwarranted risk that the proscription is "a ruse for message suppression" and too high a probability that "official suppression of ideas is afoot." The flexibility in the dissent's view is appealing and its application to cross burning is straightforward since cross burning is a symbolic expression of hate, as the majority acknowledges, and it is closely associated with the viewpoint of White, Protestant, nativist supremacy. Few symbols communicate

141. Brief of Amicus Curiae The Thomas Jefferson Center for the Protection of Free Expression, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107), 2002 WL 31085675, at *11-12 (alteration in original) (quoting Black, 553 S.E.2d at 745). Picking up on Virginia's reliance on the historical roots of its cross-burning statute, respondents argued that Virginia was trying to have it both ways by arguing that cross burning is inherently intimidating because of "cross-burning as a ritual practice of the Ku Klux Klan," but its regulation by the State is not the regulation of the Klan's viewpoint of bigotry. Brief on Merits for Respondents at 15, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107).

142. Black, 538 U.S. at 383 (Souter, J., concurring in the judgment in part and dissenting in part).

143. Id. at 382 (Souter, J., concurring in the judgment in part and dissenting in part); accord id. at 383-84 (Souter, J., concurring in the judgment in part and dissenting in part) (suggesting that the proper inquiry is whether the threat singled out for proscription is "generally identified by reference to the content of any [particular] message" or is "clearly associated with a particular viewpoint").

144. Id. at 384 (Souter, J., concurring in the judgment in part and dissenting in part).

145. Id. (Souter, J., concurring in the judgment in part and dissenting in part) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992), which had stated that an exception from the R.A.V. rule would not be appropriate unless the Court were convinced that no "official suppression of ideas [was] afoot").
such a singular message as does cross burning. And few are so closely associated with a particular viewpoint.\footnote{146} One might fairly read Black's deployment of the "particularly virulent" exception as a ticket for this day and this train only. That is, no symbolic expression other than cross burning ever will qualify for the exception "in light of cross burning's long and pernicious [and unique?] history as a signal of impending violence."\footnote{147} The quote from Black that likely will be found in much future litigation by those arguing to limit Black to cross burning is the conclusion that "when a cross burning is used to intimidate, few if any messages are more powerful."\footnote{148} But the counter-quote of choice may be, "[A] State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."\footnote{149}

It does seem clear that the Court's extensive effort to demonstrate the unique relationship between cross burning and the threat of violence telegraphs a commitment by at least some members of the Court not to permit a wholesale expansion of the "particularly virulent" exception.\footnote{150}

\begin{footnotes}
\item[146] Justice Thomas makes a persuasive argument that one cannot fairly conclude that the Virginia Legislature that enacted the cross-burning statute in 1952 had in mind suppressing the viewpoint of White. Protestant, nativist supremacy. See discussion supra note 86 and accompanying text. That is not a sufficient reason, however, to dismiss the dissent's claim that the Virginia statute is undeserving of any R.A.V. exception. "[O]fficial suppression of ideas [can be] afoot," not only in the motivation for legislation but also in its administration. Symbolic expression may be singled out because of disapproval of its message through the discretion prosecutors exercise in choosing whom to indict and through juries in determining whether to find an intent to intimidate. For the defendant caught up in the criminal justice system because he or she burned a cross for ideological reasons, Justice Thomas's historical reminder of the motives of the 1952 Virginia Legislature is not reassuring.
\item[147] See Black, 538 U.S. at 363. The Black plurality opinion of the Court reached back to the fourteenth century in its review of the use of cross burning to communicate. It demonstrated the signature use of cross burning by the "second Klan," which began its activities in 1905. \textit{Id.} at 352-53. It then reviewed in much detail the twentieth century use of cross burning as a vehicle of intimidation in "the long history of Klan violence," citing a wealth of academic literature. See \textit{id.} at 354-56. In short, the opinion makes a case that the intimidation arising from cross burning is "particularly virulent" because of the exceptional, indeed incomparable, association of that symbol with "the history of violence associated with the Klan." \textit{Id.} at 357.
\item[148] \textit{Id.} at 357 (emphasis added).
\item[149] \textit{Id.} at 363 (emphasis added).
\item[150] Even if Black were not extended to permit selective regulation of other expressive symbols, the case is likely to encourage enactment of cross-burning bans. At the time of the decision, thirteen states and the District of Columbia had enacted cross-burning statutes. Gina Holland, \textit{Court Upholds Cross-Burning Ban}, DETROIT FREE PRESS, Apr. 8, 2003, at 8A available at 2003 WL 17679147 (reporting that "anti-cross burning laws exist in California, Connecticut, Delaware, Florida, Georgia, Idaho, Montana, North Carolina, South Carolina, South Dakota, Vermont, Virginia, Washington, and the District of Columbia"). Soon after the decision in Black, the Senate Judiciary
But, it would seem naive to assume that no court will be asked to so qualify other symbols. Thus, the question *Black* presents is, what demonstration will be required before a state may appropriate another symbol for selective regulation because that symbol also has a sufficiently well-established association with intimidation?

The swastika is a likely candidate as the next symbol some states will choose for selective proscription. In the same section of the Virginia Code that proscribes cross burning, Virginia has enacted a parallel statute targeting swastikas. The ordinance struck down in *R.A.V.* included swastikas within its proscription. The popular press, which admittedly seldom captures the nuances of Supreme Court litigation, already has concluded that *Black* upholds the right of states to enact hate-crime laws targeting those who display a swastika to terrorize others. Even when the press avoids that mistake, it makes the case that

Committee in the State of Louisiana unanimously approved a bill introduced by a New Orleans legislator "that would add cross burning to a law . . . dealing with . . . intimidation, terrorizing, stalking, and cyberstalking." Mike Hasten, Panel OKs Bill to Ban Cross Burning, ALEXANDRIA DAILY TOWN TALK, May 14, 2003, at 4, 2003 WL 7324001.

151. An attempt to link the holding in *Black* to renewed efforts to ban burning of the American flag was reported soon after the decision in *Black*. Despite a string of defeats on the issue, the House continues to favor a proposed constitutional amendment that would prohibit burning or desecrating the American flag. This year, the process is beginning anew, and with a renewed fervor. Proponents are counting on the wave of patriotism both during and after the war in Iraq to heighten their chances of success. And they are taking added encouragement from a U.S. Supreme Court ruling last month upholding a Virginia ban on cross burning. *The Flag and Free Speech*, TIMES UNION ALBANY, Apr. 7, 2003, at A10, 2003 WL 5014052. Those who would attempt to use *Black* to justify a ban on flag burning are likely to face insurmountable obstacles. They will need to demonstrate that the burning of an American flag is uniquely associated with efforts to communicate a "particularly virulent" form of proscribable speech. One would think that *Texas v. Johnson* would spell quick defeat for such efforts since the Court there understood flag burning as a form of nonviolent political protest. See 491 U.S. 397, 408 (1989) (finding no risk of disturbance arising from the peaceful flag burning in that case).

152. VA. CODE ANN. § 18.2-423.1 (Michie 1996). Added in 1983, it provides:

   It shall be unlawful for any person or persons, with the intent of intimidating another person or group of persons, to place or cause to be placed a swastika on any church, synagogue or other building or place used for religious worship, or on any school, educational facility or community center owned or operated by a church or religious body. . . .

   For the purposes of this section, any such placing of a swastika shall be prima facie evidence of an intent to intimidate another person or group of persons.

*Id.*


154. See David G. Savage, *High Court Narrows Right to Burn Crosses*, CHARLOTTE OBSERVER, Apr. 8, 2003, at 11A, 2003 WL 17748158 (reporting that "by a 6-3 margin the
cross burning and displaying swastikas pose an identical intimidation potential. The linkage between cross burning and displaying the swastika in terms of their inherent intimidating effect is widely accepted. It will be recalled that in the first round of the Skokie litigation, the Illinois Supreme Court concluded that it was unconstitutional to enjoin displaying the swastika either under the fighting words exception to free speech or in anticipation of a hostile reaction. Thereafter, the Village of Skokie enacted new legislation designed to suppress display of the swastika by members of the National Socialist Party of America (NSPA). It banned the dissemination of any materials within the Village that intentionally promotes hatred based on race, national origin, or religion. That too was found unconstitutional. If Black had been decided when the Skokie controversy raged, could the Village lawfully have banned displaying a swastika with an intent to intimidate? If the answer is yes, one can imagine that Skokie law enforcement officials, convinced the demonstrators had the requisite intent to intimidate, would have had little patience with any display of a swastika. Skokie could then have prosecuted the demonstrators, leaving their fate to a jury made up of the good citizens of Skokie to determine whether the requisite intent to court upheld the hate-crime laws in states that target those who burn a cross or display a Nazi swastika on private property to ‘terrorize’ residents”).

155. See Bruce Fein, Is Cross Burning Ever Free Speech?, WASH. TIMES, Apr. 15, 2003, at A17, available at 2003 WL 7709452. The argument advanced is that [c]ross burning is uniquely terrifying to the black community. By legend and experience, burning a cross came to be understood as the signature of the Ku Klux Klan’s intent to retaliate against any black who balked at white supremacy. Indeed, as the Nazi swastika is to the Jews, cross burnings are to blacks a frightening symbol of threatened death and destruction that chills the heart and obsesses the mind. History speaks volumes.

156. The adults in the household that was the target of the cross burning in R.A.V. expressed the view that “all black people take cross-burning as a threat, just as all Jewish people take a swastika splattered across the wall as a threat.” HENTOFF, supra note 24, at xvi. Even today, German law “maintains extraordinary restrictions on Nazi symbolism, no doubt because of a fear of what would be implied by tolerance.” EDWARD J. CLEARY, BEYOND THE BURNING CROSS 147 (1994) (quoting LEE C. BOLLINGER, THE TOLERANT SOCIETY 199 (1986)). The linkage between cross burning and the swastika is made even more evident when one realizes that White supremacists themselves sometimes wear a swastika armband. See Paul Davis, Memories of the Klan in Florida, PROVIDENCE J., Apr. 24, 2003, at B4, available at 2003 WL 7064379 (recounting a report that David Duke had worn a swastika armband as a student).


158. Id. at 24.

159. See Collin v. Smith, 578 F.2d 1197, 1199, 1202 (7th Cir. 1978).

160. See id. at 1199-1200.

161. Id. at 1207.
intimidate had been proved. One supposes that only the most foolhardy NSPA member, or one desiring martyrdom, would display a swastika in Skokie under those circumstances. If that is a fair estimate, then the chill on First Amendment freedoms is glaring. Is it not also fair to predict that it would take a similarly foolhardy or martyrdom-seeking White supremacist to burn a cross in any state enacting a Virginia-type cross-burning statute, at least where the pool from which the jury is drawn is dominated by those who believe that there is no such thing as ideological cross burning and who despise the racist viewpoint expressed in cross burning?

And what of the display of the Confederate flag? Anyone who resides in the rural South, for example, can attest that many there cherish their right to display that flag—on frames for automobile license plates, as seat covers for trucks, in the rear windows of trucks, as decals on car bumpers or lunch pails, in store windows, in front yards, etc. Yet that flag carries enormous baggage as a symbol of threat, at least in the minds of some very rational people. Indeed it often is displayed, with the American flag, at Klan rallies that feature the burning of a cross. When some community in the future decides to ban display of the Confederate flag with intent to intimidate, should not such a ban be lawful because displaying the Confederate flag, like cross burning, is a "particularly virulent" expression of intimidation? If the answer is yes, imagine the consequences for other expressive symbols, such as images of men in black jackets and dark glasses marching with fists raised in a Black power salute. If the answer is no—states may not selectively proscribe displaying the Confederate flag—imagine the consequences of such an outcome if the law develops that states may ban both cross burning and the display of the swastika with the intent to intimidate. When the question becomes how "virulent" must the intimidating message of a symbol be to be "particularly virulent," we invite government line-drawing that increasingly resembles choosing sides in the public debate.

Antiwar protestors fly the flags of countries with which we are at war. The Viet Cong flag once was so displayed. May states now ban such flag flying if done with the intent to intimidate? Displaying pictures of

162. The author, who resides in rural Virginia and lives there full-time following the close of the academic year until the beginning of the next, can attest to these uses of the Confederate flag in certain parts of Virginia.

163. See Davis, supra note 156 (reporting that at a Klan rally held in Florida: "On stage, a strong wind whipped twin flags: American and Confederate. A hundred people sat on metal folding chairs in the grass.").

164. We know that since 1931, it has been unconstitutional for the government to ban the flying of a red flag. Stromberg v. California, 283 U.S. 359, 361, 369 (1931). Such a ban is unlikely today but "[a]t the time the [red] flag was a well-known symbol of the
fetuses in front of health clinics offering abortion services with the intent to intimidate is a prime candidate for proscription in states where the current majority is "pro-choice" rather than "pro-life." Burning one in effigy is a traditional way to intimidate the one whose effigy is burned. Is that a sufficient nexus to intimidation to qualify for the "particularly virulent" exception? One wonders if the State of Louisiana could have avoided its defeat in *Brown v. Louisiana* if only instead of alleging breach of the peace by those who sat silently in the "Whites only" section of that "tiny parish branch library," Louisiana legislators had perfected the foresight to enact a statute prohibiting engaging in a "silent and reproachful presence" in a public building "with the intent to intimidate."

Religious symbols can be used and have been used to intimidate members of other faiths. Muslim religious symbols may be likely candidates for obloquy following 9/11 and the current political climate aroused by the invasion of Iraq. Is it simply civil libertarian paranoia to think some community would ban the display of such symbols with the intent to intimidate? What of a similar ban on the Star of David? Or perhaps a "twofer," a ban on both. Who can deny that a reasonably strong historical case could be made that each symbol, in the view of someone, has a well-established record as a symbol of intimidation?

Lest the reader believe that these examples are so beyond any likely reality as not to be worthy of concern, perhaps the banning of the display of the Star of David by the city council in Leeds, England, will serve as a useful splash of cold reality. Edward Cleary recounts a report by Professor Alan Dershowitz that "[a] United Nations resolution equating Zionism with racism had led England (specifically Leeds, England) to ban the Star of David."

Pressure from the international

Communist party in the United States" making its display controversial. See *Cleary, supra* note 156, at 25. What if the California Penal Code that made display of the red flag illegal had contained the additional words "with the intent to intimidate"? No symbol, a zealous anti-communist would argue, is more associated with threat and intimidation than flags representing communism. The historical record of intimidation wrought by communism makes a strong case for a "particularly virulent" exception for regulating display of the red flag. How secure is *Stromberg* in light of *Black*?

166. *Id.* at 163 (Black, J., dissenting).
167. *Id.* at 142.
168. *Cleary, supra* note 156, at 132. The author states that "I had participated by telephone in a radio talk show on WBZ in Boston... Alan Dershowitz... noted that a similar law [similar to the St. Paul ordinance] had been 'used in Leeds, England, a couple of years ago to ban the Star of David as a 'racist symbol' under the U.N. declaration equating Zionism with racism'). *Id.* 84-85. "[T]he General Assembly to the United Nations [has now] repealed the offensive 1975 resolution characterizing Zionism as 'a
community to ban speech deemed racist continues and is likely to continue, as the careful work of Mari Matsuda makes plain. Article Four of the International Convention on the Elimination of All Forms of Racial Discrimination, Matsuda reports, requires signatory states “to criminalize racial hate messages.” It further provides that signatory states shall condemn all ... organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin ... which promote ... racial discrimination, and shall recognize participation in such organization ... as an offence punishable by law.

While the Convention also recognizes the right of free expression, Matsuda concludes that the Convention demonstrates that “the evolving international view” is affirmative recognition of the “right to freedom from racist hate propaganda.” Upholding the Virginia cross-burning statute is in accord with this international view, which can be expected to intensify the political pressure in this country to apply the “particularly virulent” exception to criminalize at least some of the expressive symbols discussed above.

V. THE OVERBREADTH ISSUES

The decision in Black rests on two holdings. First, a state may proscribe cross burning, but only if it proves an intent to intimidate. Second, a state may not indulge in the “shortcut” of making the act of cross burning prima facie evidence of such an intent. These holdings warrant close examination. First, the prima facie evidence provision the form of racism and racial discrimination’ by a vote of 111 to 25, with 13 abstentions.”

170. Id. at 2341.
171. Id.
172. Id. at 2342
173. See Charles Lane, Thinking Outside the U.S., WASH. POST, Aug. 4, 2003, at A13 (discussing how recent decisions of the Court, such as opinions deciding the constitutionality of the death penalty for mentally retarded criminals, affirmative action in university undergraduate and graduate programs, and state bans on homosexual sodomy, increasingly “reflect the influences of international legal norms, as well as rulings by courts in foreign countries”).
175. Id. at 367.
Court struck down created a significant split among the members of the Court, a split that focused on what Justice Scalia argued was an unprecedented view of First Amendment overbreadth. Second, upholding Virginia's right to ban cross burning with the intent to intimidate merits close scrutiny because the "devil is in the details." Is this holding sufficiently speech-protective to avoid punishment of those who burn crosses with no intent to intimidate? Or, does there remain an unacceptable risk that a jury may develop a penchant for finding such an intent when the evidence of intent is equivocal but the message communicated by the cross burning is considered reprehensible? These matters are taken up next.

A. The Prima Facie Evidence Provision and First Amendment Overbreadth

The Virginia Supreme Court concluded that Virginia could not constitutionally make the act of burning a cross prima facie evidence of an intent to discriminate because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech." The three dissenting Virginia Supreme Court justices found no constitutional infirmity in the prima facie provision. Addressing the provision's effect on the likelihood of conviction, not the enhanced risk of being prosecuted, the dissent argued that the prima facie provision merely creates an inference. The burden of proof remains with the Commonwealth, and the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." These competing arguments highlight the two questions the prima facie provision presented the United States Supreme Court: whether an increased risk of prosecution, rather than conviction, can render a statute unconstitutionally overbroad, and, in any event, whether the prima facie provision creates an unacceptable risk that juries will erroneously convict.

The majority in Black never reached the question of whether First Amendment overbreadth is available to redress the enhanced risk of prosecution created by the prima facie provision. The Court found the provision unconstitutional because it "can 'skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is

176. Id. at 371 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
178. Id. at 755 (Hassell, J., dissenting).
179. Id. at 756 (Hassell, J., dissenting).
180. Id. (Hassell, J., dissenting).
relatively weak and arguably consistent with a solely ideological reason for burning." Critical to this conclusion was a Virginia model jury instruction. It provided that "[the burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." This instruction was given to the jury in the criminal prosecution involving Barry Black but not in the O'Mara or Elliott prosecutions. The jury instruction constituted a ruling by the Virginia Supreme Court on a question of state law because the Virginia Supreme Court, provided the opportunity, chose not to disavow the jury instruction. It rendered the prima facie provision unconstitutionally overbroad because

[the instruction] permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.

It is apparent that the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas.'

Justice Scalia's opinion, joined by Justice Thomas, dissented on this point. Emphasizing agreement with the majority that the focus needs to be on who will be convicted and not who will be prosecuted, the Scalia opinion launched four attacks on the reasoning in the opinion of the Court regarding the prima facie provision. Justice Scalia first rejects the claim that the provision will make it more likely that juries will find an intent to intimidate. This, Justice Scalia argues, has no basis in fact. Since the law of Virginia provides that the prima facie provision does not relieve the Commonwealth of its burden to prove, nor the jury of its duty

181. Black, 538 U.S. at 366 (quoting Black, 538 U.S. at 385 (Souter, J., concurring in the judgment and dissenting in part)).
182. See id. at 364 (citation omitted) (citing VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL, Instruction No. 10.250 (1998 & Supp. 2001)).
183. Id.
184. Id.
185. Id. at 365 (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984)). The Court noted that the prima facie provision permits the Commonwealth to convict based on the act of cross burning itself and makes no provision for distinguishing between "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." Id. at 366. This adds to the risk of skewing jury deliberations. Id.
186. Id. at 372 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
187. Id. n.1 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
188. Id. (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
to determine, intent based on the whole record, Justice Scalia perceives no skewing of the adjudicatory process.\textsuperscript{189}

Second, and in any event, Justice Scalia argued, the majority has constructed a new “species of overbreadth doctrine . . . [and] a rare species indeed.”\textsuperscript{190} His claim in this regard is that the overbreadth doctrine is concerned with the overly broad substance of law, not its process for convicting. Inadequacies in “the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns . . . [but] such concerns sound in due process, not First Amendment overbreadth.”\textsuperscript{191}

Third, Justice Scalia was unimpressed that a hypothetical defendant, choosing to exercise the constitutional right not to present a defense, may be convicted erroneously by operation of the prima facie provision.\textsuperscript{192} His response is that a successful overbreadth defense requires proof of real and substantial overbreadth “judged in relation to the statute’s plainly legitimate sweep.”\textsuperscript{193} He argues that there are few defendants who burn a cross for ideological reasons, are arrested and prosecuted, choose not to present a defense, and are thus erroneously convicted.\textsuperscript{194} Concluding that the prima facie provision fails to create “a substantial number of impermissible applications,”\textsuperscript{195} Justice Scalia finds that the prima facie provision is not unconstitutionally overbroad.\textsuperscript{196}

Finally, Justice Scalia calls “alarming” the use of the Virginia jury instruction to find overbreadth.\textsuperscript{197} He notes that the Virginia Model Jury Instructions were not “promulgated by the Legislature nor formally adopted by the Virginia Supreme Court.”\textsuperscript{198} They should not, he argues,

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} at 372 n.1, 372-33 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{190} \textit{Id.} at 373 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{191} \textit{Id.} at 374 n.3 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{192} \textit{Id.} at 374 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{193} \textit{Id.} at 375 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).
\item \textsuperscript{194} \textit{Id.} at 374 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{195} \textit{Id.} at 375 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting New York v. Ferber, 458 U.S. 747, 771 (1982)).
\item \textsuperscript{196} \textit{Id.} at 374-75 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{197} \textit{Id.} at 376 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{198} \textit{Id.} at 377 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\end{itemize}
be deemed binding interpretations of state law upon which a statute can be ruled unconstitutional due to overbreadth.199

Black may indeed have sired a new species of overbreadth, as Justice Scalia claims. The decision certainly endorses the proposition that the unacceptable risk of punishing protected speech, the concern that energizes the overbreadth doctrine, can arise either because of a statute’s substantive terms or because of the process through which the elements of a criminal offense are established. Justice Scalia is correct, moreover, when he states that there was no record evidence that the prima facie provision would skew jury deliberations.200 Indeed, it may be this lack of record evidence that will help qualify Black one day for honorable mention as a speech-protective decision. Using a jury instruction that states that “[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent”201 is perilously close to telling a jury it may disregard rebuttal evidence and convict on the basis of the act of cross burning alone. At least this was the Court’s view when it stated that “even where a defendant . . . presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.”202 So understood, Black endorses a view of First Amendment overbreadth that holds that a state’s procedural rules must not introduce anything into a criminal trial that a fair-minded person could view as confusing to a jury and skewing its deliberative process.203 Courts are permitted, indeed required, to use their judgment to cleanse criminal procedure of rules that create this risk. The absence of documentation that procedural rules do in fact create such risks of jury-process malfunction does not relieve the judiciary of this oversight responsibility. A corollary to this vision of First Amendment overbreadth is that procedural overbreadth is not limited by the real and substantial overbreadth requirements that usually restrict the use of substantive overbreadth. Black at least points in these directions.

199. Id. at 377-78 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
200. See id. at 372-73 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
201. Id. at 364 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).
202. Id. at 365.
B. The Devil Is in the Details: The Continuing Risk of Punishment of Viewpoint

Reduced to its essentials, Black proclaims to the cross burner that “you may not be punished constitutionally for your act of cross burning if done with the intent to express a viewpoint; you may only be punished if you burn a cross with the intent to intimidate.” This is a cynical promise indeed if, as a practical matter, the promise of freedom of expression in Black rings hollow because in practice prosecutors and juries can (and likely will) blur the line between these two differently motivated acts and routinely punish ideological cross burners. What would be most cynical, of course, is if the threat of unwarranted prosecution and punishment so chills constitutionally protected speech that few prosecutions are needed since few, if any, will risk exercising their constitutional right to burn a cross for ideological reasons in states adopting Virginia-like statutes. There are a considerable number of “ifs” in the above observations that need to be examined.

Black certainly needs to be commended for insisting that one may not be punished simply because speech has a tendency to produce evils the government has a right to protect against—such as intimidation. Black stands as a bright beacon reconfirming that without an intent (an aim) to intimidate, speech cannot lawfully be punished, no matter how likely the tendency that unintended intimidation in fact will result. Anyone who has taught constitutional law to first year law students will attest to how counterintuitive this distinction between intent and tendency can be to the uninitiated. The intuitive response is to equate intent and tendency and conclude that one should be held to have intended the reasonably foreseeable consequences of one’s acts—their natural tendencies.

Only after many years of debate and more than a few false starts did First Amendment doctrine adopt the principle that criminal responsibility for speech requires proof of intent, rather than simply proof of the potential “bad tendency” of speech. Since Brandenburg v.

204. See Black, 538 U.S. at 359-60 (holding that “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat” requiring proof that “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”); id. at 360 (holding that a constitutionally proscribable intimidation requires proof that a speaker “directs a threat” to another “with the intent of placing the victim in fear of bodily harm or death”); see also id. at 357 (stating that proscribable cross burning requires evidence that it was “designed to inspire in the victim a fear of bodily harm” (emphasis added)); id. at 366 (indicating that cross burning is proscribable when done “with the purpose of threatening or intimidating a victim”); id. at 385 (Souter, J., concurring in the judgment in part and dissenting in part) (describing the test of intent as proof of an “aim to threaten”).

205. See John F. Wirenius, The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment, 43 Drake L. Rev. 1 (1994) (describing the
Ohio, however, requiring proof of intent and defining intent as one's aim or desire, have attained a prominent, if not always totally secure, place in First Amendment theory. For example, proving malicious libel
in a constitutional sense requires evidence of intent. So also do government regulation of advocacy of use of force or of law violation, the law regulating incitement of hostile audiences to reactive violence, and even the fighting words doctrine. Black now confirms that proof of specific intent (aim) must be proved also in threat cases.

The integrity of this intent requirement is compromised, however, if juries equate intent with tendency. Confusing intent and tendency will skew jury deliberations. A constitutionally mandated jury instruction is needed and, indeed, is mandated by the First Amendment procedural overbreadth principle deployed in Black to strike down the Virginia prima facie provision. The instruction on intent needs to include an

purpose is evident in the words that he uses. So long as the speaker does not actually intend to produce imminent lawless action, the Court's standard bars punishment even though the speaker is fully aware that his words may provoke illegal action and that such action is virtually certain to follow.

Id.

208. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring proof of knowing falsity or reckless disregard for the truth in libel actions brought by public officials libeled with respect to conduct germane to their qualification for office); see also Gertz v. Welch, 418 U.S. 323, 342 (1974) (requiring the same for public figures).

209. See supra note 207, for a discussion of Brandenburg.

210. See Feiner v. New York, 340 U.S. 315, 321 (1951) (holding that police may arrest speaker whose speech arouses an audience to hostile reaction only if speaker uses language that "passes the bounds of argument or persuasion and undertakes incitement to riot" (emphasis added)); see also Cohen, 403 U.S. at 20 (holding that the state may not punish an anti-war protestor for speech on the theory that the speaker incited an audience to hostile reaction absent evidence that speaker "intentionally provok[ed] a given group to hostile reaction"); id. at 23 (holding the same because Cohen "has not sought to provoke [a violent] response by a hypothetical coterie of the violent and lawless" (emphasis added)).

211. The fighting words doctrine does not explicitly contain an intent requirement. It permits regulation of speech that, as a matter of common knowledge, is inherently likely to provoke an imminent hostile response in the person to whom the words individually are addressed. See, e.g., Gooding v. Wilson, 405 U.S. 518, 524 (1972). But, an intent requirement is implicit in the elements the state must prove to proscribe speech under the fighting words doctrine, especially the requirement that the words must be "directed to the person of the hearer." Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). They must constitute a "direct personal insult." Cohen, 403 U.S. at 20. This requirement of proving that the speaker directed "fighting words" face-to-face to the "person of the hearer" is the functional equivalent of requiring proof of intent; the proof establishes conditions that, as a matter of law, demonstrate a frame of mind showing either subjective intent to produce a violent reaction or reckless disregard that a violent reaction would result.


213. It will be recalled that the prima facie evidence provision was struck down in Black because it "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case... It is apparent that the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas.'" Id. at 365 (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 797 (1984)).
explicit statement that in order to find that the defendant had the requisite intent, the jury must determine that the defendant’s purpose (aim) was to intimidate. The jury must be told that intent is not established by proof that cross burning may have had, or did have, the tendency or likelihood to intimidate. Failure to so instruct a jury should be reversible error in any conviction for cross burning. Otherwise, the promise of Black to the ideological cross burner risks being reduced to a sham.

Such an instruction is a necessary, but not sufficient, reform to secure the speech-protective promise of Black. The proposed instruction helps avoid potential juror confusion with respect to the appropriate use of the intimidating tendencies of cross burning but does not address the risk of jury nullification. Such nullification is a real and substantial threat for three reasons: 1) the widely held belief that the only reason one would burn a cross is to intimidate; 2) the inherent weakness of the jury system as a bulwark against government oppression when a cultural outsider challenges conventional orthodoxy; and 3) the risk that the government will introduce evidence of the tendency of cross burning to intimidate as probative of a subjective intent to intimidate and thereby signal juries to convict based on this tendency, notwithstanding a jury instruction to the contrary.

With respect to the first concern, meaningful protection of the constitutional right to engage in ideological cross burning requires that prosecutors, judges, and juries all accept the Supreme Court’s conclusion that cross burning sometimes is engaged in not to intimidate but rather to communicate a viewpoint. Were there to develop a widespread rejection of that view, replaced by a belief that the only reason persons burn crosses is to intimidate, there would be faint basis for confidence that judges and juries would protect ideological cross burners by finding they had no intent to intimidate.

The evidence strongly suggests the presence of a widely held belief that the only reason one would burn a cross is to intimidate. That explicitly was the position advanced by the State of Virginia in Black when it argued to the Court that “[a] burning cross—standing alone and without explanation—is understood in our society as a message of intimidation. ‘[T]he pernicious message of [cross burning is] a clear and direct expression of an intention to do one harm, [and] constitutes a true threat.’” 214 Indeed, while the Virginia cross-burning statute gave lip

The prima facie evidence provision was unconstitutional because it created an unacceptable risk of skewing jury deliberations. Id. at 366; see discussion supra notes 181-85 and accompanying text.

service to the intent requirement, Virginia's brief to the Court made plain the Commonwealth's position that proving such an intent is not constitutionally mandated.\textsuperscript{215} Moreover, Virginia's adoption of the prima facie evidentiary rule reveals its view that cross burning inherently manifests an intent to intimidate.\textsuperscript{216} Even after the decision in Black, Virginia political officials continue to argue publicly that inherent in all cross burning is the intent to intimidate.\textsuperscript{217} The mass media, moreover, continues to express this view.\textsuperscript{218} Some academic literature adopts this view.\textsuperscript{219} It is instructive that in the 1992 litigation in the R.A.V. case, Edward Cleary, the attorney for R.A.V., was opposed by "nearly every major civil rights organization" and was "treated as a pariah even after

\textsuperscript{215} See id. at *15-16 (citing State v. T.B.D., 656 So. 2d 479, 481-82 (Fla. 1995), which upheld a Florida ban on cross burning that lacked an "intent to intimidate" limitation).

\textsuperscript{216} The rationality of the prima facie provision in the Virginia statute that the Court struck down in Black was built around the assumptions that cross burning inherently intimidates, one would not burn a cross for any reason other than to intimidate, and that the combination of these two assumptions justifies eliminating, in effect, the factfinder's obligation to scrutinize the entire context of the behavior to ascertain the true aim of the act. See id. at *18 (arguing that "the act of burning a cross is typically ... intended ... to intimidate a victim").

\textsuperscript{217} Following the decision in Black, the Governor of Virginia stated, "I respect the First Amendment protection of speech, but burning a cross is never about free speech." Lyle Denniston, Court Rules Cross Burning Can Be Crime, BOSTON GLOBE, Apr. 8, 2003, at A2, available at 2003 WL 3389641. Even the Commonwealth's chief legal officer, its attorney general, seems to reject that portion of the Black holding that cross burning sometimes has only the intent to express a viewpoint. He is quoted as saying that "[a] burning cross is a symbol like no other. It doesn't just say...[and n]o one is trying to enlighten anyone with cross burning... [because cross burning] has no message except that of hatred and terror"; The Free-Speech Line, ROCHESTER DEMOCRAT & CHRON., Apr. 9, 2003, at 10A, available at 2003 WL 17913242 (stating its approval that government must prove intent to intimidate but also concluding that "it is hard to imagine an instance in which a cross burning—a central symbol to the Ku Klux Klan's violently racist ideology—could be benign"); see also Terror Shouldn't Be Protected Under Freedom of Speech Rights, PORTLAND PRESS HERALD, Apr. 11, 2003, at 12A, available at 2003 WL 3497338 (concluding that "the burning cross... has been a symbol of fear, terror and intimidation" and accordingly, "[i]t's difficult to imagine when a flaming cross would not be perceived as a threat").

\textsuperscript{218} See Cross Burning Terrorizes Public, CAL. ST. U.-LONG BEACH U-WIRE, Apr. 9, 2003, 2003 WL 18646170 (reasoning that striking down Virginia's prima facie provision was "a minor change" and merely "symbolic" because "[w]hy would someone with good intentions burn a cross...[and n]o one is trying to enlighten anyone with cross burning...[because cross burning] has no message except that of hatred and terror"); The Free-Speech Line, ROCHESTER DEMOCRAT & CHRON., Apr. 9, 2003, at 10A, available at 2003 WL 17913242 (stating its approval that government must prove intent to intimidate but also concluding that "it is hard to imagine an instance in which a cross burning—a central symbol to the Ku Klux Klan's violently racist ideology—could be benign"); see also Terror Shouldn't Be Protected Under Freedom of Speech Rights, PORTLAND PRESS HERALD, Apr. 11, 2003, at 12A, available at 2003 WL 3497338 (concluding that "the burning cross... has been a symbol of fear, terror and intimidation" and accordingly, "[i]t's difficult to imagine when a flaming cross would not be perceived as a threat").
he won the case.220 William Kunstler's explanation was that for "most blacks and most white liberals... [a]ll they could see was the burning cross."221 The evidence suggests that one might recast that observation and state that all they could see in the burning cross was the intent to intimidate. Among jurors who do not acknowledge any other intent in cross burning, defense counsel confront a nearly impossible task in arguing for acquittal on the ground that the cross burner lacked the requisite intent.

But the risk of jury nullification of the speech-protective aspects of Black transcends the dangers arising from the widely held belief that one only burns a cross to intimidate. The risk of jury nullification resides also in the pathology of intolerance. Rodney Smolla has observed that "[c]ensorship is a social instinct,"222 and "[t]he conflict felt by most decent Americans is that we hate hate speech as much as we love free speech."223 Kenneth Karst has explained what happens when a cultural "outsider" expresses an idea challenging our conventional orthodoxy or expresses an idea through "modes of expression... that go against the dominant cultural grain."224 Such expression generates

the most insistent demands for suppression of speech... [because] challenges [to] a dominant community of meaning... are bound to arouse strong emotions, for they threaten the individual identities of the people who live inside the boundaries of the dominant culture.

. . . .

The subordination of outsiders [is] rooted in fear, and the fears come to us early.225

This "aggressive impulse to be intolerant of others resides within all of us," Vincent Blasi reminds us.226 "The problem [of aggressive

220. See HENTOFF, supra note 24, at xiv.
221. Id.
224. Karst, supra note 130, at 97, 100.
225. Id. at 96, 110; see id. at 110 ("When we encounter people who have been acculturated to assign different meanings to behavior, our lack of understanding may lead us to mistrust them."); see also JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 130 (2d ed. 1996) (explaining that our commitment to freedom of speech "begin[s] to break down as the speech in question strikes more and more deeply at the personal and social values we cherish and hold fundamental to the society" and concluding that protecting speech we detest thus constitutes an "act[] of extraordinary tolerance" (quoting LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986))).
intolerance] is compounded by the fact that the suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community." Sustained socialization is required to combat this urge to suppress dissent. But during what Blasi calls "pathological" periods, times of great national distress, this socialization tends to lose its effectiveness. There develops a "notable shift in attitudes regarding the tolerance of unorthodox ideas." During "pathological periods, at least some of the central norms of the constitutional regime are . . . scrutinized and challenged. The core commitments that derive from those norms are viewed by many as highly burdensome and controversial." Blasi thus argues that because the central norms of free expression "tend to be placed in jeopardy during pathological periods . . . adjudication in ordinary times should be heavily influenced by the goal of strengthening the central norms of the first amendment tradition against the possibility of pathological challenges." Juries dealing with criminal defendants in free speech cases are no more immune from the social instinct to suppress dissent than the rest of society. Akhil Reed Amar's work summarizes this reality well. Amar argues that the First Amendment was drafted to protect "relatively popular speech critical of unpopular government policies—the kind of speech, for example, that the 1798 Sedition Act sought to stifle." In that context, the "paradigm speaker" was John Peter Zenger in colonial New York who was "a popular publisher who wanted to get to a local jury likely to be sympathetic to his anti-government message." In more

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226. Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 457 (1985) (concluding that "[b]ecause the instinct to suppress dissent is basic, primitive, and aggressive, it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression.").

227. Id.

228. Id. at 450.

229. Id.

230. Id. at 456.

231. Id. at 458. Government officials may be a primary source of suppression of speech. They tend to overvalue short-term, concrete interests that conflict with allowing free speech, and to undervalue the more abstract, long-term interests served by speech. Free speech (assuming it does not involve the press) may be less well defended by the kind of organized constituent groups that are effective in influencing government officials. Free speech may tend to create disorder, and officials might place undue emphasis on the need to maintain control.


233. Id. at 152.
recent times, the "center of gravity" has shifted to protecting "unpopular, eccentric, 'offensive' speech, and . . . speech critical not simply of government policies, but also of prevailing social norms."\textsuperscript{234} Now the "paradigm speaker" seeking free speech protection is someone more like the unpopular flag burner Gregory Johnson,\textsuperscript{235} the "cultural outsider [who] challenge[s] head on the social order and general orthodoxy of dominant public opinion."\textsuperscript{236} As Amar concludes, "Gregory Johnson, unlike popular John Peter Zenger, would not have been content to place his fate in the hands of a jury of ordinary citizens" because jurors in cases such as his view the government not as the oppressor but as "an honest agent of dominant community morality."\textsuperscript{237}

Ernst Freund has expressed parallel views showing how free speech is a precarious right when "subject to a jury's guessing at motive."\textsuperscript{238} Freund points out that "while the jury may have been a protection against governmental power when the government was a thing apart from the people, its checking function fails where government policies are supported by majority opinion."\textsuperscript{239} These are not new ideas. Fifty years ago, Thomas Emerson warned that

[m]ost of our efforts in the past to formulate rules for limiting freedom of expression have been seriously defective through failure to take into consideration the realistic context in which such limitations are administered. The crux of the problem is that the limitations, whatever they may be, must be applied by one group of human beings to other human beings. In order to take adequate account of this factor it is necessary to have some understanding of the forces in conflict, the practical difficulties[, and] . . . the possibility of distorting [legal limitations and protections] to attain ulterior purposes.

The starting point is a recognition of the powerful forces that impel men toward the elimination of unorthodox expression. . .

\textsuperscript{234} Id. at 152-53.
\textsuperscript{236} Amar, supra note 135, at 153.
\textsuperscript{237} Id.
\textsuperscript{238} See Ernst Freund, The Debs Case and Freedom of Speech, NEW REPUBLIC, May 13, 1919, at 13, reprinted in Harry Kalven, Jr., Ernst Freund and the First Amendment Tradition: Professor Ernst and Debs v. United States, 40 U. CHI. L. REV. 235, 240 (1973) (concluding that "[t]o know what you may do and what you may not do, and how far you may go . . . is the first condition of political liberty; to be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift").
\textsuperscript{239} Id. at 241 (observing that when a docile jury finds an intent to intimidate, that finding tends to be conclusive when the court "does not consider it inconsistent with possibility").
The drives to repress, both irrational and rational, tend to become overwhelming. The risk of jury nullification thus is inherent when "cultural outsiders" such as cross burners are prosecuted. The risk can be exacerbated, moreover, when prosecutors in a cross-burning trial are permitted to introduce evidence implicitly inviting the jury to convict because of the intimidating tendency of cross burning, notwithstanding a jury instruction to the contrary. Virginia's brief in Black demonstrates how this strategy might operate. Virginia stated that in the Barry Black case the jury properly found a motive to intimidate, even though Black chose to burn a cross on the land of another with permission of the land owner, because Black did not do everything possible to prevent persons, other than attendees at his rally, from observing the burning cross. He burned the cross "in public view . . . where passers-by could clearly see it," Virginia argued, although he had the option of choosing a location for the cross burning that "could not be seen from the roadside." This choice of location, Virginia urged, constitutes an indicia of intent to intimidate when a secluded place was available. Moreover, Virginia introduced evidence that Black chose a place to burn a cross that "was also clearly visible from 8 to 10 nearby houses," one of which was close enough that the person occupying the house "could hear Klan speakers 'talk real bad about the blacks and the Mexicans.' Virginia further contended that additional evidence of the intent to intimidate could be found in the size of the cross burned; the cross was twenty-five to thirty feet high, making it "visible along a three-quarter mile stretch of state roadway, where cars


The illuminating letters between Judge Learned Hand and Justice Oliver Wendell Holmes, discovered by Gerald Gunther over a quarter-century ago, further clarifies the hazards of permitting a rule of legal responsibility for speech to turn on nothing more than a jury's determination of motive. In a late March, 1919 letter from Judge Hand to Justice Holmes, Judge Hand stated that free speech cases so often actually occur when men are excited and since juries are especially clannish groups, . . . it is very questionable whether the test of motive is not a dangerous test. Juries won't much regard the difference between the probable result of the words and the purposes of the utterer. . . . [This often] will serve to intimidate [the speaker].


241. Brief of Petitioner at 6, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107). In the trial of Barry Black the prosecutors introduced photographs of "the open field where the cross was burned and the long stretch of adjacent highway" [defining "adjacent" as 300 to 350 yards away] and photographs of "a secluded area [behind some trees] on the same property where the Klan could have held its rally out of public view, without the intimidating effect on passers-by." Id. n.3.

242. See id. at 6-7.

243. Id. at 6.
passed at the rate of about 40 to 50 miles per hour." 244 All of this evidence, introduced as probative of motive, also is calculated to encourage the jury to convict if the jury finds the cross burning had the tendency (likelihood) of intimidating—thus equating intent and tendency. One need not guess that this is the strategy; Virginia essentially concedes this when it states in its brief to the Court that "while cross burning at a secluded Klan rally may intimidate no one, there is intimidation when the cross is burned—as it was in Carroll County—in a place visible to neighbors and passers-by." 245 Reinforcing this strategy of equating tendency and intent is Virginia's argument regarding the reaction of Black motorists who drove on the state highway and observed the cross burning from afar. They "stopped and looked across the field' toward the burning cross, then 'took off at a higher than normal rate of speed.'" 246 The suggestion is that cross burning had the tendency to intimidate these motorists, that those who intentionally burn a cross where it could be observed from the highway knew or should have known this would be the likely effect (tendency) of their behavior, and, therefore, intimidation was their intent. 247

The above-described strategy for proving intent is pernicious. It tends to encourage jurors to convict due to the likely effect of cross burning on others, notwithstanding a jury instruction not to confuse tendency with intent. The strategy restricts the constitutional right to proclaim a viewpoint through cross burning in ways no other expression of viewpoint is restricted. No constitutional principle permits the government to penalize a speaker for choosing to express a point of view to those who do not currently accept its truth. 248 If the right to free expression means anything it means the right to participate in the public debate by addressing nonbelievers with one's viewpoint. Yet Virginia's strategy invites the jury to convict when a cross burner does just that. If the cross burner chooses not to repair to a secluded place where none other than believers can view the message of hate and White supremacy expressed through ideological cross burning, the jury is invited to consider this a reason to convict. Such a prosecutorial strategy impairs

244. Id.
245. Id. at 33 n.19.
246. Id. at 6.
247. Virginia implicitly conceded its strategy to establish the intent to intimidate by demonstrating the tendency of cross burning to intimidate when it additionally argued to the Court that "when the cross is burned . . . at a Klan rally visible to all passers-by[. . .] . . . the incident is understood to be a threat against those minorities whom the Klan has historically sought to cower." Id. at 36 n.21.
the freedom of expression. Black purports to secure and encourages self-censorship.249

The judiciary needs to decide if it will take seriously the Court’s holding in Black that some cross burning is constitutionally protected expression of viewpoint and also take seriously the duty to protect this speech.250 If burning a cross in an open field with permission of the owner can be stretched to evidence of an intent to intimidate, because the burning could have been conducted at a more remote site, the state strikes at viewpoints as effectively through statutes requiring an intent to intimidate as through statutes that require no proof of such an intent. No court ought to indulge such a prosecutorial strategy, at least no court that is serious about honoring its oath to uphold the Constitution.

This is not to say that it is easy to accept Black’s declaration that expressions of hate and bigotry communicated through the medium of cross burning deserve full constitutional protection: only that it is necessary. It has been observed that “[t]he Supreme Court at work on the First Amendment is not a pretty sight. Freedom of speech may be a noble concept, but the actual stuff of such cases tends to be sordid.”253 The famous Frankfurter quote, used to introduce this article, comes to mind when we consider protecting viewpoints we despise: “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”252 Yet we know, as Harry Kalven, Jr. so persuasively urged many years ago, “Freedom of speech is indivisible; unless we protect it for all, we will have it for none. It is a sign of weakness to control speech; only democracies can afford the gallant gamble on utter freedom of speech—it is too dangerous for tyranny.”253

249. See Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (concluding that “[t]he existence of . . . a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview”).

250. After all, the Court in Black refers to ideological cross burning as “core political speech” and as “lawful political speech at the core of what the First Amendment is designed to protect.” Black, 538 U.S. at 365.


I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas
The above discussion of the pathology of intolerance suggests that it is most unfortunate that the decision in *Black* permits a state to punish cross burning on the property of another even when the owner or occupier consents. It would have been better if the Court had held that the Constitution commands what some states, such as Florida and California, voluntarily do—exempt from criminal proscription the burning of a cross on the property of another with permission of the owner or occupier of the premises. This single limitation in a state’s cross-burning statute would remove most of the risk of unconstitutional criminal conviction of ideological cross burners. As one amicus curiae brief in *Black* pointed out: "[L]inking criminal culpability with unauthorized access to property limits the circumstances under which a prosecution can be initiated. Thus, the potential of the statute reaching protected expression is greatly reduced."

Even when states do not so limit the reach of their cross-burning statutes, courts should find, as a matter of constitutional law, that cross burning at a Ku Klux Klan or similar political rally, is constitutionally protected. Dicta in the opinion of the Court in *Black* goes far in adopting this view. Justice O'Connor's opinion states that "sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, '[b]urning a cross at a political rally would almost certainly be protected expression.'"

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254. Florida law contains this limitation. FLA. STAT. ANN. § 876.18 (West 2000) (banning cross burning on the property of another "without first obtaining written permission of the owner or occupier of the premises"). Under California law, the same restriction applies. CAL. PENAL CODE § 11411(c) (West 2000); see also People v. Steven S., 31 Cal. Rptr. 2d 644, 646 (Cal. Ct. App. 1994).

255. The risk would still exist for those who burn a cross on public property.


257. See Steven S., 31 Cal. Rptr. 2d at 648 (holding that cross burning at a rally is protected because it is not directed at any individual).


It is of course possible that cross burners may burn a cross at a rally with the aim of intimidating others rather than to express a viewpoint. That seldom would be the case, as Justice O'Connor concluded in *Black*. To the extent that the proposed rule would create
The reforms urged above will go far in avoiding distorted fact finding that results in punishing protected speech. One additional protection is needed: active participation by the judiciary in reviewing findings that cross burning was engaged in with the intent to intimidate. The specter that causes alarm is that of a zealous prosecutor indicting, of an obliging jury convicting, and of a pliant trial and appellate court rendering a jury finding of intent to intimidate "conclusive because the court does not consider it inconsistent with possibility."259 Henry Monaghan has made the case persuasively that courts "must exercise independent judgment" with respect to constitutional facts relevant to First Amendment law application.260 As he explains, "[B]oth trial and appellate judges must examine the evidence, marshal the relevant adjudicative facts, and then apply the controlling first amendment norms to those facts."261 Such judicial oversight is needed to avoid "an intolerable level of mistakes in denial of first amendment defenses"262 caused either by the indeterminacy of a particular First Amendment rule or the more disquieting risk of "systemic bias [brought about or threatened] by other actors in the judicial system."263 This preference for active judicial oversight arises from a deep-seated belief that long judicial tenure insulates judges from political pressure, that courts are more institutionally detached from other actors, that judges are acculturated to decide cases according to legal rules, and that these forces increase the likelihood that judges will take the "long view."264

an unacceptable risk that intended intimidation goes unpunished, courts might need to design a narrow exception to the proposed rule of protecting cross burning at a political rally. Black suggests that a possible exception would be that cross burning at a political rally would not be protected if "a cross burning is directed at a particular person not affiliated with the Klan [for then] the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm." Id. at 357 ("The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce ....").

259. See Freund, supra note 238, at 241.
260. Henry P. Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 229 (1985) (extrapolating from the defamation case, Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 513-14 (1984), the general principle that "as a matter of 'federal constitutional law,' appellate courts [are not bound by the 'clearly erroneous' standard set forth in FRCP Rule 52(a) but] must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity [not just preponderance of the evidence]").
261. Id.
262. Id. at 269.
263. Id. at 271.
264. See GARVEY & SCHAUER, supra note 225, at 275.
VI. THE FUTURE OF FIRST AMENDMENT DOCTRINE AFTER BLACK

One of the more remarkable aspects of Black is the relatively casual way the Court announces that cross burning can have two quite distinct purposes, one ideological and one to threaten, and that the ideological purpose is constitutionally protected even though the ideology asserted centers on hate, bigotry, and racial superiority. The understated way in which all this is expressed in Black demonstrates that First Amendment doctrine has come a long way from the regime of Chaplinsky v. New Hampshire and Beauharnais v. Illinois when the Court placed beyond constitutional protection "words . . . which by their very utterance inflict injury."

This evolution from the Chaplinsky era is all the more remarkable when one realizes that the hateful viewpoints the First Amendment now is understood to protect have been characterized as constituting an assault that profoundly injures the psyche of its victims—"like receiving a slap in the face." The flag burning cases (Texas v. Johnson and United States v. Eichman) showed that the expression of unpopular symbolic expression was protected, but these cases did not resolve whether a viewpoint can so injure an individual or group that it loses constitutional protection. But the seeds of the contemporary protection of all ideology, even the ideology of hate, can be found in those cases, especially in the bedrock principle articulated in Johnson. R.A.V. v. City of St. Paul took that bedrock principle a step beyond Johnson by

266. 315 U.S. 568 (1942).
267. 343 U.S. 250 (1952).
268. Id. at 255-56; Chaplinsky, 315 U.S. at 572. This "two-level" theory of speech, as Harry Kalven termed it, emanates from dicta in Chaplinsky and Beauharnais. Kenneth Karst explains that as early as 1960, Kalven destroyed its intellectual foundations by demonstrating that placing speech beyond the protection of the First Amendment because it lacks redeeming social utility "violates the first amendment principle that prohibits weighing the social utility of speech." Karst, supra note 104, at 30-31 (citing Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 SUP. CT. REV. 1, 10 (1960)).
269. See Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 452 (1990). Frederick Schauer has observed, however, that

a host of communicative acts [can] indeed hurt us . . . .

The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and . . . robust free speech systems protect speech not because it is harmless, but despite the harm it may cause.

272. See discussion supra note 18 and accompanying text.
deploying it to protect even racist viewpoints.\(^{273}\) Akhil Amar reminds us that *R.A.V.* did not simply restate past law; it “remodel[ed]” it.\(^{274}\) In *R.A.V.*, the Court acknowledged that “the Court’s prior descriptions of fighting words and libel as wholly unprotected were not ‘literally true.’”\(^{275}\) Now, after *Black*, we can say with assurance that it also is not “literally true” that the Constitution provides no protection to “words ‘which by their very utterance inflict injury.’”\(^{276}\) It is equally certain, however, that *Black* did not strike entirely the words-which-by-their-very-utterance-inflict-injury category from the *Chaplinsky* list of unprotected speech.\(^{277}\) The category survives but with what effect after *Black*?

It seems clear that speech will not fall outside the First Amendment’s protection by operation of *Chaplinsky*s words-which-by-their-very-utterance-inflict-injury category simply because the idea (the viewpoint) contained in those words may “inflict injury.” If *Johnson*’s bedrock principle, as well as the holdings in *R.A.V.* and *Black*, mean nothing else, they mean that.\(^{278}\) But, the words-which-by-their-very-utterance-inflict-injury category might still serve as a source of governmental authority to control the words used to express viewpoints of hate and bigotry. That, after all, is the whole point of the fighting words doctrine, for example. The viewpoint is protected, but the means of conveying it (the words employed) may be subject to proscription.\(^{279}\) The Court’s choice in *Black* to rely on the “particularly virulent” exception to *R.A.V.* could revitalize *Chaplinsky* in the sense that government might attempt to deploy the exception to justify banning certain words, such as racial epithets, from the public vocabulary while protecting the viewpoint these words express.

Protecting the viewpoint but banning the words deployed to express it is risky business. That is the teaching of *Cohen v. California*.\(^{280}\) It is the


\(^{274}\) See Amar, supra note 135, at 147.

\(^{275}\) Id. (quoting *R.A.V.*, 505 U.S. at 383).


\(^{277}\) As it had done previously in *R.A.V.*, see 505 U.S. at 383, the Court in *Black* reaffirmed the *Chaplinsky* dictum regarding the absence of constitutional protection accorded words that “‘by their very utterance inflict injury.’” Id. (quoting *Chaplinsky*, 215 U.S. at 572).

\(^{278}\) See, e.g., *Black*, 538 U.S. at 358 (stating that the “First Amendment ‘ordinarily’ denies a State ‘the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence’” (quoting *Whitney* v. California, 274 U.S. 357, 374 (1927)).

\(^{279}\) See *Cleary*, supra note 156, at 167 (stating that the fighting words doctrine “created a Pandora’s box for freedom of speech because it held that words that led to a reflexive and violent response from a target could be punished”).

\(^{280}\) 403 U.S. 15 (1971).
Cohen decision that most eloquently rejects state efforts to remove particular words from the public discourse.\(^{281}\) A way to test whether Black might provide sustenance to state efforts to censor words because they "inflict injury" is to investigate whether Black undermines Cohen. A plausible case can be made that it does.

Justice Harlan's opinion in Cohen stands as a bulwark against what we would call today, "political correctness." It rejected California's attempt to "punish[] public utterance[s] . . . in order to maintain . . . a suitable level of discourse within the body politic."\(^{282}\) Two of the bases for the Court's refusal in Cohen to allow California to prohibit Cohen from using the words he chose to use to express his opposition to the war in Vietnam are particularly apropos to an inquiry into Black's effect on Cohen.

California opened by asserting its right to prohibit Cohen from communicating his distaste for the war in Vietnam by placing "F—-k the draft" on the back of his jacket by arguing that it had an obligation to protect against the violent reactions this might cause in others.\(^{283}\) Justice Harlan dispatched that argument quickly with two rhetorical swipes. First, there was no evidence that "substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen."\(^{284}\) Moreover, to permit the state to regulate based on such an unproved risk of reactive violence would permit the state to indulge in "an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'"\(^{285}\)

California's second ground was that, in any event, it had the right "as guardian[] of [the] public morality [to] remove [Cohen's] offensive word from the public vocabulary."\(^{286}\) It is here where we first were taught by the Court that "words are often chosen as much for their emotive as their cognitive force."\(^{287}\) This is because "much linguistic expression . . . conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."\(^{288}\) The government cannot be granted the leave it requests because, first, the power sought is

\(^{281}\) Id. at 16, 26 (holding that California could not prohibit wearing a jacket containing the words "F—-k the draft").
\(^{282}\) Id. at 23.
\(^{283}\) Id. at 22-23.
\(^{284}\) Id. at 23.
\(^{285}\) Id. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).
\(^{286}\) Id. at 22-23.
\(^{287}\) Id. at 26.
\(^{288}\) Id.
"inherently boundless."289 When one considers that "one man's vulgarity is another's lyric,"290 one soon realizes that "governmental officials cannot make principled distinctions in this area [and for this reason,] the Constitution leaves matters of taste and style . . . largely to the individual."291 In addition, to grant California's request to prohibit certain words to achieve a "suitable level of discourse"292 is to "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process [for] governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."293

If Black erodes the speech-protective coating Cohen provides, it will be with respect to one or more of the above-stated arguments in Justice Harlan's decision.

The "particularly virulent" exception to R.A.V. is undifferentiated fear in different clothing. In Tinker v. Des Moines Independent Community School District,294 the armband was said to be inherently likely to disrupt the classroom.295 In Cohen and Johnson, the behaviors were said to be inherently likely to create reactive violence.296 In Black the cross burning was said to be inherently likely to intimidate, and in a "particularly virulent" way.297 In Tinker, Cohen, and Johnson, the government was not permitted to regulate the content of speech based on such assertions of the speech being "inherently likely" to create adverse social effects.298 Black breaks that otherwise consistent pattern. If government is permitted to assert that a burning cross can inherently intimidate, indeed "virulently" intimidate, why is government not also permitted to assert that certain racial epithets, for example, inherently intimidate (or inherently create other outcomes that a state should be privileged to protect against)? Cross burning does have a unique history of association with violence, as the Court emphasized.299 But if Black develops to permit selective proscription of other symbols, which have a less certain association with threats of violence, then censoring expressive symbols could evolve into the censoring of words. As

289. Id. at 25.
290. Id.
291. Id.
292. Id. at 23.
293. Id. at 26.
295. See id. at 508.
298. Tinker, 393 U.S. at 508; see discussion supra notes 94, 293 and accompanying text; see also notes 232-42 and accompanying text.
respondents in *Black* remind us, "A word is, after all, but a symbol itself." 300

But what of Justice Harlan's second line of defense of free speech in *Cohen*—that the power of government to pick and choose which words to permit or prohibit seems "inherently boundless" because one "cannot make principled distinctions in this area" and because one should not indulge in the "facile assumption" that this can be done without "running a substantial risk of suppressing ideas" as well? 301 Does *Black* erode that principle? It would seem the answer is a resounding "yes" unless one believes that there are significantly more "principled distinctions" available to government officials when deciding which expressive symbols are "particularly virulent" than there would have been available to California officials choosing which words to ban in order to protect the public morality. If, after reading the above discussion in Part IV, one concludes that this new "particularly virulent" exception to *R.A.V.* "seems inherently boundless," then one also ought to worry that permitting such an operating principle to insinuate itself into First Amendment doctrine may well inaugurate an erosion of *Cohen.* 302

One final thought on the potentially corrosive effects of *Black* on established principles for protecting expression: Conspicuously absent from the prerequisites for constitutional proscription of cross burning is any requirement that the cross burning must not only be intended to intimidate but also that imminent intimidation is likely to occur in the circumstances. 303 Until *Black,* the Court seemed to equivocate regarding whether in "true threat" cases a state must prove that it is likely that a

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300. Brief on Merits for Respondents at 11, *Black* (No. 01-1107).
301. See discussion supra notes 289-93 and accompanying text.
302. Punishing speech because the words used cause emotional harm in the audience takes the regulation of expression into a realm far beyond the fighting words doctrine. The concept of breach of the peace is fairly contained—inherently likely to provoke an imminent hostile response in the person to whom the words individually are addressed. See, e.g., Gooding v. Wilson, 405 U.S. 518, 523 (1972). But a rule banning words that "inflict injury" refers to an internal condition that lacks fixed objective meaning and defies agreement regarding which words threaten that interest. As Mark Rutzick has explained, the "inflict injury" standard creates a . . . difficult evaluative problem for those wishing to incorporate it into the law's protected interests. Unlike the more tangible quality of order, the interest of protecting "sensibilities" has no physical component. The only manner in which a individual's "sensibilities" are known to be affected is by the individual's statement to that effect.

threat will produce an imminent fear of harm.\textsuperscript{304} On its face, the decision in \textit{Black} contains no such express requirement. The decision in \textit{Black} thus raises the question of whether the decision retreats from the normal requirement that government must show that proscribed speech creates a "clear and present danger" of substantial harm.\textsuperscript{305}

In the \textit{Black} litigation, Virginia argued that there is no constitutional requirement in cross-burning cases that a state prove that an intended intimidation actually creates the likelihood of placing another in imminent fear.\textsuperscript{306} Virginia conceded that under the fighting words doctrine, a state must establish that the words spoken are likely to create the risk of imminent reactive violence, but cross burning, it urged, is different. As Virginia argued, "Hurling an epithet may sometimes provoke a breach of the peace in the heat of the moment, but the danger is likely soon to pass [and if it does not create a likelihood of an imminent reactive violence it probably will not result in any harm at all]."\textsuperscript{307} However, "[i]t is different with intimidation. A threat to do bodily harm to an individual or his family is likely to sink deep into the psyche of its victim, acquiring more force over time.... The value of a sword of Damocles is that it hangs—not that it drops."\textsuperscript{308} This reasoning may explain why the Court jettisoned "imminent" from the normal requirements for finding criminal culpability arising from speech. This argument does not explain, however, the absence of any discussion in

\textsuperscript{304} In dicta, the Court in early cases had signaled that threats may be regulated even absent proof of such a likelihood. \textit{See, e.g.}, \textit{Watts v. United States}, 394 U.S. 705, 705, 707 (1969) (stating in dicta that federal statute prohibiting an intentional threat against the life of the President is constitutional). Yet, the holdings of other, more recent, threat cases are grounded in the government's failure to prove that a threat was likely to produce imminent harm. \textit{See, e.g.}, \textit{Rankin v. McPherson}, 483 U.S. 378, 390-92 (1987) (holding that the discharge from public employment due to private expression of desire that the next assassination attempt on President Reagan be successful was unlawful absent evidence that the speaker intended and is able to take action consistent with her expressed desire); \textit{NAACP v. Claiborne Hardware Co.}, 458 U.S. 886, 927-28 (1982) (overturning civil damage award arising from threat because "[s]trong and effective extemporaneous rhetoric" implying "an unlawful form of discipline" and creating "a fear of violence" not sufficient to "remove speech from the protection of the First Amendment" absent evidence the speech is likely to cause any harm). \textit{See generally} Steven G. Gey, \textit{The Nuremberg Files and the First Amendment Value of Threats}, 78 TEx. L. REV. 541, 552 & 552 n.65 (2000) (discussing the failure of lower courts to apply the holding of \textit{Claiborne Hardware} in cases of alleged threats).

\textsuperscript{305} \textit{See} Schenck v. United States, 249 U.S. 47, 52 (1919).

\textsuperscript{306} \textit{See} Brief of Petitioner, \textit{Black} (No. 01-1107), 2002 WL 1885898, at *14-15 (stating that "[s]o long as there is an intent to intimidate, all acts of cross burning are banned. All are subject to the same punishment.").

\textsuperscript{307} \textit{Id.} at *14.

\textsuperscript{308} \textit{Id.} (quoting \textit{Rafeedie v. INS}, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (Ginsberg, J., concurring)).
of why the Virginia statute was upheld although, on its face, it does not require proof that the cross burning done with the intent to intimidate will likely place one in fear of bodily harm—albeit not imminent bodily harm.309

Strict judicial scrutiny requires that the government show a necessity to interfere with the enjoyment of a constitutional right.310 In free speech doctrine, the “clear” requirement in the “clear and present danger” paradigm responds to that imperative. It provides assurance that the government is justified in suppressing speech because the speech is creating (or is likely to create) a substantial evil justifying government intervention.311 In other words, the likelihood requirement is constitutional law’s way of saying that no criminal culpability can attach when speech creates no danger of a concrete injury. That is the whole point of NAACP v. Claiborne Hardware Company.312

A prohibition on true threats is said to protect against several different types of injury. It “‘protect[es] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”313 None of these interests are implicated when a threat creates no reasonable likelihood of creating a risk that one will be put in fear of bodily harm. One can imagine, for example, a federal prisoner, housed in a maximum security prison for the remainder of his life, threatening the life of the President in a letter sent to the White House. None of the evils identified by the Court are likely to arise from a threat that cannot be effectuated. Similarly, what if, in the Black case, O’Mara and Elliott had retrieved the cross they lighted after it had extinguished itself a short time after it was lighted, and James Jubilee never discovered that a cross had been burned on his property? Could these cross burners nevertheless have been prosecuted lawfully for cross burning with the intent to intimidate?

The answer appears to be no. Virginia conceded in Black that Virginia law does not explicitly require proof of likelihood of harm because “[i]n Virginia criminal law, ‘intimidation’ means acts that put the victim ‘in

309. See VA. CODE ANN. § 18.2-423 (Michie 1996).
311. See Bridges v. California, 314 U.S. 252, 263 (1941) (holding that regulation of the content of speech requires proof that the “substantive evil [is] extremely serious and the degree of imminence extremely high before utterances can be punished”).
312. 458 U.S. 886, 929 (1982); see discussion supra note 304.
fear of bodily harm.”314 In other words, at least in Virginia, the “likelihood” requirement is built into the Commonwealth’s definition of “intimidation.” Because of this local definition of intimidation, it was unnecessary for the Court in Black to address the question of what if intimidation had not been so defined.315 The above discussion strongly suggests that the Virginia definition of “intimidation” is constitutionally mandated. Otherwise, Black spawns the remarkable First Amendment principle that the content of speech can be proscribed even when it creates no likelihood of harm—not a precedent the Court would introduce sub silentio.

VII. CONCLUSION

For those inclined to view Black as a sound compromise accommodating the competing legitimate interests that cross burning implicates, the above discussion should prove revealing. I have shown why the decision deserves at least honorable mention in any contest selecting noteworthy efforts to formulate speech-protective First Amendment principles. But Black also is worrisome. Embedded in its reasoning are fault lines that could grow into fissures and then chasms weakening hard-fought protections against government-sponsored imposition of orthodoxy. One example is the Court’s willingness in Black to employ the rather open-ended “particularly virulent” exception to avoid the R.A.V. ban on content discrimination. Even if cross burning is, as the Court concludes, a particularly virulent form of intimidation, can permitting selective regulation of speech on this basis be cabin’d? The political pressures will be inexorable to expand the exception to other powerful expressive symbols. Another troubling consequence of the holding in Black is the continuing opportunities available to prosecutors, judges, and juries to punish cross burning lacking any intent to intimidate. This concern is exacerbated if, as the evidence suggests, many remain convinced that cross burning has but one intent—to intimidate. Moreover, “cultural outsiders,” such as cross burners, are particularly vulnerable to the pathology of intolerance. Acting out this


315. The Court may also have concluded it need not address the requirement of government proving a likelihood that cross burning will be placing another in fear of physical harm because of the definition of intent it adopted. “‘True threats,’” the Court concluded, “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Black, 538 U.S. at 359. There can be no “serious expression of intent to commit an act of unlawful violence” when effectuating the threat clearly is not possible.
intolerance, juries too easily can foil Black's central holding that ideological cross burning can be a constitutionally protected form of free expression. If the Court is serious about protecting the ideological act of cross burning, it will need to protect that act with safeguards, such as those discussed above, that are calculated to address the forces that continue to threaten to skew the adjudicatory process in the direction of punishment.

The bitter irony of erosions of free speech protections, fashioned with the best of intentions to protect minorities and the powerless, is the long history of their use to suppress the dissent of the very persons intended to be protected. Justice Black's dissent in Beauharnais v. Illinois captures this reality stunningly. With a few interlineations, it is a fitting epitaph to Virginia v. Black. Justice Black warned:

No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech .... Moreover, the same kind of state law that makes [one] a criminal for advocating segregation [through the mechanism of burning a cross] can be utilized to send people to jail in other states for [employing expressive symbols to] advocate equality and nonsegregation. ....

....

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'

316. See CLEARY, supra note 156, at 209 (stating that "the majority will most often seek to regulate the speech of the politically powerless .... if an idea is unpopular, the only thing that may protect it from the majority is a constitutional norm of content neutrality") (quoting David Cole, Neutral Standards and Racist Speech, 2 RECONSTRUCTION 1, 68 (1992)); Amar, supra note 135, at 154-55 (arguing that if "African-Americans and other minorities look[ed] beyond the alleged facts of R.A.V. [they would] understand that the ordinance posed a threat to their freedom as well. They too—indeed they especially . . . should be wary of government censorship, and all the more so when that censorship is selective"); Donald E. Lively, Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era, 46 VAND. L. REV. 865, 873 (1993) (demonstrating that "First Amendment history indicates a tendency to transform minority protective rules into methodologies that consolidate the dominant group's advantage"). See generally Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 DUKE L.J. 484, 507-20 (1990) (citing studies showing that speech-restrictive doctrines are used disproportionately against racial and ethnic minorities as evidenced in lower court application of the fighting words doctrine, the tort of intentional infliction of emotional distress, and group defamation laws).

317. 343 U.S. 250, 274-75 (1952) (Black, J., dissenting).

318. Id. (Black, J., dissenting).