SHOULD CROSS BURNINGS BE PROTECTED AS A FORM OF FREE SPEECH?

In 1992 the U.S. Supreme Court found that while some forms of activity may be clearly obnoxious and offensive to a large number of citizens, when it is not otherwise threatening or destructive, such behavior may be protected under First Amendment guarantees. As the wording of the Court's decision in* R.A.V. *v.* City of St. Paul *shows, the purpose of legislation purporting to circumscribe such behavior may be as important as the object of that legislation. In 2003, however, in the case of* Virginia *v.* Black, *the Court signaled a partial retreat from* R.A.V. *v.* City of St. Paul, *when it found that states may outlaw acts of cross burning that are intended to intimidate. Excerpts from both opinions are included in this Law in Practice box.

R.A.V. *v.* City of St. Paul, Minnesota
U.S. Supreme Court, 1992
505 U.S. 377

Justice Scalia delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent, City of St. Paul, chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legislative Code Section 292.02 (1990), which provides:

> *Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, commits disorderly conduct and shall be guilty of a misdemeanor.*

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content-based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed . . .

The First Amendment generally prevents government from proscribing speech, see, e.g., *Cantwell* v. *Connecticut,* 310 U.S. 296, 309–311 (1940), or even expressive conduct, see, e.g., *Texas* v. *Johnson,* 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U.S. 105 (1991) . . . *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 536 (1980); *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky,* 315 U.S., at 572. We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, e.g., *Roth* v. *United States,* 354 U.S. 476 (1957) (obscenity); *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952) (defamation); *Chaplinsky* v. *New Hampshire, supra,* ("fighting words") . . .

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," . . . That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that "fighting words" have at most a "*de minimis*" expressive content or that their content is in all respects "worthless and underserving of constitutional protection," . . . sometimes they are quite expressive indeed. We have not said that they constitute "no part of the expression of ideas," but only that they constitute "no essential part of any exposition of ideas." *Chaplinsky, supra,* at 572 . . .

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses "so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not" . . . Similarly, we have upheld reasonable "time, place,

or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech" . . .

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: each is, as Justice Frankfurter recognized, a "mode of speech," *Niemotko* v. *Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility or favoritism towards the underlying message expressed . . .

To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages . . .

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion, or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects . . .

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." 464 N. W. 2d, at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that "[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," *ibid.*, but the manner of that confrontation cannot consist of selective limitations upon speech . . .

The First Amendment cannot be evaded that easily. It is obvious that the symbols that arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender" are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to "racial, religious, or gender-specific symbols"—such as "a burning cross, Nazi swastika, or other instrumentality of like import." Brief for Respondent 8. Indeed, St. Paul argued in the Juvenile Court that "[t]he burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate." Memorandum from the Ramsey County Attorney to the Honorable Charles A. Flinn, Jr., dated July 13, 1990, in *In re Welfare of R.A.V.,* No. 89-D-1231 (Ramsey Cty. Juvenile Ct.), p. 1, reprinted in App. to Brief for Petitioner C-1 . . .

St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty . . .

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means

at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Virginia v. Black
U.S. Supreme Court, 2003
538 U.S. 343

Justice O'Connor delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U.S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e.g., *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571–572. For example, the First Amendment permits a State to ban "true threats," e.g., *Watts* v. *United States,* 394 U.S. 705, 708 *(per curiam),* which 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, see, e.g., *id.,* at 708. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R.A.V., supra,* at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. . . .

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R.A.V.* Contrary to the Virginia Supreme Court's ruling, *R.A.V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists entirely of the very reason its entire class of speech is proscribable. 505 U.S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political

affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. . . .

Justice O'Connor, joined by The Chief Justice, Justice Stevens, and Justice Breyer, concluded in Parts IV and V that the Virginia statute's *prima facie* evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the opportunity to expressly disavow it, the instruction's construction of the *prima facie* provision is as binding on this Court as if its precise words had been written into the statute. E.g., *Terminiello* v. *Chicago,* 337 U.S. 1, 4. As construed by the instruction, the *prima facie* provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. E.g., *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U.S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The *prima facie* evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the *prima facie* provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the *prima facie* provision in a manner that would avoid the constitutional objections described above. . . .