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VIRGINIA V. BLACK,123 S. CT. 1536 (2003)

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FACTS

On August 22, 1998, respondent Barry Black led a Ku Klux Klan rally on private property with the owner's permission.[1] At the conclusion of the rally, the crowd burned a large cross several hundred yards from a road.[2] Rebecca Sechrist, who watched the rally, reported that the cross-burning caused her to feel "awful" and "terrible."[3] A sheriff arrested Black and charged him with burning a cross in violation of Virginia's cross-burning statute.[4] The statute (Section 18.2-423) provides that cross-burning with the intent to intimidate any person or group of persons is a class C felony.[5] It further states that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[6] The trial judge instructed the jury that intent to intimidate requires a motive to intentionally place a person in fear of bodily harm and that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[7] The jury found Black guilty and fined him $2500.[8]

Respondents Richard Elliott and Jonathan O'Mara attempted to burn a cross on the yard of their neighbor, James Jubilee.[9] Jubilee, an African-American, had previously complained to Elliott's mother about her son's backyard firing range.[10] On May 2, 1998, Elliot and O'Mara retaliated by burning a cross on Jubilee's property.[11] The next morning, Jubilee discovered the partially burned cross and became "very nervous," fearing future incidents.[12] Elliot and O'Mara were charged with attempted cross-burning and conspiracy to commit cross-burning.[13] O'Mara pled guilty to both counts, but reserved the right to challenge the constitutionality of the cross-burning statute.[14]

During Elliot's trial, the judge instructed the jury that the Commonwealth had to prove that the defendant actually intended to commit cross-burning, that he did an act in furtherance of this intent, and that he

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1 Virginia v. Black, 123 S. Ct. 1536, 1542 (2003).
2 *Id.*
3 *Id.*
4 *Id.*
5 VA. CODE ANN. § 18.2-423 (Michie 1996).
6 *Id.*
7 Virginia v. Black, 123 S. Ct. 1536, 1542 (2003).
8 *Id.*
9 *Id.* at 1542–43.
10 *Id.* at 1543.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*

intended to intimidate people.[15] The court did not define the meaning of "intimidate" nor include the prima facie evidence provision of Section 18.2-423.[16] The jury found Elliott guilty and sentenced him to ninety days in jail and a $2500 fine.[17]

The Virginia Court of Appeals affirmed both convictions.[18] On appeal, the Virginia Supreme Court held Section 18.2-423 unconstitutional on its face because it was indistinguishable from a similar type of ordinance found unconstitutional in *R.A.V. v. City of St. Paul.*[19] The court held that Section 18.2-423 discriminated on the basis of content of speech.[20] In the alternative, the court decided that the prima facie evidence section made the statute overbroad, increased the probability of prosecution, and effectively chilled free speech.[21]

HOLDING

The United States Supreme Court held that Section 18.2-423 was constitutional because it banned all cross burning with intent to intimidate and did not limit the intimidation to defined groups or opinions.[22] A plurality held that the prima facie evidence provision rendered the statute unconstitutional on its face as interpreted in the jury instructions at respondent Black's trial.[23] The Court affirmed the Virginia Supreme Court's ruling to vacate respondent Black's conviction.[24] The Court also vacated the judgment of the Virginia Supreme Court and remanded the cases of respondents Elliott and O'Mara for further proceedings.[25]

ANALYSIS

Justice O'Connor, writing for the Court, began the opinion by reciting the history of the Ku Klux Klan and cross-burning in the United

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15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The Court examined a local ordinance that banned symbolic conduct that would arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." *Id.* at 380. The Court held that the city of St. Paul could not impose special prohibitions on speakers who expressed views on certain disfavored subjects, such as race, color or creed but ignore other speech which also provoked violence, such ideas that expressed hostility towards political affiliation or sexual preference. *See id.* at 391–93.

20 Virginia v. Black, 123 S. Ct. 1536, 1543 (2003).

21 *Id.*

22 *Id.* at 1549.

23 *Id.* at 1541.

24 *Id.* at 1552.

25 *Id.*

States. The Court found that people employed cross-burning as a means to threaten or intimidate others, as well as to warn the viewer of future threats of violence.[26] Additionally, the Court found that a burning cross is a symbol of hate no matter who conveys the message and regardless of whether the message is political or intended to intimidate.[27]

The Court noted that the government may not prohibit certain ideas even if most of society finds the idea offensive, disagreeable, or false.[28] This protection applies to both symbolic or expressive conduct as well as actual speech.[29] In earlier cases, the Court had held that the First Amendment's protections are not absolute and that the government may regulate certain types of speech when an overriding societal interest in order or morality exists.[30] For example, the government can restrict speech that causes injury or incites a breach of the peace.[31] Additionally, the government may prohibit fighting words that provoke a violent reaction and true threats that communicate an intention to perform unlawful violence aimed at a particular person or group.[32]

The Court held in *R.A.V. v. City of St. Paul* that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of viewpoint discrimination exists."[33] For example, the government may prohibit threats of violence against the President because all threats of violence against the President are outside First Amendment protection.[34] However, the state could not prohibit speech that is constitutionally protected, such as outlawing threats against the President based solely on political views, because the prohibited speech would not be classified on the reason that the entire class of speech was proscribable.[35]

After reviewing the restrictions on free speech and its opinion in *R.A.V.*, the plurality found Section 18.2-423 constitutional because the

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[26] *Id.* at 1545.

[27] *Id.* at 1546–47.

[28] *Id.* at 1547.

[29] *Id.*

[30] *Id. See e.g.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[31] Virginia v. Black, 123 S. Ct. 1536, 1547 (2003) (citing *Chaplinsky*, 315 U.S. at 572).

[32] *Id.* at 1547–48 (citing Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969)).

[33] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[34] *Id.* The Court in *R.A.V.* provided two more examples of proscribable subcategories of speech. In the first example, the Court said that a state might choose to prohibit only that obscenity which is the most patently offensive in its prurience. This is known as the core prurience example. The final example stated that the government may regulate price advertising in one industry but not another because of the risk off fraud. Fraudulent speech does not have any First Amendment protection. These three examples constitute what has become termed the particularly virulent speech exception. *Id.*

[35] *Black*, 123 S. Ct. at 1549.

statute banned all cross-burning with intent to intimidate.[36] Unlike the local ordinance in *R.A.V.*, which concerned banning conduct that aroused anger based on race, color, creed, religion, or gender, the Virginia statute did not discriminate on the basis of content.[37] Anyone who burns a cross in Virginia with the intent to intimidate breaks the law, without any limitations.[38] The Court found that Virginia could constitutionally ban cross-burning with intent to intimidate because cross-burning is a particularly virulent form of intimidation.[39] Therefore, because Virginia could prohibit all intimidating messages, Virginia could choose to regulate this subset of messages due to the history of violence associated with cross-burning and the likelihood to inspire fear.[40]

After ruling on the constitutionality of Section 18.2-423, the Court examined the statute's prima facie evidence provision. The Virginia Supreme Court had not interpreted the meaning of this provision and therefore the Court relied on the jury instruction used in respondent Black's trial.[41] The trial judge had instructed the jury that the burning of a cross created prima facie evidence from which the required statutory intent could be inferred.[42] The plurality held that the prima facie evidence provision allowed a jury to convict a defendant in almost every case, especially when a defendant chose not to put on a defense.[43] The provision appeared to allow one to be found guilty solely because he or she burned a cross, without any inquiry into the defendant's intent.[44]

Therefore, the Court found the prima facie evidence provision unconstitutional because it prohibited many types of constitutional free speech and created an unacceptable risk of suppressing ideas.[45] The instruction failed to distinguish between cross-burning done to intimidate and cross-burning done for any other reason.[46] The Court held that because the interpretation of the prima facie evidence provision within the jury instruction was unconstitutional, the provision in Section 18.2-423 was unconstitutional on its face.[47] The Court stated, however, that the lower

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36 *Id.* at 1548.
37 *Id.* at 1549–50 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).
38 *Id.* at 1548.
39 *Id.* at 1549–50.
40 *Id.* at 1549.
41 *Id.* at 1550.
42 *Id.*
43 *Id.*
44 *Id.* at 1550–51.
45 *Id.* at 1551.
46 *Id.*
47 *Id.* at 1552.

courts may interpret the provision in a different manner to avoid the Supreme Court's constitutional objections.[48]

The Court thus affirmed the Virginia Supreme Court's holding that respondent Black's conviction could not stand.[49] Additionally, the Court vacated the Virginia Supreme Court's judgment regarding respondents Elliott and O'Mara and remanded their cases for further proceedings.[50]

CONCURRING AND DISSENTING OPINIONS

Justice Scalia's opinion focused on the overbreadth analysis of Virginia Code Section 18.2-423. He wrote separately to explain why no justification existed for the decision to invalidate the statute on its face due to the prima facie evidence provision.[51] Justice Scalia first examined what constitutes prima facie evidence. Virginia defines prima facie evidence as evidence that suffices, on its own, to establish a particular fact.[52] According to Justice Scalia, this definition allowed the defendant to present rebuttal evidence to the jury.[53]

Justice Scalia stated that in an overbreadth analysis, the Supreme Court normally examines whether individuals who engage in protected free speech may be convicted, as opposed to arrested or prosecuted.[54] He noted that the plurality's approach correctly focused on the question of conviction.[55] However, he argued that the plurality wrongly concluded that the possibility of these convictions facially invalidated Section 18.2-423.[56] Justice Scalia stated that the only people that the plurality deemed to be convicted wrongly were those who chose not to present a defense.[57] According to Justice Scalia, this small class of people did not give rise to an overbreadth challenge because this class did not produce a substantial number of impermissible applications.[58] Justice Scalia recognized that while some innocent individuals may be subject to conviction, they may still challenge their convictions on a case-by-case basis.[59]

Justice Scalia next argued that the Court incorrectly based its understanding of the prima facie evidence provision solely on the jury

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48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.* at 1553.
53 *Id.*
54 *Id.* at 1554.
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 1555–56.
59 *Id.* at 1554.

instructions.[60] He knew of no cases in which an ambiguous statute became interpreted solely by a jury instruction and he argued that jury instructions that do not state the law correctly should be refused, instead of treated as binding.[61] According to Justice Scalia, the Court would normally adopt an alternative reading if available to make the statute constitutional.[62] In this case, Justice Scalia would have relied on the Virginia Supreme Court's interpretation, namely that prima facie evidence only assisted the Commonwealth and did not allow the jury to ignore rebuttal evidence.[63] Justice Scalia would have permitted the Commonwealth to retry Black under a different jury instruction rather than vacating Black's conviction and dismissing the indictment against him.[64]

Justice Souter disagreed with the majority because Section 18.2-423 did not qualify for the virulence exception provided within *R.A.V. v. City of St. Paul*.[65] The Court in *R.A.V.* provided this virulence exception to allow content based subclasses of categorically proscribable expression if that subcategory was based completely on the reason the entire class of speech at issue was proscribable.[66] According to Justice Souter, none of the three examples of the virulence exception provided in *R.A.V.* resembled the present case.[67] First, he concluded that no similarity between Section 18.2-423 and the core prurience example existed.[68] He reasoned that although the Virginia legislature might have prohibited cross-burning due to its power to intimidate, it may also have done so due to disapproval of the message of white supremacy, which would not qualify as a general proscription against intimidation.[69] Justice Souter then found that the third example dealt with commercial speech and was not applicable in this case.[70]

Justice Souter then looked at the second virulence exception example, which concerns threats aimed at the President.[71] He stated that courts view threats against the President with an objective standard based on the threat of violence and not by reference to the content of the message or viewpoint of the messenger.[72] However, a content-based proscription of cross-burning appeared to Justice Souter to be a subtle effort not only to ban

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60 *Id.* at 1557.
61 *Id.*
62 *Id.*
63 *Id.* at 1557–58.
64 *Id.* at 1558–59.
65 *Id.* at 1559.
66 R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
67 Virginia v. Black, 123 S. Ct. 1536, 1560 (2003).
68 *Id.* (referring to *R.A.V.*, 505 U.S. at 388).
69 *Id.*
70 *Id.* (referring to *R.A.V.*, 505 U.S. at 388–89).
71 *Id.* (referring to *R.A.V.*, 505 U.S. at 388).
72 *Id.* (referring to *R.A.V.*, 505 U.S. at 388).

intimidation caused by cross-burning but also the ideology of white supremacy broadcasted by non-threatening cross-burning.[73] Justice Souter concluded that Section 18.2-423 failed to fit within the second example because *R.A.V.*'s virulence exception does not allow prohibitions associated with a particular viewpoint.[74]

Justice Souter stated that the Court's decision appeared to modify the third exception in *R.A.V.* rather than the virulence exception.[75] The third exception allows a subcategory for content based discrimination within a proscribable category if no official suppression of ideas occurs and that the category is "not a ruse for message suppression."[76] He said that the prima facie evidence provision within the statute attempted to suppress ideas from a particular ideology and noted that, even without the provision, the statute would sufficiently prosecute those who burn crosses with intent to intimidate.[77] He viewed the prima facie evidence provision as an attempt to skew jury deliberations toward convictions in cases where only weak evidence of intent to intimidate existed or where a defendant provided only an ideological reason for burning a cross.[78] The provision would "thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression."[79]

Because Section 18.2-423 did not fall under any of the *R.A.V.* exceptions, the statute would only survive if narrowly tailored to serve a compelling state interest.[80] Justice Souter found that it did not. Therefore, because the content-based distinction within Section 18.2-423 was invalid at the time of the arrests, Justice Souter believed that the three convictions should have been overturned.[81]

DISSENTING OPINION

Justice Thomas concluded that the Court erred when it found an expressive component to cross-burning in its use of *R.A.V.*'s exception to the First Amendment's prohibition on content-based discrimination.[82] Justice Thomas stated that Section 18.2-423 banned only conduct, not expression,

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73 *Id.*
74 *Id.*
75 *Id.* at 1561.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.* at 1562.
82 *Id.* at 1563.

and therefore should not be analyzed under a First Amendment test.[83] Treating cross-burning as speech, rather than conduct, ignores the history of cross-burning and its association with terrorist groups like the Ku Klux Klan. Justice Thomas provided examples of the association of cross-burning with violence and the way that cross-burning instills in the victims a well-grounded fear of physical violence.[84] He noted that even the legislative history behind Section 18.2-423 suggested that the legislature chose to ban the conduct of burning crosses rather than racist expression behind cross-burning.[85] Because the statute only regulated conduct, Justice Thomas stated that there was no need for the Court to analyze the statute under any First Amendment test.[86]

Even if Section 18.2-423 implicated the First Amendment, Justice Thomas found the inference of intent in the statute's prima facie evidence provision constitutional.[87] The presumption in the jury instruction created a "statutorily supplied inference" that did not compel a specific conclusion or shift the burden of production.[88] Inferences are constitutional unless "no rational trier could make a connection permitted by the inference."[89] Justice Thomas stated that it was not possible to not make a connection between cross-burning and intimidation after examining the history of cross-burning.[90] He stated that Section 18.2-423 resembled other types of statutes in which legislators found certain behavior so reprehensible that they created an irrebuttable presumption of intent, such as laws regarding drug distribution and statutory rape.[91]

Justice Thomas next addressed the plurality's concern that people who lacked the intent to intimidate would nevertheless be arrested and prosecuted prior to the instructions stage of an actual trial.[92] Justice Thomas did not find this problem compelling because the Court upholds regulations regarding the freedom of speech even when the conduct initially appears culpable, but results in dismissed charges.[93] For example, pornographers who traffic images of adults that appear to be images of minors may be arrested and prosecuted for child pornography even if the jury later finds the materials to be legal.[94]

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83 *Id.*
84 *Id.* at 1564.
85 *Id.*
86 *Id.* at 1566.
87 *Id.* at 1564.
88 *Id.* at 1566–67.
89 *Id.* at 1567.
90 *Id.*
91 *Id.* at 1567–68.
92 *Id.* at 1568.
93 *Id.*
94 *Id.*

Justice Thomas concluded that the First Amendment must give way to other interests in certain situations.[95] He stated, however, that the plurality erred by finding that people sometimes burn crosses without intent to intimidate.[96] He disagreed that cross-burning could sometimes be just "unwanted communication" because he saw cross-burning as almost always a physical threat.[97]

CONCLUSION

The Court's opinion in *Virginia v. Black* clarifies case law regarding proscribable speech and provides support for the Court's opinion in *R.A.V.* In addition, the Court guides state legislatures in creating constitutional statutes that prohibit cross-burning. Finally, the Court furthers the interests of minorities while protecting the First Amendment guarantee of freedom of speech.

The Court's opinion fits squarely within the holdings of past First Amendment cases. The holding revitalizes the historical opinion provided in *Chaplinski v. New Hampshire*,[98] where the Court stated that certain types of speech, including fighting words or lewd speech, do not fit within First Amendment protections.[99] The Court's holding in *Black* also echoes the opinion in *Roberts v. U.S. Jaycees*,[100] in which the Court held that "stated violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[101] Finally, the opinion clarifies the virulence exception in *R.A.V.*[102]

The Virginia Supreme Court did not correctly interpret the Court's opinion in *R.A.V.* The court wrongly found Section 18.2-423 unconstitutional, mistakenly interpreting *R.A.V.* as a prohibition on all forms of content-based discrimination within a proscribable area of speech.[103] As discussed, the First Amendment does allow for content-based discrimination when the basis for the discrimination consists entirely of the very reason the entire class of speech is proscribable.[104] If the Supreme Court had upheld the

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95 *Id.*

96 *Id.*

97 *Id.*

98 Chaplinski v. New Hampshire, 315 U.S. 568 (1942).

99 *Id.* at 571–72.

100 Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

101 *Id.* at 628.

102 Several lower courts had correctly interpreted *R.A.V.*'s examples; if the Court had ruled differently these decisions would have been overturned. *See, e.g.*, People v. Stanistreet, 58 P.3d 456 (Cal. 2002); Ohio v. Thompson, 767 N.E.2d 251 (Ohio 2002).

103 Virginia v. Black, 123 S. Ct. 1536, 1549 (2003).

104 *Id.*

Virginia Supreme Court's ruling, states could not regulate subsets of outrageously intimidating messages even if the entire type of speech failed to fall under First Amendment protection. An opposite ruling by the Supreme Court would have potentially lessened the protections of minorities: particularly threatening crimes in which minorities tend to be the victims, such as cross-burning with the intent to intimidate, would not have been specifically outlawed and special sanctions on those who use particularly virulent speech could not have been imposed.

By allowing states to create statutes that proscribe cross-burning with intent to intimate, the Court protects minorities from those who seek to terrorize them. A key point of the Court's opinion was that the cross-burning statute outlawed all cross-burning with intent to intimate, not just cross-burning executed with animus against minorities. However, this overarching ban against all cross-burning with intent to intimidate carries the implication that minorities will be protected since many cross-burnings are intended to intimidate minority victims. In future cases involving symbolic speech or content-based discrimination, a statute will be found constitutional if the specific speech outlawed falls under a class of proscribable speech.

To protect the victims of cross-burning after *Black*, states must ensure that their statutes fit within *R.A.V.*'s virulence exception and that their statutes ban all cross-burning with intent to intimidate, without limitations regarding content. For example, both Idaho's and Montana's cross-burning codes include provisions prohibiting cross-burning based on certain characteristics such as race, color, or involvement in civil rights activities.[105] A court could find this unconstitutional for the same reasons that the Court found the ordinance in *R.A.V.* unconstitutional. To comply with the virulence exemption, a statute cannot contain special prohibitions on speakers who express views on certain disfavored subjects.[106] If the statute does have special prohibitions, the law is no longer proscribable for the reason that the entire type of speech is proscribable.

In addition to complying with the virulence exception, states should also re-examine any prima facie evidence provisions of their statutes. For example, Connecticut's cross-burning statute could be problematic because it automatically deems the burning of a cross on public property or private property without the owner's permission an illegal discriminatory practice.[107] Like Section 18.2-423's unconstitutional prima facie evidence provision, Connecticut's statute fails to examine the cross-burner's intentions. A

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105 IDAHO CODE § 18-7902 (2003); MONT. CODE ANN. § 45-4-221 (2003).
106 R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).
107 CONN. GEN. STAT. ANN. § 46a-58 (2003).

defendant who fails to put on a defense may therefore be convicted, whether or not the defendant intended to discriminate.

One must remember that the First Amendment's protection of free speech must remain sacred, even while protecting minorities. For example, Justice Souter failed to see that Section 18.2-423 correctly only criminalized those acts outside of the First Amendment's protections. He stated that the legislature might have singled out cross-burning in the statute based on a disapproval of the message of white supremacy and not based on cross-burning's power to threaten. Because the Court found the prima facie evidence provision unconstitutional, however, a jury must now find that the accused intended to intimidate the alleged victim. Thus, Justice Souter misunderstood that pure ideologist speech would not be outlawed; only intimidating speech that has no First Amendment protection would be.

Section 18.2-423 protects all people, not just minorities, from intimidation, a type of true threat that should not be afforded any First Amendment protection. In the *R.A.V.* hearings before the Supreme Court, attorney Tom Foley argued, "The First Amendment was never intended to protect an individual who burns a cross in the middle of the night in the fenced yard of an African-American family's home."[108] Cross-burning is "nothing short of domestic terrorism" according to Virginia's Attorney General Jerry W. Kilgore.[109] Section 18.2-423 "involves two important freedoms—freedom of speech and freedom from fear. [Virginia's] statute preserves the first and secures the second."[110]

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[108] EDWARD J. CLEARLY, BEYOND THE BURNING CROSS 173 (1994).
[109] Edward Walsh, *State Bans on Cross Burning Upheld*, WASH. POST, Apr. 8, 2003, at A1.
[110] *Id.*