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## Supreme Court Watch

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# SUPREME COURT WATCH

By Reginald C. Oh

In its 2002–03 Term, the United States Supreme Court handed down a key decision dealing with the issue of race at the state and local government levels. In *Virginia v. Black*, 123 S. Ct. 1536 (2003), the Supreme Court considered whether the State of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. *Id.* at 1541. The Court, in an opinion written by Justice Sandra Day O'Connor, struck down the cross-burning statute as an unconstitutional restriction of free speech. Specifically, the Court held that the "prima facie evidence" provision of the cross burning statute, which treats any act of cross burning as prima facie evidence of the intent to intimidate others, is facially unconstitutional. *Id.* Even though the Court found Virginia's statute constitutionally infirm, however, it held that state and local governments may permissibly draft carefully tailored cross burning statutes, so long as the statutes target for prohibition a specific type of cross burning—cross burning carrying the threat of imminent violence. *Id.*

This case involved a consolidated appeal involving three defendants convicted separately of violating section 18.2–423 of the Virginia Criminal Code, which states, in part: "It shall be unlawful for any person or persons, with the intent of intimidating any person or groups of persons, to burn, cause to be burned, a cross on the property of another, highway or other public place." VA. CODE ANN. § 18.2–423 (1996). On August 22, 1998, defendant Barry Black led a Ku Klux Klan rally on private property, with consent of the property owner. At the conclusion of the rally, a 25 to 30 foot cross was lit on fire, and as the cross burned, the Klan members played "Amazing Grace" over loudspeakers. A sheriff observing the rally arrested Black, who acknowledged that he was responsible for burning the cross. Black was convicted at trial and sentenced to a \$2,500 fine. *Black*, 123 S. Ct. at 1542.

On May 2, 1998, respondents Elliot and O'Mara burned



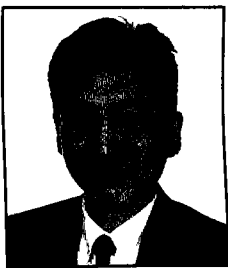
a cross on the property of James Jubilee, their African American next-door neighbor. Jubilee had earlier complained to Elliot's mother about shots being fired behind Elliot's home, and in apparent retaliation, Elliot and O'Mara set the cross on fire on Jubilee's property. Elliot and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, but in doing so, reserved the right to challenge the constitutionality of the statute. Elliot chose to defend himself at a jury trial. At Elliot's trial, the judge instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning" and that "the defendant had the intent of intimidating any person or group of persons." *Id.* at 1543. The jury found Elliot guilty of attempted cross burning, but acquitted him of conspiracy to commit cross burning. *Id.*

Each respondent appealed to the Supreme Court of Virginia, arguing that section 18.2–423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases and held that the statute impermissibly infringes upon constitutionally protected speech. It reasoned that the statute is "facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of content, and [because] the statute is overbroad." *Black v. Commonwealth of Virginia*, 553 S.E.2d 738, 740 (2001). The Commonwealth of Virginia appealed the Virginia Supreme Court's ruling to the U.S. Supreme Court.

Justice O'Connor, writing for a plurality,<sup>1</sup> held that "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Black*, 123 S. Ct. at 1549. The Court struck down the statute, however, holding that the prima facie evidence provision of the statute, as interpreted by the *Virginia Model Jury Instructions*, rendered the statute facially unconstitutional. The Court then upheld the reversal of respondent Black's conviction, but with respect to respondents Elliot and O'Mara, the Court vacated the judgment of the Virginia Supreme Court and remanded the case for the Virginia Supreme Court to determine whether the "prima facie evidence provision" is severable, and if so, whether respondents Elliot and O'Mara could be retried. *Id.* at 1552.

In striking down the Virginia statute, the Court focused its analysis on the provision of the statute stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." VA. CODE ANN. § 18.2–423 (1996). The statutory provision creates an "inference" that the cross burning was indeed done with the intent to intimidate. Once that inference is raised, the burden then shifts to the defendant to disprove and rebut that initial inference with evidence suggesting that his or her motive was not to intimidate another person or persons.

The Court held that this "prima facie evidence" provision violated the First Amendment, because it would create the possibility that the state could convict a person who burned a cross solely as a means of political expression, and not as a



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means to intimidate another person. *Black*, 123 S. Ct. at 1551. It is “overbroad,” because it fails to distinguish between different types of cross-burning, and treats them all as “prima facie evidence” that the act was done with the intent to intimidate. Thus, the Court reasoned that the “prima facie evidence” provision, read literally, would treat a cross burning done as part of a movie or play as the same as a cross burned on the property of another person without that person’s consent. Both acts of cross burning would give rise to the inference that the cross burning was committed with the intent to intimidate, thus creating a possibility that a person may be prosecuted and convicted for engaging in lawful political speech, like burning a cross for filmmaking purposes. For the Court, therefore, this prima facie evidence provision would “create an unacceptable risk of the suppression of ideas.” *Id.*

Although the Court struck down Virginia’s cross burning statute, it took pains to emphasize that carefully tailored cross-burning statutes may survive First Amendment scrutiny. To be sure, states and localities may not prohibit cross burning conducted as an attempt to symbolize “shared group identity and ideology,” because, according to the Court, ritualistic cross burning is a form of core symbolic political speech that is protected by the First Amendment. In reaching this conclusion, the Court emphasized that “[t]hroughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology.” *Id.* at 1546. The burning cross is a central ritual of Klan gatherings, and it is also intimately connected with the religious beliefs of Klan members. The Court noted that “[t]ypically, a cross burning would start with a prayer by the ‘Klavern’ minister, followed by the singing of Onward Christian Soldiers.” *Id.*

The Court, however, distinguished cross burning as a symbolization of shared group identity and ideology from cross burning as a historically based form of intimidation. The Court noted that “when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm.” *Id.* To buttress its conclusion that there is a strong, historically based association between cross burning and violence, the Court devoted several pages to discuss the historical association between the Ku Klux Klan and the use of a burning cross as “a tool of intimidation and a threat of impending violence.” *Id.* at 1545. For example, the Court noted that in Miami in 1941, the Klan used cross burning to help reinforce racially segregated housing patterns. “The Klan burned four crosses in front of a proposed housing project, declaring, ‘We are here to keep niggers out of town. . . . When the law fails you, call on us.’” *Id.* (quoting S. KENNEDY, *SOUTHERN EXPOSURE* 176 (1991) (internal quotation marks omitted)). Similarly, in 1949 in Richmond, Virginia, the Klan burned a cross on the front yard of an African American school teacher who had just moved into a block formerly occupied only by whites. After the cross burning, the school teacher felt compelled to ask the police for protection. *Id.*

The Court also emphasized that, historically, the Klan used cross burning to terrorize people not just on the basis of

race or religion, but as “embodied threats to [all] people whom the Klan deemed antithetical to its goals.” *Id.* It noted that, “in Alabama in 1942, in ‘a whirlwind climax to weeks of flogging and terror,’ the Klan burned crosses in front of a union hall on the eve of a labor election,” *id.* (quoting KENNEDY, *supra*, at 180), and that a rash of cross burning incidents in the late 1940s compelled the then governor of Virginia to state “that he would ‘not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization.’”<sup>2</sup>

Thus, given the strong historical link between the cross burning and violence, the Court held that cross burning with the intent to intimidate may be prohibited, even though such a prohibition would constitute “content based discrimination.” The Court acknowledged such a prohibition is content-based discrimination, because even cross burning with the intent to intimidate still is conveying a message; it is still a means of communication. That message, however, is limited to the message of intimidation. Such speech, the Court held, falls outside of the protection of the First Amendment and may be prohibited.

Moreover, the Court reasoned that a state may constitutionally prohibit a specific subset of acts of intimidation. Thus, a statute prohibiting a specific form of intimidation, cross burning, is constitutionally permissible, because “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 idea or viewpoint discrimination exists.” *Id.* at 1549. In other words, because, as a general matter, statements or acts seeking to intimidate others fall outside of the protection of the First Amendment, a state may constitutionally prohibit specific statements seeking to intimidate, so long as it does so for the same reason that the general act of intimidation may be prohibited. The Court analogized a prohibition on cross burning conducted with the intent to intimidate to federal statutes that specifically prohibit threats of violence directed against the United States president. Similarly, the Court analogized a prohibition on cross burning with the intent to intimidate to statutes that prohibit specific categories of obscenity that it deems to be most patently offensive because of their prurience. Thus, if a state chooses to specifically ban cross burning as a most virulent and destructive method of intimidation, such a statute is constitutional, because the reason for specifically prohibiting a certain method of intimidation is for the same reason that all acts and messages of intimidation are proscribable.

The Court, in upholding Virginia’s statute, distinguished it from the ordinance it struck down in *R.A.V. v. St. Paul*, 505 U.S. 377 (1991), which unconstitutionally prohibited cross burning conducted with “knowledge or reasonable grounds to know that the cross burning would arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *ST. PAUL, MINN., LEGIS. CODE* § 292.02 (1990). The *St. Paul* ordinance was unconstitutional for two reasons. First, the ordinance engaged in impermissible viewpoint discrimination, because it prohibited cross burning directed only “toward one of the specified disfavored topics” of race, color, creed, re-

ligion or gender, *Black*, 123 S. Ct. at 1549 (quoting *R.A.V.*, 505 U.S. at 391), but permitted cross burning conducted on the basis of other topics, such as hatred toward lawyers or unions. The Court in *Black* reasoned, however, that Virginia's statute does not engage in such similar viewpoint discrimination, because the statute prohibits all cross burnings done with the intent to intimidate, rather than prohibiting only cross burnings done with the intent to intimidate for a particular reason or targeted against a specific racial or religious group.

Second, Justice O'Connor emphasized another significant difference between the constitutionally valid Virginia statute and the constitutionally infirm St. Paul ordinance. The St. Paul ordinance prohibited cross burning that causes "anger and resentment" in a person. For the Court, government may regulate speech intended to invoke feelings of terror and intimidation, but it may not regulate speech intended to invoke merely feelings of anger and resentment. The Court emphasized this distinction between cross burning made in an attempt to arouse anger and hatred versus cross-burning made in an attempt to intimidate, primarily to protect cross-burning as a form of political expression. Cross-burning at a Ku Klux Klan rally, for example, may, "even at a political rally, arouse a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings." *Id.* Dissenting or controversial political speech often is expressed to arouse anger and resentment in its target audience, as is arguably the case with flag burning as a means of political expression. Such speech, however, is core political speech that deserves the strongest First Amendment protection.

The import of the Court's decision in *Black* is that narrowly tailored statutes banning cross-burning will survive First Amendment scrutiny, so long as the statute prohibits cross-burning as a category of "true threats" and if it does not prohibit cross-burning intended to intimidate based on a specific content (e.g., intent to intimidate on the basis of race).

Moreover, although the Court struck down Virginia's "prima facie evidence provision" as interpreted by the *Virginia Model Jury Instructions*, the Court did leave room open for the possibility that a more carefully drafted "prima facie evidence provision" may survive a First Amendment challenge. For example, a prima facie evidence provision may pass constitutional muster if an inference of intent to intimidate is raised only when a cross is burned on the property of another without that person's consent, or when a cross is burned according to historically based methods associated with intimidation and violence. Such a provision would more clearly separate out those cross burnings committed with the intent to intimidate from those cross burnings conducted as expressions of "group identity and ideology."

In upholding the authority of states to regulate cross burning carrying the threat of violence and intimidation, however, the Court failed to clearly articulate a principle to explain why it matters, for First Amendment purposes, whether a statute proscribes cross burning conducted as an expression of racist ideology or whether a statute proscribes cross burning conducted with the intent to intimidate. That is because the

Court permits the government to engage in viewpoint and content discrimination to regulate racist speech in other contexts. Most notably, as noted by First Amendment scholars, the government has regulated racist speech in the workplace context. Under Title VII, the federal statute prohibiting racial discrimination in the workplace, for example, pervasive hostile speech made on the basis of race in the workplace may give rise to a Title VII "hostile work environment" claim.<sup>3</sup> Thus, if an employer permitted its employees to burn a cross at the workplace, it is likely that racial minority employees would have a very strong "hostile work environment" claim against his or her employer for permitting such conduct. In this situation, it would seem difficult to analytically distinguish a cross burned at the workplace as a means of expressing a belief in white supremacy and a cross burned at the workplace as a means of intimidating another person. But, if the holding of *Black* is extended to Title VII hostile work environment claims, a court would be compelled to conclude that one form of cross burning at the workplace is constitutionally protected speech, while the other form of cross burning is not. That result would be difficult to defend, because from the perspective of employees subjected to the cross burning, both types of cross burning would seem to create the conditions for a hostile work environment claim.<sup>4</sup>

Of course, the Court may distinguish cross burning at the workplace from cross burning at a Ku Klux Klan rally. The Court may contend that cross burning at the workplace is prohibitible under Title VII, because such cross burning is being targeted at a "captive audience." Or, the Court may contend that such cross burning is permissible as a regulation of time, place, and manner. Whether those are valid bases to distinguish cross burning at the workplace from cross burning at a political rally, the crucial point is that the basis for making such a distinction does not fall on whether the cross burning is a form of political expression or whether it is a tool of intimidation. Given that Title VII arguably engages in content and viewpoint discrimination when it gives racial groups a cause of action based on the racist, political speech of their employers or fellow employees, the Court does not provide a meaningful answer when it states that government cannot prohibit cross burning at a political rally because such a prohibition discriminates on the basis of content. That answer, the answer provided in *Black*, merely begs the following question: *why* does the Court permit the government to engage in viewpoint discrimination and prohibit derogatory, racist remarks in the workplace, but not similarly permit viewpoint regulation of derogatory, racist, speech in other contexts, as at a Ku Klux Klan rally?

In any event, to assist state and local government officials in understanding the scope of their authority when it comes to regulating certain acts that may potentially be protected by the First Amendment, such as cross burning, the Court should articulate clearer principles to explain under what circumstances the government may appropriately engage in content and viewpoint discrimination. Such clear and articulate principles would provide much needed guidance to

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Use L.Rep. 47 (3/12/2003)). The reasonable duck rule, under which the Corps regulated isolated wetlands if a duck flying across interstate boundaries might use them, may yet fly again if Congress does overrule *SWANCC* and either the wildlife-sensitive rationale of *GDF* or the economic activity rationale of *Rancho Viejo* are sustained by the Supreme Court.

**Takings—Removal—Ripeness.** This conundrum is a favorite of mine. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court required a landowner to exhaust state traditional court compensation remedies before going to federal court. However, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the very same Supreme Court said that a municipal defendant in a takings claim which had been brought in state court pursuant to *Williamson* could remove that case to federal court.

An enterprising landowner claimed that the decision in *City of Chicago* in effect modified or partly overruled *Williamson*. He argued that the Supreme Court could not have intended to require a plaintiff to sue in a state forum, but to give the defendants the option of either continuing in state court or removing to federal court. He objected to entitling the defendant, although not the plaintiff, to determine that the case should be heard in federal court.

This seemingly clever argument was rejected by the Circuit on February 13, 2003. *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir.2003). While the situation may be anomalous, the Eighth Circuit said, there is no indication that the Supreme Court intended to overrule *Williamson* when it allowed removal of takings claims by defendants to federal courts in the *City of Chicago* case.

In addition, the court declined the plaintiff's request to determine that he could come back to federal court, and relitigate all his factual claims, after ripening his case in state court. The court felt it premature to determine what *res judicata* or collateral estoppel effects might flow from a state court adjudication.

**Moratoria—Settlements—Damages.** In *Taboe-Sierra Regional Preservation Council, Inc. v. Taboe Regional Planning Agency*, 535 U.S. 302 (2002), the U.S. Supreme Court held, in a ruling lauded by local government, that moratoria were not automatically takings which required payment of damages. This ruling did not ward off a suit brought by North Key Largo, Florida landowners against Monroe County for a temporary taking based on an eight year hold on development. On July 17, 2001, the trial court, having found a 98 percent diminution in value under the moratorium—from \$5,887,700 to \$145,000—held that a taking had occurred. A jury trial was then scheduled to determine damages. On May 4, on the eve of the trial, the case settled for \$5.9 million, believed to be the largest temporary takings recovery in U.S. history, according to *Land Use Law Report*. This amount, coincidentally, equals the \$5.9 million the county paid for the land when it purchased it in 1990. *Shadek v. Monroe County Board of County Commissioners*, (C.A.P. 95–398, settlement announced March 4, 2003), reported in 31 *Land Use L.Rep.* 43 (3/12/2003).

This is an extreme case. However, it demonstrates that ju-

bilant predictions by either landowners or governments concerning Supreme Court land use decisions tend to give way to more nuanced results when cases are actually fought out in the trenches. Clearly the trial judge in this case did not find in the *Taboe-Sierra* decision grounds for vacating his prior ruling that the moratorium had constituted a taking even if moratoria are not a per se taking.

**Elementary Schools—Free Speech—Cruelty to Animals.** And finally, on April 15 the Third Circuit held that a school could prevent a nine year old third grader from circulating a petition opposing a class field trip to the circus. The petition had stated, "we third grade kids don't want to go to the circus because they hurt animals." The youngster had obtained more than thirty signatures. When she continued her efforts at a class recess, the teacher told her to put the petition away.

Although she was never punished, the student sued. An issue in the case was whether *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), even applied in elementary schools. The majority held that *Tinker*, which said the First Amendment did apply in high schools, had more limited applicability to elementary schools, stating that "if third graders enjoy rights under *Tinker*, those rights would necessarily be very limited." Because the student had not even been disciplined, and there was no punishment for her expression, the court found no First Amendment violation. One concurring judge, however, reached the same result on a different basis—he was willing to assume there was a right to petition, but that the school had not materially interfered with it because it had on several occasions allowed her to obtain signatures. *Walker-Serrano v. Leonard*, 71 U.S.L.W. 1659 (3d Cir. 4/15/03).

And so it goes.

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state or local governments seeking to regulate certain acts, like cross burning, in order to fulfill their Thirteenth Amendment duty to eliminate the badges and incidents of slavery,<sup>5</sup> and their Fourteenth Amendment duty to ensure all of their residents the equal protection of the laws.

### Endnotes

1. Chief Justice Rehnquist and Justices Breyer and Stevens joined Justice O'Connor's plurality opinion. Justices Scalia and Stevens wrote separate concurrences. Justice Souter, joined by Justices Ginsburg and Kennedy, filed an opinion concurring in the judgment and dissenting in part. Justice Souter concluded that the statute makes an unconstitutional content-based distinction, and that no exception should save the statute from invalidation. Justice Thomas wrote a dissenting opinion, because he would have upheld the statute, including the prima facie evidence provision.

2. *Black*, 123 S. Ct. at 1545 (quoting D. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN 333 (1980)). The rash of cross burning incidents in the late 1940s catalyzed the Commonwealth of Virginia to pass its first version of its cross burning statute in 1950. *Id.*

3. See, e.g., Kingsley Browne, *Title VII as Censorship: Hostile-Work Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

4. See *United States v. City of Buffalo*, 457 F. Supp. 612, 633 (W.D.N.Y. 1978) (hostile work environment claim brought on basis of posters posted at police station stating "The KKK is still alive.").

5. See Akhil Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992) (arguing that Thirteenth Amendment might allow regulation of cross burning as an attempt to eliminate cross burning as a badge and incident of slavery).



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