

“...or abridging the freedom of speech”

Virginia v. Black: *the First Amendment on trial*

By Justin Gelfand

*“But like a burning flag, a neo-Nazi march, a segregationist rally or any other form of unpopular speech, the right of free-speech should trump the potential danger a symbol could pose.”*

It is an act that permeates many chapters of American history. It is perceived by most as vicious and racist, and with good reason; the Ku Klux Klan and similar hateful organizations adopted the burning cross as an instrument of terror. Decades after nightriders torched oversized crosses to intimidate Blacks and civil-rights advocates, episodes of similar incidents sporadically occur. The burning cross has been widely used to implicitly convey hatred – and, at times, to implicitly convey a warning signal of approaching physical danger.

For this reason, states and local jurisdictions across the nation have enacted legislation banning the act of cross burning. Virginia is one such state. After the Virginia Supreme Court ruled 4-3 that the state’s fifty year-old law violated the constitutional right to free speech, the case made its way to the U.S. Supreme Court. The Virginia law banned the act of burning a cross “with the intent of intimidating any person or group of persons.” The issue brought before the court was simple: is the act of cross burning a constitutionally protected expression, like the act of flag-burning, or is it an overt threat that can be banned by the states? On April 7, the nation’s highest court ruled 6-3 that states can in fact ban cross burning in situations where it is likely to intimidate others.

This case pitted free-speech rights against the right to be free from intimidation, a right derived from many high court decisions. There is certainly very little, if any, benefit from many forms of speech, and cross burning as symbolic speech is often reflective of appalling sentiments of unprovoked hatred. Nevertheless, the act of burning a cross – as assessed from a speech viewpoint – should be constitutionally protected along with any other act of symbolic speech.

To classify the act as criminal, the court would have had to interpret cross burning in all instances as intimidation. Because symbolic expression of an unpopular political idea is protected by the First Amendment, upholding the Virginia law would require the court to altogether dismiss the possibility that a burning cross *could* ever be employed as a means of political speech *without* intending to intimidate others. The ruling was rather perplexing; while stopping short of allowing all-out bans on cross burning, the court upheld bans on the act of burning a cross with the intent to intimidate.

Writing for the majority, Justice Sandra Day O’Connor coined the burning cross a symbol of a “reign of terror” in post-Civil War America. Justice Clarence Thomas joined the majority, writing that “just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.” Thomas even refused to assess the case on

free-speech grounds, writing that Virginia had the right to ban activity deemed “particularly vicious.”

But this justification by the majority really misses the point. Fire safety aside, there is no intrinsic harm in the act of burning a cross. And this is an important distinction to be made. Burning down one’s house, as Thomas alludes to, is not an act that should be protected under the rubric of symbolic speech, because there is intrinsic harm – in this case, destruction of property – in such a malicious act. Governmental restriction of threatening speech should only be permitted when the speech is *explicitly* threatening. At best, a burning cross can pose an *implicit* threat. According to the court’s decision – according to the law of the land – people can be held accountable for burning a cross if the prosecution proves that the defendant’s intent was to intimidate. Because this decision includes implicit intent, the court failed to provide an objective measure of intent in the circumstance of a cross burning. In other words, it has now essentially become the burden of the defendant to prove to the court that there was no intent to intimidate in his/her cross burning. According to the letter and spirit of this ruling, though, the intent need not necessarily have been directed at specific individuals in the community; technically, the intent could have been to intimidate “the populace,” but at that point, any unpopular political speech can be construed as “intimidating” to those who disagree. The only justifiable restrictions on speech are those that convey unambiguous physical danger to individuals within a given community.

The ruling comes from the same court that rightfully secures the constitutional right of individuals as evil as neo-Nazis to march through a densely Jewish-populated town – not because there is any inherent benefit in the demonstration, but because the Constitution explicitly mandates that free-speech rights not be abridged in circumstances of that nature. So, after the decision in *Virginia v. Black*, the status quo allows the following: Klansmen have the constitutionally-secured right to march in white mask, but can be criminally convicted for burning a cross on such a march if a court were to find that the defendant *intended* to intimidate.

The constitutional impact of this decision is substantial. The court has drawn a thin line separating political symbolism from political violence. Direct threats on individuals should certainly be prosecuted. But the court has deemed that cross burning is always indicative of the threat of physical harm. The high court has created a new class of expressive and symbolic speech; previously, expressive speech was protected as long as there was no direct and explicit threat inherent in that speech. Now, though, the court has placed the burning cross in a league of its own, by proclaiming that the burning cross is necessarily intimidating and threatening.

Racism is certainly a problem which must be aggressively fought. And it is the responsibility of Americans to prevent organizations like the Ku Klux Klan from realizing their awful goals. But the means to do so remain in the forum of political speech; Americans should vocally protest racism through all the acceptable avenues of political expression. But in that capacity, the United States government should not have

the authority to repress any form of political speech. In this way, the Constitution will continue to protect the minority and secure the rights of the unpopular.

In *Virginia v. Black*, the United States Supreme Court set the exceptionally perilous precedent that symbolic speech *intended* to intimidate is not protected by the First Amendment. The majority's decision does not assess speech on a content-neutral basis, but rather creates a class of speech specifically for cross burning. A torched cross is highly offensive and provocative, as are the sentiments it is often used to convey. But like a burning flag, a neo-Nazi march, a segregationist rally or any other form of unpopular speech, the right of free-speech should trump the *potential* danger a symbol *could* pose.