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**THE SUPREME COURT AND THE AMERICAN CIVIL LIBERTIES
UNION’S COLORBLIND PROTECTION OF CROSS BURNING IN FIRST
AMENDMENT JURISPRUDENCE LEGITIMATES WHITE SUPREMACY**

Kiran Sidhu*

INTRODUCTION

The notion that the Supreme Court has used, and continues to use, the Constitution as an instrument to uphold White supremacy since the inception of our nation is hardly a novel concept.¹ The Court’s use of colorblindness² as a mechanism to maintain White racial privilege by creating legal frameworks that make it increasingly difficult to prevent, proscribe, or prosecute race-based violence is increasingly interrogated and exposed.³ Indeed, it is through the Court’s treatment of race-based claims in Fourteenth Amendment Equal Protection Clause cases that we can most clearly see the employment of colorblindness as a vehicle to preserve the status quo.⁴ But, the idea that the Court has long taken a colorblind approach to constructing the contours of the First Amendment—highlighted by its *laissez-faire* attitude towards certain

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¹ See generally Marissa Jackson, Note, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States’ Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 156 (2009) (explaining the shift towards colorblindness in the American legal and political landscape through a discussion of colonialism).

² See OSAGIE K. OBASOGIE, *BLINDED BY SIGHT* 115–16 (2014) (explaining that colorblindness is, *inter alia*, an “acknowledge[ment] that race is a social construction without any inherent biological significance. . . . But it uses the constructed nature of race to conclude that since race has no biological meaning it therefore has no social meaning and therefore should not be recognized at all. Colorblindness encourages a *disassociation with the social significance of race*; it is an affirmative nonrecognition of how racial meanings, constructed as they may be, still impact social and legal decision making in a manner that fundamentally shapes everyday life.”).

³ See *id.* at 118–19; see also Jackson, *supra* note 1, at 175.

⁴ See OBASOGIE, *supra* note 2, at 145.

forms of hate speech⁵—in a manner that likewise preserves White privilege, is less often acknowledged or discussed.⁶

For example, many preeminent legal scholars have examined the deleterious effect that the Court's non-regulation of hate speech can have on the psyche of minorities;⁷ however, it is difficult to find mainstream liberal scholarship that faults or rebuts the Court's initial presumption against content-based discrimination under the First Amendment.⁸ Deregulation of speech is viewed as a fundamental civil liberty in American society, synonymous with "freedom" and

⁵ See, e.g., *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (finding facially unconstitutional per the First Amendment the provision of Virginia's cross burning statute which stated that burning of a cross in public view "shall be prima facie evidence of an intent to intimidate[.]"); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (refusing to uphold the constitutionality of St. Paul ordinance prohibiting the display of a symbol which "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" holding it facially invalid under the First Amendment).

⁶ See, e.g., Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 849 (2008) ("There is a presumption against content-based discrimination under the First Amendment. Therefore, the content of messages, whether political speech or racist hate speech, must be ignored to protect the free flowing ideological marketplace. This fits nicely with the illusion of neutrality—race must be ignored at all costs to preserve colorblind neutrality.").

⁷ See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332 (1989) [hereinafter, Matsuda, *Considering the Victim's Story*] ("In addition to physical violence, there is the violence of the word. Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group."); see also, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7 (1993) [hereinafter, MATSUDA ET AL., WORDS THAT WOUND] ("All of us found ourselves increasingly drawn into writing, speaking, and engaging in public debate as incidents of assaultive speech increased in recent years . . . Assaultive speech directly affected our lives and the lives of people from whom we cared.").

⁸ See *infra* note 10; Cf RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 204 (2004) ("[A] new form of criticism called First Amendment legal realism . . . argues that this noble amendment should be subjected to the same degree of legal skepticism and scrutiny as other legal norms."); Matsuda, *Considering the Victim's Story*, *supra* note 7, at 2321 ("In calling for legal sanctions for racist speech, this Article rejects an absolutist first amendment position. It calls for movement of the societal response to racist speech from the private to the public realm.").

“democracy.”⁹ Thus, the Court, through its fashioning of First Amendment hate speech jurisprudence, and its vehement opposition to content-based restrictions, has divided scholars into two camps. The first camp takes the content-neutral, absolutist (read: colorblind) approach that speech should remain unburdened by regulations that obstruct the free flow of ideas.¹⁰ The second camp, generally comprised of critical race theorists,¹¹ posits that the Court should institute greater protection for minorities who are more vulnerable to the effects of hate speech.¹² The American Civil Liberties Union (“ACLU”) leads the first camp in the debate on hate speech,¹³ and, for progressive legal scholars who otherwise agree with the ACLU’s position on most topics, it can be a source of great frustration. It can be especially frustrating for legal scholars of color who are personally affected by the prevalence of hate

⁹ See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264 (1994) (quoting Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 n.192 (1991)) (“[T]he First Amendment is special: The First Amendment, more even than other constitutional provisions conferring fundamental rights, contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals.”).

¹⁰ See, e.g., Powell, *supra* note 6, at 849 (“There is a presumption against content-based discrimination under the First Amendment. Therefore, the content of messages, whether political speech or racist hate speech, must be ignored to protect the free flowing ideological marketplace. This fits nicely with the illusion of neutrality—race must be ignored at all costs to preserve colorblind neutrality.”); see also Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1654–57 (1993) (characterizing the First Amendment as “about as close to absolute as the Constitution gets” and—in specifically discussing the cross burning case, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)—noting that reading in the provisions of the Reconstruction Amendments would be “dangerous business” as these amendments are “too tenuous” or “too far” from the First Amendment to be factored into an analysis of *R.A.V.*).

¹¹ See *supra* notes 7 and 8.

¹² See DELGADO & STEFANIC, *supra* note 8, at 2 (analyzing the legal and historical issues that the hate speech debate raises. This includes a strong critique of free speech absolutists like the ACLU on the basis that such a position is inherently post-racial because it presupposes a world without racial stratification).

¹³ See *Speech on Campus*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/speech-campus> (last visited Jan. 18, 2018) (explaining why the ACLU defends “unpopular” or “offensive” ideas including hate speech on campus that people find bigoted).

speech.¹⁴ Or worse, scholars of color like myself, who are negatively affected by hate speech, can be made to feel feeble-minded for taking offense to such speech. This subdual¹⁵ is, arguably, a direct result of the Court's colorblind construction of the First Amendment.

This article critiques the ACLU and the Court's content-neutral position by refusing to choose sides in a debate that is doomed from the start.¹⁶ Of course, any argument that leads with the proposition that there is a First Amendment right not to have one's feelings hurt, and then follows with the assertion that the Court should act to suppress speech anytime a minority is offended, will be greeted with great skepticism.¹⁷ Rather, this article will illustrate how the ACLU's support of the Court's colorblind approach to analyzing hate speech—and specifically, cross burning under the First Amendment—is frustrating precisely because it serves as yet another example of the reification of White supremacy within constitutional law.

Using First Amendment cross burning cases as a vehicle, this article seeks to expose the Court's commitment to preserving the status quo with respect to racial hierarchy. Part I of this article provides a brief primer on First Amendment jurisprudence and how the Court has crafted its colorblind, content-neutral contours.¹⁸ Parts II and III discuss the ways in which the Court and the ACLU maintain White privilege when they examine both "fighting words" and "true threats" by looking chiefly at what the speaker intends by the speech, and not what a

¹⁴ See MATSUDA ET AL., WORDS THAT WOUND, *supra* note 7, at 1 ("This [hate speech] debate has deeply divided the liberal civil rights/civil liberties community and produced strained relationships within the membership of organizations like the American Civil Liberties Union (ACLU)."); see also DELGADO & STEFANIC, *supra* note 8, at 32–33.

¹⁵ See, e.g., DELGADO & STEFANIC, *supra* note 8, at 208–09 (discussing arguments that emphasize "a certain let-it-roll-off-your-back toughness" with respect to regulating hate speech).

¹⁶ See *infra* Parts II, III, and IV.

¹⁷ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt. 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.") (citation omitted); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) ("Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, [which] is protected by the First Amendment.").

¹⁸ See *infra* Part I.

reasonable marginalized listener receiving that speech would consider to be fight-inducing, or threatening, respectively.¹⁹ Part III additionally offers Dr. Chris Demaske's alternate framework for analyzing hate speech that considers the power dynamics at play in First Amendment jurisprudence and provides a means of operationalizing the critique herein that current First Amendment tests lack an historical lens.²⁰ In Part IV, this article addresses how the Court and the ACLU reify White supremacy by characterizing hate speech as a form of valuable political debate.²¹ In other words, Part IV examines how the Court's unwillingness to uphold content-based restrictions on conduct like cross burning illustrates its belief that cross burnings' expressive content is *not* worthless or of *de minimis* value to society, and that it belongs within the marketplace of ideas, which is troubling, to say the least.²²

I. THE COLORBLIND CONTOURS OF THE FIRST AMENDMENT PRIVILEGE WHITENESS.

Generally speaking, the First Amendment prevents the government from regulating speech²³ or expressive conduct²⁴ as a response to societal disapproval of the ideas expressed. The Court has repeatedly held that where the government seeks to restrict speech or conduct based on its content, such content-based regulations²⁵ are

¹⁹ See *infra* Parts II, III.

²⁰ See *infra* notes 149–59 and accompanying text.

²¹ See *infra* Part IV.

²² See *infra* Part IV.

²³ *Cantwell v. Connecticut*, 310 U.S. 296, 309–11 (1940).

²⁴ *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

²⁵ See Amanda J. Congdon, Comment, *Burned Out: The Supreme Court Strikes Down Virginia's Cross Burning Statute in Virginia v. Black*, 35 LOY. U. CHI. L.J. 1049, 1060 (2004) (“A law that restricts speech is content-based if the government bases its regulation on the subject matter or viewpoint of the expression. In contrast, a law is content-neutral if the government’s justification for the law does not relate to the content of the speech.”); see also Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 622 (2003) (allocating some of the confusion in First Amendment jurisprudence to the definition of “content” and arguing that “the proper meaning of ‘content’ is the communicative impact. The appropriate question is . . . whether its application depends upon the communicative impact of the speech affected. If so, then the action is content-based.”).

presumptively invalid.²⁶ The Court, however, has reasoned that our American society, “like other free, but civilized societies,” has carved out certain narrow restrictions on the content of speech in certain proscribed areas.²⁷ These limited “proscribable”²⁸ categories of content-based restrictions include speech that is obscene,²⁹ or defamatory.³⁰ The Court also permits States to ban a “true threat” without running afoul of the First Amendment.³¹ Perhaps most famously, the Court held in *Chaplinsky v. State of New Hampshire*, that States may also restrict speech that constitutes “fighting words,” or “those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace[,]”³² or “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”³³

While the Court has acknowledged that the regulation of all of these excepted categories *is* content-based, the Court has held that the First Amendment is inapplicable “because [the categories’] expressive content is worthless or of *de minimis* value to society.”³⁴ Recently, the Court further unpacked its rationale behind the regulation of these categories under the First Amendment, and limited the government’s

²⁶ For examples of cases where the court determined that content-based regulations are presumptively invalid, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

²⁷ *Id.*

²⁸ See *id.* at 418 (Stevens, J., concurring) (“The Court [in *R.A.V.*] revises this categorical approach. It is not, the Court rules, that certain ‘categories’ of expression are ‘unprotected,’ but rather that certain ‘elements’ of expression are wholly ‘proscribable.’ To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains.”).

²⁹ *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

³⁰ See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952) (holding racist speech that amounts to libel was beyond constitutional protection); see also *Roth*, 354 U.S. at 483 (“[L]ibellous utterances are not within the area of constitutionally protected speech.”).

³¹ See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (per curiam) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)) (internal quotation marks omitted); accord, *R.A.V.*, 505 U.S. at 388 (“[T]hreats of violence are outside the First Amendment.”).

³² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (citation omitted).

³³ *Black*, 538 U.S. at 359 (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)).

³⁴ *R.A.V.*, 505 U.S. at 400 (White, J., concurring) (citing *Chaplinsky*, 315 U.S. at 571–72).

power to legislate therein.³⁵ The Court reasoned that the government should be permitted to control their proscribable content insofar as such categories act as vehicles for content discrimination, but, the government cannot extend the regulation of the category further so that “nonproscribable” content is regulated.³⁶ For example, the government may pass a law making it illegal to publish libelous content, but cannot legislate specifically against libel critical of racial minorities,³⁷ because that would indicate the government’s hostility or favoritism towards the underlying content of the libel.³⁸

In other words, First Amendment regulations should be “content-neutral,”³⁹ or colorblind, to borrow phrasing from scholars and justices describing the Court’s late 20th century approach to the Fourteenth Amendment’s Equal Protection Clause jurisprudence.⁴⁰ As one legal scholar avers, “the content of messages, whether political speech or racist hate speech, must be ignored to protect the free flowing ideological marketplace.”⁴¹ Therefore, this colorblind First Amendment framework requires those wishing to proscribe racist speech to show that the content may be regulated as part of one of the excepted, content-based categories, such as fighting words.

³⁵ *See id.* at 383–84 (Scalia, J., majority).

³⁶ *See id.*

³⁷ *See id.* at 384. *But cf.* *Beauharnais v. Illinois*, 343 U.S. 250, 284 (1952) (Dougllass, J., dissenting) (“Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that [libelous] conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus.”).

³⁸ *R.A.V.*, 505 U.S. at 386 (“The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”).

³⁹ *See Congdon, supra* note 25, at 1060 (“A law that restricts speech is content-based if the government bases its regulation on the subject matter or viewpoint of the expression. In contrast, a law is content-neutral if the government’s justification for the law does not relate to the content of the speech.”); *see also* Gielow Jacobs, *supra* note 25, at 622 (allocating some of the confusion in First Amendment jurisprudence to the definition of “content” and arguing that “the proper meaning of ‘content’ is the communicative impact. The appropriate question is . . . whether its application depends upon the communicative impact of the speech affected. If so, then the action is content-based.”).

⁴⁰ *See OBASOGIE, supra* note 2, at 118–29.

⁴¹ Powell, *supra* note 6, at 849.

II. WHITE SUPREMACY AFFIRMED: THE COURT RULES RACIST SPEECH IS *NOT* A FORM OF FIGHTING WORDS.

In *Chaplinsky v. New Hampshire*, the Court defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁴² In addition, for plaintiffs arguing that racist hate speech constitutes proscribable fighting words, they must show that the speech to be regulated “[is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”⁴³ In *R.A.V. v. City of St. Paul*, the Court explained why burning crosses privately or publicly cannot be considered fighting words.⁴⁴ In this case, a White individual, known in court documents as R.A.V., burned a cross inside the fenced yard of a Black family that lived across the street from the house where R.A.V. was staying.⁴⁵ R.A.V. was prosecuted under the St. Paul Bias–Motivated Crime Ordinance,⁴⁶ which made it a misdemeanor to place on public or private property certain symbols or objects, including burning crosses, 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.”⁴⁷ The Petitioner began his oral argument by asking the Court, “[t]o what degree does abhorrence of cross burning justify banning it [under the Ordinance]?”⁴⁸ The *R.A.V.* Court, led by Justice Scalia, answered abhorrence alone is not sufficient, reasoning, “[a]lthough the [O]rdinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes *only* hurt feelings, offense, or resentment, [which] is protected

⁴² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁴³ *Id.*

⁴⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁴⁵ *Id.* at 379.

⁴⁶ ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

⁴⁷ *R.A.V.*, 505 U.S. at 380 (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

⁴⁸ See Transcript of Oral Argument at 1, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 636263, at *3. Petitioner’s oral argument to the Court in the *R.A.V.* case began with the observation that “[e]ach 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.*

by the First Amendment.”⁴⁹ Therefore, the Court held, the Ordinance was “fatally overbroad and invalid on its face”⁵⁰ under the First Amendment. Scalia’s remarks are consistent with past constitutional decisions declaring that Americans cannot invoke the First Amendment whenever they are hurt or offended by particular speech or expressive conduct.⁵¹

In *R.A.V.*, however, the Minnesota court below determined that the Ordinance was not overbroad because it reached only those expressions that constitute fighting words within the meaning of *Chaplinsky*.⁵² Justice Scalia thought differently, stating:

Although the phrase in the [O]rdinance, ‘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 [O]rdinance 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.⁵³

⁴⁹ *R.A.V.*, 505 U.S. at 414 (emphasis added).

⁵⁰ *Id.*

⁵¹ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt. 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.”) (citations omitted); see also, *STONE ET AL.*, *CONSTITUTIONAL LAW* 1084 (7th ed. 2013) (“[T]erminiello v. Chicago, 337 U.S. 1 (1949) stands for the proposition that speech may not be restricted because the ideas expressed offend the audience.”).

⁵² *R.A.V.*, 505 U.S. at 381.

⁵³ *Id.* at 391 (citations omitted).

St. Paul additionally argued that the Ordinance fell within another specific exception that allowed content discrimination, that is, when it is aimed at the “secondary effects”⁵⁴ of speech.⁵⁵ St. Paul averred that the Ordinance was intended not to protect the speaker’s right to free expression, but instead to protect against the victimization of people who have been a part of historically discriminated groups.⁵⁶ The Court disposed of this argument by pointing out that two years after that “secondary effects” case was decided, the Court clarified in a subsequent case that, when considering content-based restriction, “secondary effects” cannot include listeners’ reactions or emotive impact to speech, because this analysis would cause “damage to free and equal debate[.]”⁵⁷ Moreover, such an addition “could set the Court on a road that will lead to the evisceration of First Amendment freedoms[.]”⁵⁸ an argument with which the ACLU concurs. The ACLU, joined by other groups in *amici* for *R.A.V.*, contend that they “do not suggest that the reasonable apprehension of fear alone is a sufficient predicate for criminal prosecution.”⁵⁹ As the case deals with suppressing speech, the ACLU, *et al.*, “believe that the state must carry the additional burden of proving that *the speaker intended* his statement to be taken as a threat, even if he had no intention of actually carrying [the threat] out.”⁶⁰

The petitioner cross burner in this case, joined by the ACLU,⁶¹ asked the Court to modify the fighting words doctrine to narrow its

⁵⁴See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 54 (1986) (holding that where a city passed an ordinance regulating the time, place, and manner of adult movie theatres—finding that its “predominate concerns” were with the “secondary effects” of adult theaters on the surrounding community, and not with the content of adult films themselves—this finding was more than adequate to establish that the city’s zoning interests content-neutral, and unrelated to the suppression of free expression).

⁵⁵ *R.A.V.*, 505 U.S. at 394.

⁵⁶ *Id.*

⁵⁷ *Id.* (citing *Boos v. Barry*, 485 U.S. 321 (1988)).

⁵⁸ *Id.* at 338 (Brennan, J., concurring).

⁵⁹ Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 21, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 11003956 at * 21 (citing *Rogers v. United States*, 422 U.S. 35, 48 (1975) (Marshall, J., concurring)).

⁶⁰ *Id.* (emphasis added).

⁶¹ Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 10–11, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 11003956 at *10–11 (“[A]mici do not believe that this limiting

scope, and thereby invalidate the Ordinance as overbroad pursuant to this suggested narrower construction.⁶² However, he argued that even a narrower doctrine would be “ineffective because . . . denominating particular expression a ‘fighting word’ because of the impact of its ideological content upon the audience is inconsistent with the First Amendment.”⁶³ In fact, even in *Chaplinsky*, the original fighting words case, the state court below declared that in interpreting the fighting words statute,⁶⁴ “[t]he word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.”⁶⁵

St. Paul’s argument regarding the effect on the minority listener of hate speech, and the Court’s disposal of it, is especially interesting. The Court not only discards the argument using First Amendment precedent, which holds that considering how listeners might feel would destroy freedom of speech as we know it, but the Court also seems to reject the argument on the basis that cross burning does not actually

construction is sufficient to rescue the ordinance from invalidity. . . . Whatever else one might say about the *Chaplinsky* and *Brandenburg* standards, they have rarely been met in the reported cases. By contrast, one need only open the daily paper to see how much protected speech has the potential to arouse ‘anger, alarm or resentment’ on the basis of race, color, creed, religion, or gender.”)

⁶² *R.A.V.*, 505 U.S. at 381.

⁶³ *Id.* at 381 n.3 (“An important component of petitioner’s argument is . . . that narrowly construing the ordinance to cover only ‘fighting words’ cannot cure this fundamental defect. In his briefs in this Court, petitioner argued that a narrowing construction was ineffective because (1) its boundaries were vague, and because (2) denominating particular expression a ‘fighting word’ because of the impact of its ideological content upon the audience is inconsistent with the First Amendment At oral argument, counsel for petitioner reiterated this second point: ‘It is . . . one of my positions, that in [punishing only some fighting words and not others], even though it is a subcategory, technically, of unprotected conduct, [the ordinance] still is picking out an opinion, a disfavored message, and making that clear through the State.’”) (internal citations omitted).

⁶⁴ The Appellant in *Chaplinsky* was convicted of violating Chapter 378, Section 2 of the Public Laws of New Hampshire. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942). As cited in *Chaplinsky*, this law dictates that “[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.” *Id.*

⁶⁵ *Id.* at 573.

have the effect that the listener claims to experience.⁶⁶ Justice Scalia explains that the reason fighting words are categorically excluded from First Amendment protection is because the mode of expressing an idea, not the idea itself, whatever it might be, is “particularly intolerable (and socially unnecessary).”⁶⁷ But, Scalia writes that 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.”⁶⁸ This suggests that, to Scalia, cross burning is simply “obnoxious,” as opposed to actually threatening, to which countless legal scholars, and even Supreme Court Justices—including Clarence Thomas—would likely retort, how else should cross burning be perceived *but* threatening?⁶⁹ Even if the Court refuses to legitimize the particular addressee’s level of offense to a burning cross, the likelihood that “men of common intelligence”⁷⁰ would understand that a burning cross would *not* “cause an average addressee to fight”⁷¹ is low, given that “[t]he world’s oldest, most persistent terrorist organization is . . . the Ku Klux Klan [KKK][.]” which often utilizes cross burning as its chief instrument of inflicting terror.⁷²

Therefore, considering the effect of particular hate speech on the listener, as opposed to what the speaker intends by the hate speech, is absolutely necessary in situations where the Court’s own subjective, White-centric, and colorblind notions of what is, and is not threatening cloud its judgement with regard to what speech should be afforded First Amendment protection. By taking a content-neutral approach that

⁶⁶ See *R.A.V.*, 505 U.S. at 393; *supra* notes 52–58 and accompanying text.

⁶⁷ *R.A.V.*, 505 U.S. at 393.

⁶⁸ *Id.*

⁶⁹ See *Virginia v. Black*, 538 U.S. 343, 391 (2003) (Thomas, J., dissenting) (“In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”).

⁷⁰ *Chaplinsky*, 315 U.S. at 573.

⁷¹ *Id.*

⁷² See *Black*, 538 U.S. at 388–89 (Thomas, J., dissenting) (citing M. NEWTON & J. NEWTON, *THE KU KLUX KLAN: AN ENCYCLOPEDIA* VII (1991)) (“For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder.”) (citations omitted). *Id.* at 343–44 (majority opinion) (“The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence[.]”) (citations omitted).

disregards the listener's more-than-valid emotive response,⁷³ the Court contours the First Amendment in a manner that perpetuates White supremacy.

III. FOR TRUE THREATS, THE COURT HOLDS A CROSS BURNER'S INTENT IS WORTH MORE THAN THE EFFECT OF CROSSBURNING ON MINORITY LISTENERS, THUS UPHOLDING WHITE SUPREMACY

The type of intent an individual needs to communicate a "true threat" under the First Amendment, *i.e.*, whether the Court should consider just the speaker's intent (subjective approach)⁷⁴ or alternatively, both the effect on the listener of hate speech and the speaker's intent (objective approach)⁷⁵ is currently the subject of a

⁷³ See *Boos v. Barry*, 485 U.S. 321, 337 (1988) (Brennan, J., concurring) (concluding that the content-based nature of a constraint on speech cannot depend on whether the restriction is intended to address secondary effects).

⁷⁴ Some courts reason that the "clear import" of *Black* "is that only intentional threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *See, e.g. United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech."); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (stating that "an entirely objective definition" of true threats may "no longer [be] tenable" after *Black*); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'"); *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("Black...makes purely objective approach to ascertain true threat no longer tenable.").

⁷⁵ Other circuits to consider the issue have concluded that "*Black* did not work a 'sea change,' tacitly overruling decades of [circuit] case law by importing a requirement of subjective intent into all threat-prohibiting statutes." *United States v. Martinez*, 736 F.3d 981, 987–88 (11th Cir. 2013); *accord United States v. Jeffries*, 692 F.3d 473, 479–80 (6th Cir. 2012), *cert. denied*, 134 S.Ct. 59 (2013) ("*Black* does not work the sea change that *Jeffries* proposes."); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("We are not convinced that *Black* effected the change that *White* claims."). *See also United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) (holding, on plain error review, that "this court has applied an objective defendant vantage point standard post-*Black*[,] and "[a]bsent further clarification from the Supreme Court, [they] see no basis to venture further and no basis to depart from [their] circuit law.").

circuit split.⁷⁶ This split follows the Court's decision in the most recent cross burning case, *Virginia v. Black*.⁷⁷ In *Black*, the Court considered whether a Virginia statute, which made it a felony to burn a cross on private or public property with "the intent of intimidating any person or group of persons,"⁷⁸ violated the First Amendment.⁷⁹ Of utmost importance to the Court,⁸⁰ the statute also stated, "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."⁸¹ Three Virginia residents in this case were convicted separately under the statute.⁸² One White man, ironically named Black, led a KKK rally in 1998, in which he burned a cross in an open field where other KKK members gathered;⁸³ the other two White men drove a truck onto a Black victim's private property, planted a cross on his lawn, and set it on fire.⁸⁴ The Black individual stated that he was "very nervous," 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."⁸⁵ The Court itself admitted that "cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence,"⁸⁶ and held that Virginia could institute a general ban on cross burning with an intent to intimidate given cross burnings' "long and pernicious history as a signal of impending violence" in America.⁸⁷

Despite the Court's five-page analysis⁸⁸ on why cross burning in the U.S. is a "symbol of hate,"⁸⁹ and how it is inextricably linked to

⁷⁶ *United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) ("We are invited in this case to change our circuit law on the type of intent needed by a defendant to communicate "true threats[.]" We note there is a circuit split on the question of intent in the aftermath of *Virginia v. Black*, 538 U.S. 343 (2003).").

⁷⁷ 538 U.S. 343 (2003).

⁷⁸ VA. CODE ANN. § 18.2-423 (1996).

⁷⁹ *Virginia v. Black*, 538 U.S. 343 (2003).

⁸⁰ *Id.* at 364 ("The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional.").

⁸¹ VA. CODE ANN. § 18.2-423 (1996).

⁸² *Black*, 538 U.S. at 348.

⁸³ *Id.*

⁸⁴ *Id.* at 350.

⁸⁵ *Id.* (citations omitted).

⁸⁶ *Id.* at 360.

⁸⁷ *Black*, 538 U.S. at 363.

⁸⁸ *Id.* at 352-57.

⁸⁹ *Id.* at 357 (citation omitted).

the KKK,⁹⁰ White supremacy, and violence in this nation,⁹¹ it nonetheless held that the Virginia statute—as written—was unconstitutional,⁹² thereby overturning Black’s conviction,⁹³ and vacating the judgment as to the two other cross burners.⁹⁴ Justice O’Connor, writing for the plurality, reasoned that while the First Amendment permits Virginia to outlaw content-neutral cross burning done with the intent to intimidate (recognizing that such conduct is a “particularly virulent form of intimidation”),⁹⁵ the prima facie provision violated the First Amendment because it served as a “shortcut” to determining all of the “contextual factors that are necessary to decide whether a *particular* cross burning is intended to intimidate.”⁹⁶ Citing to its own five-page construction of the history of cross burning,⁹⁷ the Court reasoned that a cross burning is not always intended to intimidate, “[r]ather, 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, it held, burning a cross at a political rally would almost certainly be protected expression.”⁹⁸

The Supreme Court of Virginia, and the Virginia legislature by virtue of writing the prima facie intent clause into the statute, had decided that the act of cross burning alone, with no evidence of intent to intimidate, would “suffice for arrest and prosecution.”⁹⁹ But the Court felt otherwise, deciding unilaterally that burning a cross could symbolize political affiliation,¹⁰⁰ comprise part of their ceremonial rituals¹⁰¹, and represent general Klan group identity¹⁰², the way that hair gel unites the cast of *Mad Men*. This is White supremacy at its finest, in that the Court elevates cross burning’s alleged expressive content and

⁹⁰ *Id.* at 352.

⁹¹ *Id.* at 354.

⁹² *Black*, 538 U.S. at 348.

⁹³ *Id.* at 367.

⁹⁴ *Id.* at 367–68.

⁹⁵ *Id.* at 363.

⁹⁶ *Id.* at 367.

⁹⁷ *Black*, 538 U.S. at 365.

⁹⁸ *Id.* 365–66 (citations omitted).

⁹⁹ *Id.* at 364.

¹⁰⁰ *Id.* at 357.

¹⁰¹ *Id.* At 356–57.

¹⁰² *Id.*

reveals its own disregard for the feelings of those experiencing threatening hate speech.¹⁰³

The true threat definition is undoubtedly murky. The Court defines “true threats” as those in which 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.”¹⁰⁴ It went on to say that, “[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence,”¹⁰⁵ and “from the disruption that fear engenders,”¹⁰⁶ in addition to protecting people “from the possibility that the threatened violence will occur.”¹⁰⁷ Thus, from the Court’s stated analysis of the true threat exemption from First Amendment protection, it is unclear whether true threats must be analyzed from the perspective of the speaker, or from the perspective of the person to whom the speech is directed.¹⁰⁸ It is also unclear whether the speaker must intend simply

¹⁰³ See *infra* notes 111-15 and accompanying text.

¹⁰⁴ *Black*, 538 U.S. at 360 (citing *Watts*, 394 U.S. at 708 (“political hyperbole” [sic] is not a true threat); *R.A.V.*, 505 U.S. at 388).

¹⁰⁵ *Black*, 538 U.S. at 360.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Paul T. Crane, *True Threats and the Issue of Intent*, 92 VA. L. REV. 1225, 1226 (2006) (explaining that “in providing a definition, the Court created more confusion than elucidation” and “spawned as many questions as answers.”); see also Steven Gey, *A Few Questions About Cross Burning, Intimidation and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1288 (2005) (“Justice O’Connor’s opinion in the cross burning case borders on the incoherent.”).

to communicate, or to subjectively intend to communicate *and* threaten,¹⁰⁹ hence the circuit split.¹¹⁰

What seems clear, however, is that by ruling that a cross burning by itself, *cannot* be understood as a prima facie intent to intimidate, the Court has taken an unstated position. That is, the Court endorses the view that the speaker's intent matters more than a reasonable listener, or the minority individual's emotive response, of being "very nervous" when seeing a cross burning on his lawn.¹¹¹ According to this terrorized individual's "common intelligence" to use language from the Court's fighting words doctrine,¹¹² cross burning was just round one of other

¹⁰⁹ See *United States v. Cassel*, 408 F.3d 622, 636–37 (9th Cir. 2005) (explaining that "while the jury instruction correctly stated that 'intimidation' involves 'words and conduct that would put an ordinary, reasonable person in fear or apprehension,' it failed to specify that the statute requires 'fear or apprehension' of injury inflicted *by the defendant*. Whether the threat is of injury to person or property, there is no doubt that it must be a threat of injury brought about—rather than merely predicted—by the defendant."); accord *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" (quoting *Virginia v. Black*, 538 U.S. 343, 360 (2003))). Cf. *United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) (holding, on plain error review, that "this court has applied an objective defendant vantage point standard post-*Black*[,] and "[a]bsent further clarification from the Supreme Court, [they] see no basis to venture further and no basis to depart from [their] circuit law.").

¹¹⁰ Compare *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014) and *rev'd and remanded*, 135 S. Ct. 2001 (2015) (citing *Black*, 538 U.S. at 359) ("[W]e read 'statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence' to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as 'statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence.' This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.") (internal citation omitted) with *Cassel*, 408 F.3d at 631 ("The clear import of [the 'true threats' definition in *Virginia v. Black*] is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that 'the speaker means to communicate...an intent to commit an act of unlawful violence.' A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.").

¹¹¹ *Black*, 538 U.S. at 363.

¹¹² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

progressively worse phases of threats and violence.¹¹³ The Court's minimization of the threatening effect of cross burning on minority individuals in this nation, as seen in *Black*, is nevertheless consistent with the aforementioned discussion of Justice Scalia's analysis in *R.A.V.*, that cross burning is more "obnoxious" than actually threatening fighting words.¹¹⁴ These two cross burning cases demonstrate that the Court's First Amendment analysis will disregard history and context and adopt a White-centric framework through which to evaluate threat levels. And that White individuals' right to express themselves through a discriminatory act foretelling racial violence is valued equally if not greater than the Black person's reactive fear of that impending violence.¹¹⁵ Herein lies the reification of White supremacy through the Court's construction of First Amendment law.

The ACLU certainly takes the position that *Black* compels the consideration of the speaker's "subjective intent to threaten"¹¹⁶ in any true threat analysis.¹¹⁷ According to the ACLU, "one person's opprobrium may be another's threat," therefore, "[a] statute that proscribes speech without regard to the speaker's intended meaning

¹¹³ *Black*, 538 U.S. at 363.

¹¹⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) ("[I]t has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.").

¹¹⁵ See *Black*, 538 U.S. at 400 (Thomas, J., dissenting) ("That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as 'unwanted communication,' but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.") (internal citations omitted).

¹¹⁶ Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners at 6, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 11003956 at *6 ("Establishing subjective intent to threaten as a constitutional *mens rea* requirement for true threats would not require any deviation from this Court's precedents."); see also Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 6, *Elonis v. United States*, 135 S.Ct. 2001 (2015) (No. 13-983), 2014 WL 4215752 at *6 ("Although lower courts have divided over how to interpret *Black*, this Court's plain language and reasoning strongly support the conclusion that *Black* defined true threats to include only those statements made with the intent to threaten.").

¹¹⁷ Brief for American Civil Liberties Union, *Elonis*, 135 S.Ct. 2001 (2015) (No. 13-983).

runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed.”¹¹⁸ As a result, the ACLU argues that the Court’s plain language and reasoning in *Black* supports the view that true threats should include only those statements made with the intent to threaten,¹¹⁹ in order to “ensure adequate breathing room for such [core political, artistic, and ideological speech.]”¹²⁰

The Fifth Circuit, on the other hand, mandates an “objective test,” which considers whether the speaker knowingly intended to communicate, and whether an objective or reasonable person would regard it as a serious expression of harm, thereby rendering irrelevant the speaker’s subjective intent to threaten.¹²¹ Likewise, the Third Circuit has determined that reading the speaker’s subjective intent to threaten into *Black* contravenes the logic undergirding the true threats exception, as it “would fail to protect individuals from ‘the fear of violence’ and the ‘disruption that fear engenders,’ because it would protect speech that a reasonable speaker would understand to be threatening.”¹²²

Likewise, the Fourth Circuit has explicitly maintained that its objective test in determining whether a statement constitutes a true threat is if “an ordinary *reasonable recipient* who is familiar with the context . . . would interpret [the statement] as a threat of injury.”¹²³

¹¹⁸ Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 6, *Elonis v. United States*, 135 S.Ct. 2001 (2015) (No. 13-983), 2014 WL 4215752 at *5.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616–17 (5th Cir. 2004) (“However, the government can proscribe a true threat of violence without offending the First Amendment. Speech is a ‘true threat’ and therefore unprotected if an objectively reasonable person would interpret the speech as a ‘serious expression of an intent to cause a present or future harm.’ The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person. Importantly, whether a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a ‘true threat.’”).

¹²² *United States v. Elonis*, 730 F.3d 321, 329–30 (3d Cir. 2013) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

¹²³ *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) (emphasis added). *See also Crane*, *supra* note 108, at 1246 (citing *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973)) (“The reasonable listener test, the second version of the

Some courts have called the “reasonable listener standard” a strict liability standard, that allows a jury to convict speakers for making ambiguous statements that the listener might find threatening, regardless of whether the speaker knew the listener would find it threatening.¹²⁴ But, the Fourth Circuit, in adopting a standard that takes into account what the reasonable listener perceives, knowing the context of the speaker’s threats—as opposed to what the reasonable cross burner intends—removes the element of White privilege that is inherent in the Court and the ACLU’s reliance on the speaker’s intent in cross burning.¹²⁵ Undoubtedly, with regard to cross burning, “I’m sorry you feel that way” is hardly an appropriate or logical response by the speaker, given the history of racism and terror associated with such conduct; only the Third, Fourth and Fifth Circuits’ articulation of the true threat test, which take listener’s experiences into account, can provide adequate protection for minority groups victimized by hate speech and the hate crimes which oftentimes follow.¹²⁶

Moreover, focusing on what the speaker intends by the speech versus what the reasonable listener perceives, maintains White supremacy in First Amendment jurisprudence, because it ignores the reality that an act of terrorism against minorities in America does not need to be blatantly hateful for it to be understood as a true threat, or a fighting word.¹²⁷ The speaker’s intent does not need to be made crystal clear by the speaker, because White supremacist groups leverage hundreds of years’ worth of history and state-sanctioned racism when

objective test, takes a different perspective: a communication is a true threat if ‘an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury.’”).

¹²⁴ See *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (“Where a statement may be ambiguous, the entire context, including the tone used, may assist the jury in determining whether that ambiguous statement was a threat.”); see also *Crane*, *supra* note 108, at 1246 (“In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made.”).

¹²⁵ See *Crane*, *supra* note 108, at 1246 (“The reasonable listener test, the second version of the objective test, takes a different perspective: a communication is a true threat if ‘an ordinary, reasonable recipient who is familiar with the context of the [statement].’”).

¹²⁶ See *Virginia v. Black*, 538 U.S. 343, 343–44 (2003) (explaining that “The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence[.] . . . For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder.”) (citations omitted).

¹²⁷ See *supra* notes 120–26 and accompanying text.

they threaten racial minorities.¹²⁸ In *Black*, Justice Thomas forcefully begins his dissent by asserting, “[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred...and the profane. I believe that cross burning is the paradigmatic example of the latter.”¹²⁹ Alexander Tsesis, who has written extensively on how hate speech can catalyze crimes against humanity¹³⁰ maintains, “[s]tatements against out-groups can reflect the speakers’ willingness to act in accordance to prejudice, [clear examples including] the connection between historical symbols like burning crosses and swastikas with menacing behavior.”¹³¹ Yet, in an Establishment Clause case, *Capitol Square Review and Advisory Bd. v. Pinette*, the Court ruled that the KKK cross was simply a religious symbol, thereby overturning the lower court’s decision to deny the KKK its permit to place a cross in the state-house plaza (a public forum) during the Christmas season.¹³² Justice Scalia writing for the majority, therefore, ruled in favor of the KKK’s right to erect a cross, holding that the KKK’s cross was private religious Christian speech, which is as fully protected under the free speech clause of the First Amendment as secular private expression.¹³³ Though Justice Thomas concurred with the result, he wrote separately to vehemently oppose the Court’s initial presumption that the KKK’s cross is a symbol of Christianity.¹³⁴ He

¹²⁸ See, e.g., *Black*, 538 U.S. at 388–89 (Thomas, J., dissenting) (“In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’ The world’s oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.”) (internal punctuation and citations omitted).

¹²⁹ *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

¹³⁰ ALEXANDER TSEISIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* chs. 2–4 (2002); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 740–55 (2000); Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 142 (2005).

¹³¹ Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 143 (2005).

¹³² *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760–61 (1995).

¹³³ *Id.* at 760–61.

¹³⁴ *Id.* at 770–72.

argues that the KKK's cross is a "symbol of hate," and "a symbol of [W]hite supremacy" as opposed to a symbol of religious worship.¹³⁵ As Thomas avers in *Black*, "the connection between cross burning and violence is *well ingrained*["]¹³⁶ In fact, he refers to "violent and terroristic conduct" as "the Siamese twin of cross burning["]¹³⁷ Thomas goes on to cite lower court opinions wherein courts recognize that, for minority individuals, fearing for their own lives and the lives of their loved ones is a reasonable reaction to seeing a burning cross based on historical events.¹³⁸ For example, in one cited case, a woman testified that as a Black American specifically, the burning cross symbolized "[n]othing good. Murder, hanging, rape, lynching. Just anything bad that you can name."¹³⁹

Moreover, implicit acts of racism deserve attention even if legal institutions are unwilling to recognize them as such. One of the resounding critiques of the seminal Equal Protection Clause case, *Washington v. Davis*, wherein the Supreme Court held that a facially neutral law with even a profound racially discriminatory impact was not a per se violation of the Equal Protection clause without proof of discriminatory intent, is that it requires minority plaintiffs to produce a "smoking gun" to prove claims of racism.¹⁴⁰ Indeed, much of implicit bias discourse and movement-building is focused on pushing the law to recognize implicit bias and implicit racism, precisely because of the standard set in *Washington v. Davis* and its progeny.¹⁴¹ But, as scholars

¹³⁵ *Id.*

¹³⁶ *Virginia v. Black*, 538 U.S. 343, 390 (2003) (emphasis added).

¹³⁷ *Id.* at 394.

¹³⁸ *Id.* at 390–91.

¹³⁹ *Id.* at 390–93.

¹⁴⁰ *Washington v. Davis*, 426 U.S. 229, 245–48 (1976); *See also* Jonathan Feingold & Kren Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210.221 (citing to *Washington v. Davis*, 426 U.S. 229 (1976) to introduce current disparate treatment theory, then noting that current efforts by plaintiffs trying to make a credible racism allegation requires that they find evidence of the defendant's conscious intent to discriminate. "[T]hose alleging racism...search for the smoking-gun quote or document that will reveal racist intent.").

¹⁴¹ *See, e.g., Intent Standard*, Equal Justice Society, <https://equaljusticesociety.org/law/intentdoctrine/> (last visited Dec. 27, 2017) ("Existing equal protection law fails to incorporate many modern-day manifestations of discrimination and therefore deprives potential plaintiffs of access to our courts and redress for discrimination. Moreover, conservatives have worked to entrench the "intent" approach and push us down a path towards colorblind Constitutionalism.

maintain, “[a] ‘smoking gun’ is rarely found because naked prejudice is kept safely hidden.”¹⁴² Instead, most racism “often reflect[s] our familiarity with explicit biases,” and only hints at race.¹⁴³ However, racial animus is not a thing of the past, simply because racial epithets have become more nuanced and less overt. Instead, we must use historically-based context clues to gap-fill: the KKK no longer needs to accompany its crosses with placards espousing racist vitriol, the cross speaks for itself and relies on our familiarity with history and on explicit biases to make its point. But, the Court—in a display of severe historical amnesia—instead holds that the KKK’s cross is a symbol of its celebration of Christianity.¹⁴⁴ An analogously unsound ruling would be if the German *Bundesverfassungsgericht* (Germany’s highest court) were to adjudicate an issue today involving a neo-Nazi group’s right to erect a swastika, by premising a favorable opinion to the neo-Nazi group on the basis that the swastika represents to that group an ancient religious icon used in the Indian subcontinent. Such a statement is illogical precisely because it ignores any and all historical context.

The emotive response of fear instilled in individual minorities who are victimized by White supremacist rhetoric, and their “common intelligence” about what a burning cross signifies, is informed *not* just by any individualized instance of terror, but rather, by the codification of pages of history that makes up America’s past of slavery, racial segregation and state-sanctioned discrimination.¹⁴⁵ The Court, in allowing such conduct to receive First Amendment protection, contributes to a re-writing of history so as to ignore the real experiences of terror experienced by minorities. Thus, for the Court to adequately protect minorities, it is crucial that First Amendment jurisprudence

To address this problem, [Equal Justice Society] has successfully facilitated the incorporation of the cognitive science theory of ‘implicit bias’ (also known as ‘unconscious bias’) into both litigation and public policy discourse surrounding discrimination law.”)

¹⁴² Gabriel “Jack” Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 Asian Pac. Am. L.J. 129, 133 (1996).

¹⁴³ Feingold & Lorang, *supra* note 140, at 221

¹⁴⁴ *Black*, 538 U.S. at 356–57.

¹⁴⁵ See *supra* notes 123–29 and accompanying text; see also *Black*, 538 U.S. at 388 (Thomas, J., dissenting) (“In holding the ban on cross burning with intent to intimidate unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’”) (internal punctuation and citations omitted).

understand true threats and fighting words from the perspective of “reasonable listeners¹⁴⁶,” instead of following the ACLU’s guidance, which urges courts to consider what the speaker intends to communicate and, in so doing, unjustifiably affords White supremacists the benefit of the doubt.

Dr. Chris Demaske, who interrogates issues of power associated with the First Amendment and culturally disempowered groups, proposes a three-prong doctrinal framework to analyze First Amendment cases to allow for an analysis of the “historical relationship between group identity and individual power . . . and the power embedded between individual speakers.”¹⁴⁷ In Demaske’s framework

[i]n place of the traditional focus on whether the regulation in question is content-neutral or content-based, [the Court would consider:] (1) the character, nature and scope of the speech restriction; (2) the historical context of the cultural groups involved in the speech at issue; and (3) the individual power relations occurring at the particular speech moment.¹⁴⁸

The first prong allows the Court to holistically consider the government’s reason for censorship or restriction that could allow for content and viewpoint restrictions, but still recognizes that the character of the speech—whether content-based or content-neutral—is a significant consideration.¹⁴⁹ Under the second prong, “the Court would consider the historic context based on culturally constructed group identity when reviewing whether to restrict speech,” with empirical psychological and social scientific studies to be “used to determine the status [and level]¹⁵⁰ of a group’s historical disempowerment.”¹⁵¹

¹⁴⁶ See e.g., Matsuda, *Considering the Victim’s Story*, *supra* note 7, at 2357 (“The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the “fighting words” doctrine...”).

¹⁴⁷ Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL’Y 273, 280 (2004).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 280–81.

¹⁵⁰ ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* chs. 2–4 (2002) (outlining “ways in which historical data could be used to determine the level of disempowerment individuals may feel based on their group identity.”).

¹⁵¹ See Demaske, *supra* note 147, at 281–82.

Moreover, Demaske notes that incorporating this prong is consistent with the majority's extensive analysis of the history of cross-burning in *Black* as a symbol of hate.¹⁵² The third prong looks at relational power dynamics, and "requires a consideration of the power dynamic of the specific speech situation. For example, does the speech take place on public or private property? Are the speakers alone or surrounded by others?"¹⁵³ A "speech moment" analysis could also take into account, for instance, whether the public space in which the speech occurs takes place in a town comprised of a community that is predominantly made up of the ethnically marginalized, or otherwise marginalized group who is the target of that speech.¹⁵⁴ Demaske's alternative framework, therefore, offers a method of exorcising White supremacy from the First Amendment by allowing state governments to use "historical evidence and psychological studies to create effective hate-speech regulations that would not unfairly privilege one side of the debate or drive certain ideas or viewpoints from the marketplace."¹⁵⁵

IV. THE COURT LEGITIMATES WHITE SUPREMACY BY LEGITIMATING HATE SPEECH.

The Court additionally maintains White supremacy by elevating cross burning to important racist expression, necessary to political debate seen vis-à-vis its decision to analyze conduct like cross burning under the First Amendment; and to then afford such conduct First Amendment protection.

In Justice Thomas's powerful dissent in *Black*, he argues that cross burning is terrorizing conduct, rather than racist expression, and therefore does not need to be analyzed under the First Amendment whatsoever.¹⁵⁶ Thomas maintains that his conclusion is supported by the fact that the Virginia legislature sought to enact a statute that acknowledged and rectified the State's own prevailing practice of racial segregation.¹⁵⁷ Moreover, Thomas posits that Virginia, in instituting a ban on cross burning with intent to intimidate demonstrates:

¹⁵² *Id.* at 281–82.

¹⁵³ *Id.* at 282.

¹⁵⁴ *Id.* at 282–83, 296.

¹⁵⁵ *Id.* at 316.

¹⁵⁶ *Virginia v. Black*, 538 U.S. 343, 394–95 (2003).

¹⁵⁷ *Id.*

[E]ven segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, 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. And, 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. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.¹⁵⁸

The Court, however, is resolved on ensuring that cross burning—despite its notoriety as an instrument of terror—receives the benefit of First Amendment protection because of its apparent expressive value.¹⁵⁹ The Court's holding in *Black* is demonstrative of this point.¹⁶⁰

The Court, of course, *has* used law to suppress the flourishing of certain ideas through content-based restrictions, even in the face of First Amendment-based counter-arguments in the past.¹⁶¹ So-called “low value” speech includes fighting words, commercial advertising,¹⁶²

¹⁵⁸ *Id.* at 394–95.

¹⁵⁹ *Id.* at 366 (“[O]ccasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott’s *The Lady of the Lake*.”).

¹⁶⁰ *Id.* at 366 (“Burning a cross at a political rally would almost certainly be protected expression.”) (citations omitted).

¹⁶¹ See generally Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2228 (2015) (noting that it is widely accepted that the First Amendment is inapplicable, or applies weakly to “low-value” speech, but challenging the assumption that such low-value speech has never raised any constitution concern).

¹⁶² See *id.* at 2182. (“Advertising has been considered a category of low-value speech since the Court rather summarily held, in *Valentine v. Chrestensen* in 1942, that the Constitution’s protections did not apply to this kind of speech.”).

defamation;¹⁶³ and obscene, or profane speech.¹⁶⁴ For various reasons, the Court has deemed this speech so valueless that it is simply unworthy of Constitutional protection.¹⁶⁵ For instance, in *New York v. Ferber*, the Court held, *inter alia*, that two movies depicting young boys masturbating was unprotected by the First Amendment, because the value of permitting the live permanence “of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”¹⁶⁶ The Court considers political speech, on the other hand, to be of “high value.”¹⁶⁷ However, it is likewise a myth that the Court has never allowed states to proscribe content-based, political speech. In *Gitlow v. People of State of New York*, the Court upheld a New York law that rendered criminal anarchy a felony, and sustained the conviction of a man who published and circulated a “Left Wing Manifesto” denouncing capitalism and supporting communism.¹⁶⁸ The Court based its decision on the theory that a State has the right to self-preservation,¹⁶⁹ and that free speech guarantees may be reasonably limited, for example, by a State that, “in the exercise of its police power . . . punish[es] those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.”¹⁷⁰

That the Court determined the Virginia cross burning statute to be unconstitutional on the basis that it would create the “unacceptable risk of the suppression of ideas,”¹⁷¹ thereby illustrates the Court’s backing of White supremacy as an “idea,” worthy of Constitutional protection, or at least, that it serves higher than *de minimis* value to society. The *Black* plurality reiterated the bedrock principle embedded

¹⁶³ See *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952); see also *Roth v. United States*, 354 U.S. 476, 483 (1957) (“[L]ibellous utterances are not within the area of constitutionally protected speech.”).

¹⁶⁴ See *Roth*, 354 U.S. at 481 (“[E]xpressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.”).

¹⁶⁵ Lakier, *supra* note 161, at 2228.

¹⁶⁶ *New York v. Ferber*, 458 U.S. 747, 762 (1982).

¹⁶⁷ See Lakier, *supra* note 161, at 2228.

¹⁶⁸ *Gitlow v. New York*, 268 U.S. 652, 656 n.2 (1925) (“The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. Humanity can be saved from its last excesses only by the Communist Revolution.”).

¹⁶⁹ *Id.* at 668.

¹⁷⁰ *Id.* at 667 (citations omitted).

¹⁷¹ *Virginia v. Black*, 538 U.S. 343, 365 (2003).

in our First Amendment jurisprudence, that the “hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.”¹⁷² Putting aside the vast evidence that cross burning instills in minorities a little more than discomfort, the Court’s assertion here—in the context of cross burning—substantiates racial hatred as valuable political discourse to society; a minority individual’s identity in this country is a topic always up for discussion. This principal is enshrined in other, non-cross burning-related First Amendment cases as well.¹⁷³

In *Brandenburg v. Ohio*, at issue was Ohio’s “Criminal Syndicalism Act,” which punished those who, generally speaking, advocated violence as a means of accomplishing political reform.¹⁷⁴ Ohio had used the Act to convict the leader of a KKK group, who at a KKK rally, had shown a video to KKK members.¹⁷⁵ Portions of the film were also later broadcast on local television and on a national network.¹⁷⁶ The film contained derogatory phrases about Black and Jewish people, stating “[t]his is what we are going to do to the niggers[,]

¹⁷² *Id.* at 358 (citation omitted); *see also* *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”) (internal citation omitted).

¹⁷³ *See* Matsuda, *Considering the Victim’s Story*, *supra* note 7, at 2351 (“What the American position means in the area of race is that expressions of the ideas of racial inferiority or racial hatred are protected. Anyone who wants to say that African Americans and Jews are inferior and deserving of persecution is entitled to. However loathsome this idea may be, it is still political speech.”).

¹⁷⁴ *See* *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (quoting OHIO REV. CODE ANN. § 2923.13) (“The Act punishes persons who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform;’ or who publish or circulate or display any book or paper containing such advocacy; or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or who ‘voluntarily assemble’ with a group formed ‘to teach or advocate the doctrines of criminal syndicalism.’”).

¹⁷⁵ *Id.* at 444.

¹⁷⁶ *Id.* at 445.

[a] dirty nigger[,] send the Jews back to Israel . . . [s]ave America. Let's go back to constitutional betterment. Bury the nigger."¹⁷⁷ In a *per curiam* opinion, the Court determined the Act was unconstitutional under the First and Fourteenth Amendments because it punished mere advocacy and assembly, as opposed to punishing incitement to *imminent* lawless action, which would be constitutional.¹⁷⁸ Moreover, the Court reasoned that failing to distinguish between advocacy and imminent lawless action "sweeps within its condemnation speech which our Constitution has immunized from governmental control."¹⁷⁹ The Court did not elaborate on what speech would fit into this category of "immunized" speech,¹⁸⁰ however, a direct comparison of the previously discussed *Gitlow* case¹⁸¹ with *Brandenburg* yields the conclusion that the type of political speech in *Brandenburg*, *i.e.*, hate speech, has more than minimal value to the Court. What value such hate speech has is beyond comprehension to many academics,¹⁸² but is certainly consistent with the theory that the Court uses constitutional law to preserve ideas of White supremacy, insofar as "being a member of a privileged group is being the . . . subject of all inquiry in which people of color or other non-privileged groups are the objects."¹⁸³

The Court's commitment to preserving White supremacist ideological values through its protection of so-determined, "high value" hate speech is further supported by the Court's analysis in the more recent cross burning cases discussed herein.¹⁸⁴ In *R.A.V.*, for example, Justice Scalia wrote that the Ordinance at issue which proscribed 'fighting words' that insult, or provoke violence on the basis of race, color, creed, religion or gender, "[went] even beyond mere content

¹⁷⁷ *Id.* at 446 n.1 (internal punctuation omitted).

¹⁷⁸ *Id.* at 457.

¹⁷⁹ *Brandenburg*, 395 U.S. at 448.

¹⁸⁰ See Demaske, *supra* note 147, at 174 (quoting *Brandenburg*, 395 U.S. at 449) ("Any statute or law that would restrict speech not producing 'imminent lawless action' would 'sweep within its condemnation speech which our Constitution has immunized from government control.' The Court did not set any additional parameters of what speech would fit into this category.").

¹⁸¹ See *supra* notes 168–70 and accompanying text.

¹⁸² See generally MATSUDA ET AL., WORDS THAT WOUND, *supra* note 7.

¹⁸³ Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other - Isms)*, 1991 DUKE L.J. 397, 402 (1991).

¹⁸⁴ *Supra* Parts II and III.

discrimination, to actual viewpoint discrimination,¹⁸⁵ the logic being that proponents of racial equality could argue their points, but White supremacists would be crippled.¹⁸⁶ Scalia contended that “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”¹⁸⁷ Similarly, the Court, in *Black*, reasoned that the unconstitutional prima facie evidence provision of the Virginia statute at issue, denied the defendants the opportunity to exercise their constitutional right to put on a defense.¹⁸⁸ Therefore, Scalia, in *R.A.V.*, and O’Connor in *Black* expressly reaffirm White supremacy by treating it as one side of a “debate,” which merits airtime. Justice White, in dissent, takes issue with Scalia’s position, and avers that, “by characterizing fighting words as a form of ‘debate,’ the majority legitimates hate speech as a form of public discussion.”¹⁸⁹ White additionally observes:

Any contribution of [*R.A.V.*’s] holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone’s lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.¹⁹⁰

Justice White, in one sentence, presents the theory that the Court intends to keep messages of racial hatred within the reach of the First Amendment, because the value of their content outweighs the public interest in order and morality. The Court values racial hatred so much, that Americans should be able to trade ideas freely about whether the

¹⁸⁵ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

¹⁸⁶ *See id.* (“Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.”).

¹⁸⁷ *Id.* at 392.

¹⁸⁸ *Virginia v. Black*, 538 U.S. 343, 345 (2003).

¹⁸⁹ *R.A.V.*, 505 U.S. at 402 (White, J., dissenting) (internal citations omitted).

¹⁹⁰ *Id.*

White race is supreme, with First Amendment protection, and without undue interference from federal or state authorities.

CONCLUSION

The Supreme Court and the ACLU sincerely believe that their content-neutral, colorblind, and *laissez-faire* approach to the regulation of hate speech under the First Amendment protects the free-flow of ideas. This article has challenged this popular viewpoint by first exposing the lack of First Amendment absolutism,¹⁹¹ and second, by presenting the distinct ways in which the Court, through its cross burning cases, has deliberately shaped the contours of First Amendment jurisprudence in a manner that maintains White supremacy.¹⁹² The Court does this by insisting that cross burning has redeeming political value by refusing to recognize it as non-speech fighting words; and by defining true threats by the speaker's intent rather than what a reasonable minority individual would understand to be threatening.¹⁹³ Finally, the Court legitimates White supremacy by even choosing to afford cross burning First Amendment protection. That is, the Court could instead create a rule that cross burning encourages a debate about whether a minority has the right to exist, and, that such a debate is actually low value speech, undeserving of any First Amendment analysis.¹⁹⁴

Although the ACLU's abstract argument that only the broadest content-neutral protection of speech will provide the best hope for eliminating racial hatred may be compelling, in reality, it is a post-racial position that ignores and forgets our nation's gruesome history of slavery and state-sanctioned segregation. Former ACLU president Ira Glasser believed that the problem is not speech, but bigotry and prejudice, and only a liberal construction of the First Amendment will necessarily allow for the type of discourse that will combat

¹⁹¹ See *supra* Part II.

¹⁹² See *supra* Part III.

¹⁹³ See *supra* Part III; see also Matsuda, *Considering the Victim's Story*, *supra* note 7, at 2357 ("The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content/conduct" distinction.").

¹⁹⁴ See *supra* Part IV.

discrimination.¹⁹⁵ However, to make sense of the ACLU's logic, an ahistorical understanding of cross burning is required. As Professor Obasogie writes, the "role of context and history in colorblindness discourses is largely sidestepped and undertheorized in favor of flat, acontextual claims that race consciousness is race consciousness; the Klansman and the affirmative action supporter suffer from the same folly of paying too much attention to race."¹⁹⁶ Of course, this ideological stance, "denies the ongoing significance of racial subordination and White racial privilege."¹⁹⁷ Indeed, so too does the Court and ACLU's colorblind position that all ideas, including notions of White supremacy, are of equal value to society.¹⁹⁸

Cross burning is valueless, like other threats and words that by their very utterance inflict injury; for the Court and the ACLU to find otherwise maintains a system of law that places White privilege above the security and dignity of minorities.¹⁹⁹ The danger of forgetting and unknowing the historical context of cross burning,²⁰⁰ and allowing such terrorism to thrive as a protected form of expression, is that minority victims' right to protection from White terrorism is undermined. If we

¹⁹⁵ See generally Ira Glasser, *Introduction to HENRY LOUIS GATES, JR. ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1995) (arguing that dialogue, not censorship, might better lead us to racial justice).

¹⁹⁶ See OBASOGIE, *supra* note 2, at 172.

¹⁹⁷ *Id.*

¹⁹⁸ See Powell, *supra* note 6, at 849 ("Content neutrality and colorblindness are reinforcing doctrinal concepts. Both types of 'blindness' (to content under the First Amendment) and to race (under the Fourteenth Amendment) lead to the same result. The First Amendment's prohibition against content-based discrimination by the state, as applied to hate speech and colorblind constitutionalism both serve to preserve the status quo.").

¹⁹⁹ See, e.g., DELGADO & STEFANCIC, *supra* note 8 (arguing that hate speech left unregulated harms both society and the individuals who are targeted by the speech precisely because it devalues targeted individuals and promotes their unequal treatment); Matsuda, *Considering the Victim's Story*, *supra* note 7, at 2378 ("[T]he failure to provide a legal response limiting hate propaganda elevates liberty interests of racists over liberty interests of targets.").

²⁰⁰ See Matsuda, *Considering the Victim's Story*, *supra* note 7, at 2368 (calling generally for an end to "unknowing" our history of racism, and that, "[r]ather than looking to the neutral, objective, unknowing, and ahistorical reasonable person, we should look to the victim-group members to tell us whether the harm is real harm to real people.").

are to take the goals of the Reconstruction Amendments²⁰¹ seriously,²⁰² such an ahistorical, colorblind view of the First Amendment cannot and should not persist.

²⁰¹ See Scott Allen Carlson, *The Gerrymandering of the Reconstruction Amendments and Strict Scrutiny: The Supreme Court's Unwarranted Intrusion into the Political Thicket*, 23 T. MARSHALL L. REV. 71, 77 (1997) (“Prior to the passage of the Fifteenth Amendment, the Fourteenth Amendment was promulgated by the Thirty-Ninth Congress in 1868 with the purpose of securing racial equalization and eliminating racially discriminatory practices.”).

²⁰² See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992) (criticizing the R.A.V. Court for “seem[ing] to have forgotten that it is a *Constitution* they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well.”).