

## ***VIRGINIA V. BLACK* (2003)**

Like *Grutter*, *Virginia v. Black*, 123 S.Ct. 1536 (2003), was a ruling authored by Justice O'Connor in which the interests of racial minorities carried the day. The case was styled and argued in free speech terms, but the result makes more sense perhaps when viewed from the perspective of racial equality. In *Black*, the Court was faced with a First Amendment challenge to a Virginia statute that made it a distinct crime to burn a cross as part of an episode of intimidation. As construed by the lower courts, the Virginia law also allowed the state to presume a defendant's intent to intimidate from the fact of burning a cross itself. The Supreme Court refused to permit the state to establish intent to intimidate merely because a cross was burned; as the Court pointed out, there can be instances of cross burning where no intent to intimidate was established by some other means, the Court found no First Amendment problem with the state attaching special criminal consequences to the fact that a cross was burned as part of that intimidation.

This result was mildly surprising to many observers because a decade ago, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court had said that a city could not single out "racial" fighting words and punish them specially, because to do so would be to discriminate based on the content and/or viewpoint of one's message. One would have thought that if singling out "racial" fighting words constitutes viewpoint discrimination, so too would singling out "cross burning" intimidation. Indeed, one could argue that imposing distinct punishment for burning a cross (like imposing distinct punishment for using a swastika) is *more* likely to betray a legislative intent to stamp out unpopular and vile ideologies. The *Black* Court tried to distinguish *R.A.V.* by arguing that a burning cross does not carry with it any particular message— but rather only a generic message of hatred or anger. Justice O'Connor's opinion here seemed less than convincing. Indeed, in reading the history of the practice of cross burning, and the links between this history and the KKK— all of which is described quite vividly in O'Connor's opinion— one fully expected her opinion to say that cross burning was particularly associated with the KKK's message of racial and religious bigotry directed at minority groups. Instead, the opinion abruptly characterized cross burning as a kind of generic escalation, like the phrase "And I mean it" at the end of a sentence. Because it is generic, said the Court, cross burning can be singled out. Justice Thomas's concurrence was more honest; he acknowledged that cross burning is uniquely associated with racial and religious supremacy. But, as Justice Kennedy's dissent pointed out, it is hard to square this acknowledgment with *R.A.V.* and the complete message-neutrality it requires. It may be that fighting words (at issue in *Black*), although I am not sure why this should be so. More likely, *Black* illustrates that the Court's instincts of complete viewpoint-neutrality in speech, just like its instincts of complete color blindness in equal protection, had a tendency to give way to a recognition that sometimes racial minorities and their interests warrant special protections and special treatment.

One more point that links *Black* to the affirmative action cases in another way bears mention. Justice Thomas was active in asking questions at the oral argument in *Black*. From the bench, he passionately suggested that cross burning has no purpose other than to cause fear and terror and, for that reason, ought not to be considered speech protected by the First Amendment. When Thomas made those remarks, all across the country, press and pundits made a special not

of this message. As Edward Lazarus has pointed out, the very same words from any other justice might well have gone unnoticed. They certainly would not have drawn the rapt attention Thomas garnered or have shaped people's thoughts the way Thomas's remarks likely did. Part of the reason for that is Justice Thomas's race and the unique credibility his experience as a black person gives him when speaking on matters such as this. That racial relevance, precisely, is a key premise, of educational diversity, an interest Justice Thomas (dissenting in *Grutter*) rejected completely.