

## A First Amendment Analysis of Hate Speech Aimed at Illegal Immigrants: When Intolerant Speech is No Longer Protected

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On May 15, 2006, President George W. Bush, in a speech on immigration reform, stated that the country needed to pursue a debate in a “reasoned and respectful tone.”<sup>1</sup> He also said that, as a country, “We must honor the great American tradition of the melting pot, which has made us one nation out of many peoples.”<sup>2</sup> Since the President and Congress began debating different legislative proposals on immigration reform, the rhetoric on both sides, at times, has been contentious. Pro-immigration reform advocates say that the country should grant immunity to the millions of illegal immigrants living in the United States.<sup>3</sup> Other pro-immigration supporters, including a bi-partisan majority in the U.S. Senate, support a law that would allow illegal immigrants to pay a fine and apply for citizenship.<sup>4</sup>

Opponents of immigration reform argue that the government should not grant amnesty and, instead, they support the construction of a wall between Mexico and the United States. The U.S. House of Representatives passed a bill in December 2005 that would have strengthened border security without granting any type of amnesty to illegal immigrants.<sup>5</sup> Supporters of this approach advocate that the estimated ten to twelve million illegal immigrants should be tried as felons.<sup>6</sup> Other opponents even support rounding up illegal immigrants and deporting them to their country of origin, a view not supported by the Bush administration.<sup>7</sup>

The debate over illegal immigration has been heated. The ongoing national debate included an organized protest on May 1, 2006 in several cities by those who favor immigration reform.<sup>8</sup> Often times, during these protests, there were counter-protests by organizations that oppose any reform measures. Several of these groups argue that many of the illegal immigrants who are Hispanics are ruining the country through the “hispanicization” of the United States.<sup>9</sup> The language used by extremists against illegal Hispanic immigrants is meant to demean and belittle them. They have accused Hispanics of taking American jobs and bringing disease, poverty, and increased crime to the United States.<sup>10</sup>

In a recent study on groups who oppose illegal immigration reform, the Anti-Defamation League (ADL) reported that many groups have allied themselves with white supremacist groups.<sup>11</sup> According to the ADL, in April and May of 2006, several white supremacist groups,

such as the Neo-Nazi Vanguard and White Revolution, staged demonstrations against Hispanics across the country.<sup>12</sup> The ADL reports that in addition to the protests, there were also acts of violence committed by racists against Hispanic victims. For example on April 29, 2006 in East Hampton, Long Island authorities arrested a skinhead teenager for threatening another teenager with a machete and chasing a second victim with a chain saw while yelling racist epithets.<sup>13</sup>

This paper will analyze the First Amendment implications of the hate speech used by anti-immigration and white supremacist groups against Hispanic immigrants. Hispanics are used in this study because they are the minority group that many illegal immigration opponents refer to in their opposition to amnesty. This paper will begin by highlighting recent examples of hate speech used by anti-immigrant and white supremacist groups in the current debate on illegal immigration reform. Next, this paper will review pertinent literature on the First Amendment status of hate speech. It will then analyze several rulings by the U.S. Supreme Court in cases pertaining to hate speech. It will review the Court's decisions in *Brandenburg v. Ohio*,<sup>14</sup> *R.A.V. v. St. Paul*,<sup>15</sup> and *Virginia v. Black*.<sup>16</sup> In each of these cases, the Court ruled on the constitutionality of hate speech. The Court's rulings in these cases will help explain under what specific circumstances hate speech that is now directed at immigrants is protected speech. With these three cases, the Court also has provided a guide for when hate speech that becomes a threat to harm someone is not protected by the First Amendment. Finally, this paper will apply the Court's rulings to recent examples of hate speech acts by individuals and groups who oppose illegal immigrants. It will use the Court's rulings as a guide for determining under what specific circumstances a speech act within the immigration debate loses its First Amendment protection.

#### **HATE SPEECH AIMED AT HISPANICS**

There are several organized groups that oppose any immigration reform policy that includes amnesty or a path to citizenship. Some of these groups are white supremacists who oppose an increase in Hispanic immigration to the United States. One group based in Charlottesville, Virginia, is National Vanguard, a pro-white organization who views the "White race as a distinct nation, worthy of preservation" and rejects the "notion that 'diversity', i.e., the mixing of the races, is a beneficial trend for White societies to follow."<sup>17</sup> National Vanguard members in California and Nevada staged anti-immigrant protest at a Home Depot in Victorville, California in June 2005.<sup>18</sup> They protested what they believed was Home Depot's support for immigrant employees.<sup>19</sup> The organization's members stated that their protest was about keeping

Hispanics out of the country and preventing a “Mestizo invasion.”<sup>20</sup> They claimed to worry about “whose” land their children will inherit i.e. a Latino or “white” country.<sup>21</sup>

In a speech aimed at Hispanic immigrants, the organization’s Web site states that “All across America, people are waking up to the very real personal and national consequences of uncontrolled non-White immigration: economic costs, security/terror dangers, increased crime, destruction of infrastructure and social services, and a dramatic lowering of the cultural tone of our society.”<sup>22</sup> The anti-immigrant organization has accused Home Depot of supporting an anti-White agenda by importing illegal aliens for the company.<sup>23</sup> National Vanguard believes that the consequences of Home Depot’s employment policies will allow illegal immigrants to drive down wages; evade taxes; receive welfare; and get free health care.<sup>24</sup>

A second white supremacist group, American Renaissance, is another organization that opposes Hispanic immigration to the United States. The editor of its Web site, Jared Taylor, states that Hispanics bring disease and crime to the country.<sup>25</sup> Taylor states that the immigrants are attempting to take over the country with the aim of reunifying Mexico with the Southwest United States.<sup>26</sup> According to the American Renaissance Web site, race will play an important role in the most pressing challenges in the Twenty First Century.<sup>27</sup>

The Web site displays an archive of news articles related to the immigration issue with editorial comments posted under the headline.<sup>28</sup> The editorial comments deride any pro-immigration legislation supported by state and federal governments.<sup>29</sup> One article posted on September 5, 2006 discussed how a white professor at New Mexico Highlands University was passed over for tenure in favor of a Hispanic professor.<sup>30</sup> American Renaissance members commented how they were not surprised that a Hispanic academic received tenure and promotion over his white colleague.<sup>31</sup> For example one anonymous posting stated that “Affirmative action equals inequality for whites.”<sup>32</sup> Another wrote that “If you are white and under 40 change your name to a hispanic one.”<sup>33</sup> The anonymous author stated that caucasians are at a disadvantage to Hispanics in gaining employment. Everyone who posted a comment to the article agreed that caucasians are generally discriminated in society including on college campuses.<sup>34</sup>

A third example of anti-immigrant hate speech comes from the National Knights of the Ku Klux Klan (KKK). According to a report by the Southern Poverty Law Center, on May 6, 2006, the KKK held an anti-immigration rally in Russellville, Alabama.<sup>35</sup> At a gathering of

more than 300 Klansmen, a cross was burnt while they yelled “Let’s get rid of the Mexicans!”<sup>36</sup> The KKK states that part of their mission is to support building a fence across the U.S.-Mexican border. They believe that the illegal immigrants from Mexico are taking jobs away from Americans.<sup>37</sup>

These three groups are a small example of recent demonstrations against illegal immigrants, specifically Hispanics. The immigration issue has sparked an increase in the number of groups who openly foster a hostile climate against Hispanics.<sup>38</sup> They see this issue as an opportunity to promote their white supremacist agendas.<sup>39</sup>

### LITERATURE REVIEW

The legal debate over whether the First Amendment should protect hate speech predates the current national debate on illegal immigration. In 1995 Columbia University Law Professor Kent Greenawalt said that a general criminal prohibition of abusive words that are designed to hurt and humiliate should be unconstitutional.<sup>40</sup> Greenawalt asserted that free speech should become illegal when an individual has initiated contacts with a victim simply to harass that individual. He equated this behavior with making harassing telephone calls, an action Congress and the courts have determined to be illegal.<sup>41</sup> If the United States were to have laws against racial and ethnic slurs, then Greenawalt believed these laws could focus on the face-to-face verbal encounters because the targeted speech is aimed at a specific audience. He asserted that the aim in these situations is to try to incite a violent confrontation between speaker and victim.<sup>42</sup>

Georgetown University Law Professor Mari Matsuda took Greenawalt’s argument one step further. In 1993 she rejected any absolutist First Amendment positions for protecting hate speech.<sup>43</sup> She commented on the outcome of the 1977 Illinois court case, *Village of Skokie v. National Socialist Party*<sup>44</sup> where the Illinois Supreme Court ruled that a neo-Nazi organization could march in a parade. Based on the outcome of the *Skokie* case, Matsuda supported the possibility of a legal response to racist speech in order to show that victims of racism are valued members of society: “Tolerance of hate speech is not tolerance borne by the community at large. Rather it is a psychic tax imposed on those least able to pay.”<sup>45</sup> She supported a three-part test for determining the basis to prosecute hate speech.<sup>46</sup> The first part of the test is determining if the speech encompasses a message of racial inferiority. Second, does the speech have a message directed against a historically oppressed group of people? Finally, the last part of the test is whether the message is persecutory, hateful, and degrading. If all parts of the test are answered

in the affirmative, prosecution could proceed. Matsuda cautioned that she would not want to see the “floodgates” of litigation based on frivolous accusations in order to impose censorship over speakers.<sup>47</sup>

Matsuda argued that bomb threats, incitement to riot, and fighting words are already unprotected speech. Racist speech should be the next category without First Amendment protection because its victims usually experience physical and emotional distress when they are the direct targets.<sup>48</sup> Victims are restricted in their personal freedoms. In order to avoid further hate messages, they often quit their jobs, curtail their own speech (personal chilling effect), and avoid certain locations.<sup>49</sup> Matsuda argued that racism is an ideology that tries to impose racial supremacy and keep selected victimized groups in subordinated positions.<sup>50</sup> She stated that victims should be able to find restitution for this numbing fear that is imposed on their lives.

In contrast to the viewpoints of Matsuda, and Greenawalt, Franklyn Haiman stated that banning hate speech could lead to several consequences.<sup>51</sup> In 1993 Haiman asserted that criminalizing hate speech does not make the attitudes that lead to that expression go away.<sup>52</sup> If hate speech is prohibited, those holding intolerant attitudes will move underground and possibly “fester” their hatred in violent ways.<sup>53</sup> Generally, Haiman worried that any legal limits on hate speech would become counterproductive.<sup>54</sup> He wrote that an unseen enemy is more dangerous than one that is visible. He does not believe that all racists would go underground, but instead would become more sophisticated in how they phrase their racism. Prohibition would also make censored materials similar to “forbidden fruit” by making them more attractive to fringe elements.<sup>55</sup> Purveyors of prohibited speech gain notoriety and possibly even sympathy because their works are banned.

Elizabeth Phillips Marsh, a professor at the Quinnipiac College School of Law in Connecticut, warned that attempts to ban hate language must not “chill” legitimate speech.<sup>56</sup> In 2000 she argued that hate speech is protected at the cost of a victim’s dignity, equality, security, and freedom from emotional distress.<sup>57</sup> Marsh interpreted the *Brandenburg* test as requiring a link between advocacy and action. If the link is “broken,” a speaker will not be held accountable for an illegal, violent action.<sup>58</sup> With Internet-based hate speech, Marsh stated the courts should use evidentiary factors to distinguish between mere advocacy and incitement. These factors, she said, should include the social context of the speech, the predictability of a serious chance of

unlawful activity, whether any violence occurred, and the extent of the speaker's knowledge of the likelihood of violence.<sup>59</sup>

With the Court's *R.A.V. v. St. Paul* ruling in 1992 and its *Virginia v. Black* decision in 2003 several scholars have tried to analyze the Court's recent approach to hate speech, incitement, and threats by comparing *R.A.V.* and *Virginia v. Black* to its older cases such as *Chaplinsky v. New Hampshire*.<sup>60</sup> *Chaplinsky* was the first major fighting words speech case before the Court. It ruled that fighting words are not protected by the First Amendment. Notre Dame Law Professor, G. Robert Blakey, and attorney, Brian J. Murray, stated in 2002 that the Court, in *Chaplinsky*, acknowledged the existence of certain, well defined, and narrowly limited classes of speech where prohibiting them would not violate the First Amendment.<sup>61</sup> In their article the authors provided an analysis of *Chaplinsky* and *R.A.V. v. St. Paul*. The authors posited that the Court has curtailed *Chaplinsky's* scope of fighting words because it will not limit content, specific fighting words.<sup>62</sup>

In *R.A.V.*, Blakey and Murray stated, the Court held that certain excepted categories are protected against viewpoint discrimination.<sup>63</sup> The government cannot regulate speech based on its content.<sup>64</sup> In their view the Court has allowed true threats to be proscribed under the First Amendment, but this is a narrow category of limiting speech. True threats must be distinguished from "political hyperbole," controversial debate about ideas.<sup>65</sup> When protected speech is mixed with unprotected speech, Blakey and Murray stated that individual liability must be based on individual conduct.<sup>66</sup>

Michael Rosenfeld, a law professor at the Cardozo School of Law, stated in 2003 that, in his analysis of *Brandenburg v. Ohio*, the Court's decision is the current constitutional standard for determining when hate speech no longer has any First Amendment protection.<sup>67</sup> He asserted that the Court equated protecting the constitutionality of hate speech with the Communist Cold War era in that extremist speech that was purely political in content and not aimed at any one individual was protected.<sup>68</sup> Rosenfeld argued that the *Brandenburg* standard influenced the Court's *R.A.V.* decision.<sup>69</sup> The targeted speech of the St. Paul cross burning statute did not amount to an incitement to violence, the reason why Rosenfeld believes the Court struck down the city ordinance.<sup>70</sup> A burning cross did not equal "fighting words" and the ordinance was based on impermissible viewpoint discrimination.<sup>71</sup> According to Rosenfeld, the Court could not allow the statute to stand because it criminalized expression likely to incite violence in one

category (i.e. race or religion) but not others (i.e. homosexuality).<sup>72</sup> Rosenfeld posits that the Court's approach to hate speech is geared toward minimal regulation.

According to Roger Hartley, Public Policy Professor at the University of Arizona, this minimal regulation of speech may include threats against the individual. In his 2004 analysis of the Court's *Virginia v. Black* decision, Hartley stated the Court reaffirmed the idea that the First Amendment does not provide any protection to speech that inflicts injury.<sup>73</sup> According to the Court, for an injury to occur, the speaker must intend for the speech to intimidate. He agreed with the Court that speech, in this case a burning cross, that supports an unpopular viewpoint is still constitutionally protected.<sup>74</sup> Hartley contended that the Court's decision means that an individual may not be punished simply because speech has a tendency to produce evils.<sup>75</sup> The government has the right to protect against intimidation. Without intent to intimidate, hate speech cannot be punished.<sup>76</sup>

### **FIRST AMENDMENT PROTECTION FOR HATE SPEECH**

With the growing number of groups organizing Web sites and demonstrations opposed to immigration reform, the Constitution protects their right to free speech. The U.S. Supreme Court has protected the right of extremists to speak disparagingly about others.<sup>77</sup> Citing a belief in the market place of ideas approach to speech, the Court has openly said that stifling extremist speech would cause more harm than good.<sup>78</sup> As the Court stated in its 2003 *Virginia v. Black* decision, the First Amendment's protection of free speech allows in the "free trade in ideas."<sup>79</sup> This includes ideas that the overwhelming majority of Americans might find distasteful.<sup>80</sup>

The First Amendment does not allow the state the power to prohibit the dissemination of social, economic, and political philosophies that most Americans believe are false.<sup>81</sup> The Court has struck down laws that attempt to place content-based restrictions on the speaker.<sup>82</sup> It has upheld the right of the KKK to speak about promoting a "whites only" society as well as burning a cross to express unpopular political and social views.<sup>83</sup> Organizations such as the KKK have the constitutional right to advocate unpopular ideas, but they do not have the right to incite violence or intimidate specific individuals who may fear for their lives.<sup>84</sup> The Court's decision in *Brandenburg v. Ohio*<sup>85</sup> protected the right of racist organizations to promote their extremist philosophies.

***Advocacy for Political Change in Brandenburg v Ohio***

In 1969, the Court decided one of its landmark decisions on incitement and hate speech.<sup>86</sup> In *Brandenburg v. Ohio* an Ohio Klu Klux Klan (KKK) leader had been convicted under an Ohio state statute that punished advocating violence as a means of political change.<sup>87</sup> Clarence Brandenburg, the KKK leader, had contacted and invited a television reporter to attend a Klan rally in Hamilton, County Ohio.<sup>88</sup> Portions of the rally were taped and broadcast on television.<sup>89</sup> The taped scenes included 12 hooded figures gathered around a large wooden cross. Many of the Klansmen uttered phrases derogatory of African Americans and Jews.<sup>90</sup> For example, they chanted slogans such as “Save America” and “Freedom for the Whites.”<sup>91</sup>

In addition to the racial and anti-Semitic epithets, Brandenburg also issued a warning to the American government: “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”<sup>92</sup> This was the statement that local authorities used to arrest Brandenburg for violating the Ohio state law. In a per curiam vote, the Court unanimously overturned the law, stating that the First Amendment does not permit a state to forbid advocacy of the use of force except where the advocacy is directed to imminent incitement.<sup>93</sup> The teaching of resorting to violence does not equal actually preparing a group for violent action.<sup>94</sup> The Court stated any advocacy speech statute must distinguish between the concept of advocacy and actually preparing for violence.<sup>95</sup>

In defending Brandenburg’s right to teach advocacy for political change, the Court also defended the KKK’s right to free speech on other issues. The organization’s political advocacy message included the themes of white power and the suppression of minorities. In this case, African Americans and Jews were singled out as victims of the Klan’s hatred. Nonetheless, the Court protected the right of Brandenburg and his KKK followers to assemble and speak out against minorities and the federal government.

In its decision, the Court ruled that incitement to violence that results from speech is unconstitutional.<sup>96</sup> It created what is now known as the *Brandenburg* test to determine when any speech, including hate speech, loses its First Amendment protection. In the first part of the test, *advocacy* (words that inform an audience about the speaker’s hopes and beliefs and might include the “mere abstract teaching” of political reform) is legal.<sup>97</sup> Brandenburg had used phrases to tell an audience of his political beliefs that Caucasians were suppressed.<sup>98</sup>

The second part of the *Brandenburg* test is whether words direct or lead to incitement. This is speech that goes beyond mere advocacy. If the defendant is only aware that his words may incite illegal action but does not have incitement in mind as his purpose, his or her speech is protected.<sup>99</sup> If the speaker knows his or her words will likely trigger an illegal action, then the speech is not protected.<sup>100</sup> In this case *Brandenburg* spoke of an upcoming, organized July 4<sup>th</sup> march in Washington, D.C., but he never stated that the march should turn violent.<sup>101</sup>

The third part of the test is whether the words lead to an imminent act of violence. This is at the heart of *Brandenburg*. It means a very short time before the violence occurs.<sup>102</sup> The violence must occur nearly immediately after the actual spoken words or at the speech's conclusion, meaning "right now." *Brandenburg's* speech never made it this far; violence did not occur.

The final part of the *Brandenburg* test is the illegal action. When the illegal action takes place, there are no free speech controversies.<sup>103</sup> If speech leads to violence, then it is the direct result from the third part of the test, imminence. In *Brandenburg* the Court ruled that if violence had resulted from the Klan meeting, the speech would have been illegal, but there wasn't a breach of peace from the rally.

Justice Hugo Black, in his concurring opinion in *Brandenburg*, stated that the government has no power to curb the "belief and conscience" of any individual based on his or her convictions.<sup>104</sup> The Justice remarked that "One's beliefs have long been thought to be sanctuaries which government could not invade."<sup>105</sup> He said that power to curb speech can only be used in the rare instances that violence is imminent. *Brandenburg* is just one case where the U.S. Supreme Court upheld the right of a white supremacist group to utter phrases against minorities and the government. In another case, *R.A.V. v. St. Paul*,<sup>106</sup> the Court again protected the Constitutional right to express unpopular views including racist remarks.

### ***Court Rules Against Content-based Restrictions on Speech***

In June 1990 a group of teenagers in St. Paul, Minnesota had assembled a cross on the yard of an African American family from pieces of a broken chair.<sup>107</sup> They then burnt it on the family's yard.<sup>108</sup> Local authorities arrested the teenagers under the St. Paul Bias-Motivated Crime Ordinance.<sup>109</sup> The law criminalized the use of a symbol, object, or graffiti placed on public or private property with the intent of arousing anger on the basis of an individual's

characteristic such as race, religion, and gender.<sup>110</sup> Essentially, the St. Paul ordinance banned signs and symbols that advocated hate speech and incitement to violence.

The Court approached *R.A.V.* differently than it did in *Brandenburg* in that it unanimously struck down the Minnesota ordinance because it prohibited speech solely on the basis of the subjects the speech addressed.<sup>111</sup> In writing the Court's opinion, Justice Antonin Scalia stated the First Amendment did not permit the government to impose special prohibitions, content-based restrictions, on speakers who express views on disfavored subjects.<sup>112</sup> More specifically, Scalia said the ordinance's First Amendment weakness was that it would permit displays containing abusive words or symbols if they were on subjects other than race, color, creed, religion or gender. While offensive symbols on these subjects would be illegal, offensive symbols or words that arouse anger about a person's occupation, political affiliation, or sexual orientation would be legal.<sup>113</sup> For the Court, this ordinance amounted to viewpoint discrimination.

Justice Scalia wrote that the St. Paul statute did not single out a generic offensive mode of expression such as threats, but instead, prohibited fighting words geared toward racial, gender, or religious intolerance while leaving out other categories that would permit fighting words.<sup>114</sup> In *R.A.V.*, if an ordinance such as this were allowed to stand, the Court warned: "[The] regulation of 'fighting words,' like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone."<sup>115</sup> Essentially, the Court overturned the statute because certain categories of offensive fighting words were allowed while others were branded illegal. In the Court's opinion, content-based restrictions are "presumptively invalid."<sup>116</sup> The government may not regulate speech based on its hostility or favoritism towards the message.<sup>117</sup>

In his concurring opinion, Justice Byron White stated any prohibition on fighting words is not simply a time, place, or manner restriction, but a ban on categories of speech that portrays a thematic message even if the public does not like the message.<sup>118</sup> The notion that certain expressions may cause hurt feelings or resentment does not mean it can be stripped of its First Amendment protection.<sup>119</sup>

*R.A.V.* is a second of example of the Court embracing the concept that speech, even by extremists, should not be curtailed. Similar to its holding in the *Brandenburg* decision, the Court in *R.A.V.* reaffirmed the constitutional principle that the government should not regulate speech

based on the ideology of the speaker. Speech can only be limited when it is likely to incite to violence and threaten an individual.<sup>120</sup> In 2003 the Court again examined the issue of hate speech within the context of a burning cross and the intended message behind the burning cross.

***Burning a Cross as a Form of Political Speech Versus Burning It as a Threat***

Eleven years after its *R.A.V.* ruling, the Court tackled another statute involving cross burning as a form of hate speech. The most recent ruling by the Court involving hate speech and incitement is its 2003 case, *Virginia v. Black*.<sup>121</sup> The Court's decision was based on two separate cross burning incidents in Virginia. In August, 1998 Barry Black led a KKK rally in Carroll County, Virginia.<sup>122</sup> About 25 to 30 Klansmen met at the rally on the private property of one of its members.<sup>123</sup> They spoke in a derogatory manner about African Americans and Mexicans.<sup>124</sup> At the end of the rally, the crowd circled a 25 to 30 foot high cross and then burnt it.<sup>125</sup> The local sheriff arrested Black in violation of a Virginia statute that equated all burning crosses as intent to intimidate a person or group of people.<sup>126</sup>

In the second incident, on May 2, 1998 Richard Elliott and Jonathan O'Mara burnt a cross on the yard of their Virginia Beach next door neighbor, the Jubilee family.<sup>127</sup> Elliott and O'Mara were not members of the KKK.<sup>128</sup> The two men drove a truck onto the Jubilee's property and set fire to a cross they brought with them.<sup>129</sup> After seeing the cross the Jubilee's son, James, said he became "very nervous" and afraid that another incident would occur.<sup>130</sup> Virginia Beach law enforcement arrested Elliott and O'Mara and they were prosecuted under the same state statute that authorities had prosecuted Barry Black.<sup>131</sup> Violation of the law came with jail time and a financial penalty.

In an eight to one vote, the Court outlawed the burning of a cross when it is burned to intimidate people.<sup>132</sup> The Court said it is legal to ban conduct such as the burning of a cross but not the expression, the political or sociological ideas associated with the act.<sup>133</sup> Black's burning of the cross as a political or racial message is legal, but O'Mara's use of the burning cross to threaten and intimidate his neighbor was not protected speech.

The Court struck down a portion of a 1996 Virginia statute that declared that all burning of crosses is automatically a form of intimidation against a victim.<sup>134</sup> The Court also held, as unconstitutional, the part of the statute that interpreted all cross burnings as prima facie evidence of intent to intimidate.<sup>135</sup> In writing the Court's opinion, Justice O'Connor stated that a person may legally burn a cross as "core" political speech if the physical act does not include

intimidating an individual.<sup>136</sup> She wrote that the statute's prima facie evidence that all cross burnings are meant to intimidate blurred the separation between burning for intimidation and burning a cross as a political message.<sup>137</sup>

Justice O'Connor stated that a prohibition on "true threats" protects individuals from the fear of violence and the ensuing disruption to their lives.<sup>138</sup> Her opinion defined "true threats" as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>139</sup>

O'Connor posited that intimidation is a threat when a speaker intends to place a person or group of people in fear of bodily harm or death.<sup>140</sup> She said burning a cross for intimidation is a very powerful message to the intended victim because:

the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical.<sup>141</sup>

In the case of the Klu Klux Klan, O'Connor wrote that the burning cross is often directed at a particular individual and meant to coerce the victim to comply with the Klan's wishes.<sup>142</sup>

Justice O'Connor stated that the speaker does not need to actually carry out the threat for the speech to lack constitutional protection. Rather, a prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders."<sup>143</sup> This is the key to the Court's ruling on the constitutionality of a white supremacist symbol such as a burning cross. When burnt as a form of political speech, the First Amendment protects the burning cross, but when used to threaten or intimidate an individual it is no longer afforded protection by the Constitution.

In this case Barry Black's use of the burning cross was meant to make a belligerent statement about minorities and to promote white supremacy. It was constitutionally protected speech. In the other incident, Elliott and O'Mara used the burning cross to intimidate their neighbor, James Jubilee. In turn, Jubilee worried if the burnt cross was the first step towards another, violent confrontation. The First Amendment does not protect Elliott and O'Mara's actions since their speech intimidated and scared Jubilee. The Court's ruling in this case, along with its *Brandenburg* and *R.A.V.* decisions, provide a guide for a First Amendment analysis of

the speech various anti-immigrant and white supremacist groups are employing against Hispanics during the ongoing debate on immigration reform.

### **FIRST AMENDMENT PROTECTS ANTI-IMMIGRANT RHETORIC**

Several political groups in the United States have been debating the current policy regarding illegal immigrants. They propose reforms that would allow a guest worker program and a form of amnesty for the estimated ten to twelve million illegal immigrants. Others oppose these policies. Using the Court's reasoning in the *Brandenburg, R.A.V.*, and *Black* decisions, it is legal for an organization such as National Vanguard or American Renaissance to protest any aspect of the debate on immigration reform. The protests these groups have held, such as National Vanguard's June 2005 anti-Home Depot protest in California, are protected by the First Amendment.

The Constitution protects these groups' right to organize its supporters and to urge the government to deny amnesty to illegal immigrants and to deport them back to their country of origin. It is also legal for these organizations to print and distribute materials that discuss what they believe are the dangers posed by illegals – including Hispanics – who live in the United States. The Constitution safeguards extremist ideas used against Hispanics by white supremacist organizations as long as they are not aimed at any one individual with the intent of threatening that person with physical or psychological harm.

As noted earlier in this paper, on May 6, 2006, the National Knights of the Ku Klux Klan held an anti-immigration rally in Russellville, Alabama. Participants chanted "Let's get rid of the Mexicans" and "Send them back."<sup>144</sup> The demonstration took place on the steps of the Franklin County, Alabama Courthouse.<sup>145</sup> The demonstration did not spark a violent reaction from others who had gathered to counter-protest the KKK.<sup>146</sup> Using the Court's reasoning in its *Brandenburg, R.A.V.*, and *Black* decisions, the protest in front of the courthouse was constitutional.

After the rally, the KKK members drove nearly 21 miles to a field near Vina, Alabama and burnt a 22 foot high cross in an open field.<sup>147</sup> As a political statement against immigrants, the cross burning is legal. It took place in an open field and was not on personal property. If the cross had been burnt on the property of an immigrant family, then according to the Court's *Black* decision it could have been an illegal act as a form of intimidation. The First Amendment does not protect burning a cross as a threat or act of intimidation.

As the Court ruled in *Brandenburg v. Ohio*, the Constitution protects political advocacy as long as the speech does not incite to violence. On April 11, 2006 at a pro-immigration rally in Tucson, Arizona, Roy Warden, a member of Border Guardians, was arrested for assaulting a television news reporter.<sup>148</sup> Border Guardians is an anti-immigration organization. Warden and ten others led a counter-demonstration at the same downtown location.<sup>149</sup> During the counter-demonstration Warden stated:

Listen up, Mexican invaders we will not permit you, the ignorant, the savage, the unwashed, to overrun us, as happened in Rome...Land must be paid for in blood. If any invader tries to take this land from us we will wash this land and nurture our soil with oceans of their blood!<sup>150</sup>

Until this point the First Amendment protects his speech. Warden then proceeded to burn the Mexican flag. This action spurred two girls to throw water on him. A news crew with a local FOX television station recorded the scuffle.<sup>151</sup> Warden then assaulted the news crew for videotaping him.<sup>152</sup> The police arrested both the girls and Warden.<sup>153</sup> The violence that erupted after Warden burnt the Mexican flag was a result of a symbolic speech act that incited to violence. Under the Court's *Brandenburg* test, Warden's burning of the Mexican flag may not be afforded any First Amendment protection since it incited others to violence.

One month later on May 14, 2006, another speech act by Warden may have also lacked any constitutional protection. The First Amendment does not protect threats to harm someone. Warden sent an electronic mail (e-mail) death threat against Isabel Garcia, a Tucson Public Defender, and two of her colleagues regarding his upcoming plans to erect a "free speech area" outside the Tucson, Arizona city council chambers.<sup>154</sup> In the e-mail Warden stated:

Time to put your money where your big fat mouths are: If any of the three of you, or any of your pendejo thugs assault me in any way, break through my perimeter, make any threat of deadly force upon my life, etc., I will not hesitate to draw my weapon and blow your freaking heads off.<sup>155</sup>

During the council meeting on May 17th, Warden threatened violence against anyone who crossed his free-speech perimeter during his flag-burning demonstration.<sup>156</sup>

Warden's counter-protest to the pro-immigration rights march in Tucson was legal. His burning of the Mexican flag would have been legal had it not incited to violence. The U.S.

Supreme Court has ruled that symbolic action is protected speech.<sup>157</sup> Burning a flag is a form of speech. As the Court ruled in *Brandenburg*, speech that advocates any political ideology is legal until it incites to violence. Warden's words against Mexican immigrants might have been shocking but were legal. The First Amendment did not grant him the right to violently assault the television news crew. The e-mail that Warden sent to Isabel Garcia can be construed as a threat. He told Garcia that if she crossed into his free speech zone he would kill her. The Court in *Virginia v. Black* stated that the First Amendment does not protect threats. Justice Sandra Day O'Connor defined "true threats" as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>158</sup>

## CONCLUSION

With the ongoing debate on immigration reform, there has been an increase in hate speech directed at Hispanic illegal immigrants. Despite the heated rhetoric, a vibrant democracy needs a healthy discussion on political and social issues that affect millions of people living in the United States. Unfortunately, a portion of the current debate includes hate speech aimed at Hispanics.

The First Amendment guarantees the right of every American to make remarks that the majority of society may find repugnant. The American belief in a free marketplace of ideas includes speech that denigrates a group of people. The marketplace also supports counter-speech that will try to educate the public and dispel any intolerant attitudes. Unless incitement to violence results from the speech, the Court in *Brandenburg v. Ohio*, *R.A.V. v. St. Paul* and *Virginia v. Black* has supported the marketplace approach. As it stated in *Virginia v. Black*, the First Amendment protects the free trade of ideas, even those that a vast majority of Americans disagree with.<sup>159</sup>

While the Constitution grants the right of Americans to disparage others, it does not guarantee the right to threaten any individual with physical or emotional harm. In *Virginia v. Black*, Justice Sandra Day O'Connor wrote that the First Amendment does not protect threats of harm.<sup>160</sup> Threats and intimidation impose a psychological fear that can change how victims conduct their daily routines. O'Connor said victims fear for their physical safety because a threat disrupts their lives.<sup>161</sup>

In the ongoing debate on illegal immigration, the First Amendment does not protect anyone who threatens another with violence. The Constitution does not grant anti-immigrant activist Ray Warden the right to send e-mails threatening physical harm to anyone who crosses his free speech zone. As the ADL reported, the Constitution also does not allow a Long Island skin head wielding a machete to frighten a Hispanic teenager. Yet, the First Amendment does guarantee the right to espouse any political, economic, or sociological position as long as it does not incite to violence. As the Court has repeatedly said, the First Amendment promotes the concept that ideas, even racist ones, should be a part of the national exposition of ideas.

Notes

<sup>1</sup> Press Release, President Bush Addresses the Nation on Immigration Reform (May 15, 2006).

<sup>2</sup> *Id.* In addition to embracing the “melting pot” concept, President Bush also said, “We honor the heritage of all who come here, no matter where they come from, because we trust in our country’s genius for making us all Americans -- one nation under God.”

<sup>3</sup> Associated Press, *Tough House-Senate Negotiations Over Immigration Expected*, CNN.Com May 25, 2006 available at: <http://www.cnn.com/2006/POLITICS/05/25/immigration.ap/index.html>.

<sup>4</sup> Comprehensive Immigration Reform Act of 2006, S.2611, 109<sup>th</sup> Cong. (2006). The Senate passed the bill with a 62-36 vote.

<sup>5</sup> Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R.4437, 109<sup>th</sup> Cong. (2005). The House of Representatives passed the bill with a 239-182 vote.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* In contrast President Bush states that he disagrees with deportation: “Some in this country argue that the solution is to deport every illegal immigrant, and that any proposal short of this amounts to amnesty. I disagree. It is neither wise, nor realistic to round up millions of people, many with deep roots in the United States, and send them across the border.”

<sup>8</sup> Randall C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength* N.Y. Times, May 2, 2006, at A1. Demonstrations were held in several U.S. cities including Los Angeles, New York, Chicago, and Las Vegas.

<sup>9</sup> Jared Taylor, *A Debate at the University of Texas, Arlington College Republicans* (April 29, 2006) (transcript available at <http://www.amren.com/>).

<sup>10</sup> *Id.* Jared Taylor, the editor of the American Renaissance magazine, a white supremacist publication stated that: “Illegal immigrants enter this country without any kind of health screening and as a consequence have brought to the United States exotic diseases we’ve never had in the past and other diseases that we thought we had eradicated. Some of the examples are tuberculosis, plague, leprosy, typhoid... We fight crime, or at least we claim to be fighting crime, and yet we import people who are likely to commit crime.”

<sup>11</sup> Anti-Defamation League, *White Supremacists Ratchet Up Anti-Hispanic Action As U.S. Immigration Debate Rages* at [http://www.adl.org/PresRele/Extremism\\_72/4822\\_72.htm](http://www.adl.org/PresRele/Extremism_72/4822_72.htm) (May 24, 2006).

<sup>12</sup> *Id.* The ADL reports that between April 29 and May 20, 2006 five protests were held in different communities across the country: Seattle, Washington, Keene, New Hampshire, Russellville, Alabama, Montgomery, Alabama, and Greenville, South Carolina.

<sup>13</sup> *Id.*

<sup>14</sup> 395 U.S. 444 (1969).

<sup>15</sup> 505 U.S. 377 (1992).

<sup>16</sup> 538 U.S. 343 (2003).

<sup>17</sup> National Vanguard, *Why Does National Vanguard Exist?* at: <http://www.nationalvanguard.org/nv/about.html>.

<sup>18</sup> Ann Hendon, *National Vanguard: Just Say No to Illegal Immigrants* at: <http://www.nationalvanguard.org/story.php?id=5543> (July 25, 2005).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> According to National Vanguard spokesman Kevin Alfred Strom, "We're talking about *whose* (their emphasis) land this is and *whose* children will inherit it. That means we're talking about race -- not just little pieces of paper that have the words 'US citizen' printed on them. Bush will be printing those by the million soon, and handing them out to anyone who wants them -- but that won't make the Mestizo invasion go away."

<sup>22</sup> *Id.*

<sup>23</sup> Charles L. Carroll, Jr. *New Flyer: Boycott Home Depot* at <http://nationalvanguard.org/story.php?id=5441> (July 7, 2005).

<sup>24</sup> *Id.*

<sup>25</sup> TAYLOR, *Supra* note 9.

<sup>26</sup> *Id.* According to Taylor, "Mexico is the only country in the world that has an often expressed—passionately expressed—demand, a claim on American territory. The majority of Mexicans believe that the territory that changed hands after the Mexican-American War rightly belongs to them."

<sup>27</sup> American Renaissance, *at*: <http://www.amren.com/siteinfo/information.htm#what>.

<sup>28</sup> American Renaissance, <http://www.amren.com/index.html>.

<sup>29</sup> As an example from May 26, 2006 the Web site contained links to the following news articles. Under each headline is an editorial comment by American Renaissance. There is also an opportunity for visitors to the Web site to comment on the article:

Senate OKs Citizenship for Illegal Aliens, *Washington Times* [0 comments](#)

Senate votes for amnesty for 10 million and doubling of legal immigration by 62 to 36.

Against Tide, Some Seek Mexican Citizenship *Arizona Republic (Phoenix)* [0 comments](#)

A grand total of 4,349 people of non-Mexican ancestry became citizens last year.

Arizona Legislature OKs Immigration Bill, *AP* [0 comments](#)

Governor expected to veto new enforcement bill, as usual.

Mother Says She Dumped Newborn to Keep Boyfriend, *Washington Post* [0 comments](#)

More Hispanic family values.

<sup>30</sup> American Renaissance, *Former Professor Sues Over Denial of Tenure*, available at: [http://www.amren.com/mtnews/archives/2006/09/former\\_professo.php](http://www.amren.com/mtnews/archives/2006/09/former_professo.php).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Southern Poverty Law Center, *Immigration fervor fuels racist extremism at*: <http://www.splcenter.org/news/item.jsp?aid=186> (May 17, 2006).

<sup>36</sup> *Id.*

<sup>37</sup> Ku Klux Klan, *How Come We Can Have 40,000 miles Of Interstate, But Not 2,000 Miles Of Border Fence?* at: <http://www.kkk.bz/index1.htm> (May 30, 2006).

<sup>38</sup> Southern Poverty Law Center, *supra* note 32.

<sup>39</sup> *Id.*

<sup>40</sup> Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* 53 (1995).

<sup>41</sup> *Id.* at 54.

<sup>42</sup> *Id.* at 63.

<sup>43</sup> Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in *Words That Would: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 18 (1993).

<sup>44</sup> 373 N.E.2d 21(1978). The Illinois Supreme Court affirmed the right of the National Socialist Party of American to display the Nazi flag in a parade in Skokie, Illinois, a town with a large Jewish population.

<sup>45</sup> *Id.* at 18.

<sup>46</sup> *Id.* at 36.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 24.

<sup>49</sup> *Id.* at 25.

<sup>50</sup> *Id.* at 23.

<sup>51</sup> FRANKLYN HAIMAN, *SPEECH ACTS AND THE FIRST AMENDMENT*, 32 (1993).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 33.

- <sup>54</sup> *Id.* at 34.
- <sup>55</sup> *Id.*
- <sup>56</sup> Elizabeth Phillips Marsh, *Purveyors of Hate on the Internet: Are We Ready for Hate Spam?*, 17 GA.ST. U. L. REV. 379, 400 (2000).
- <sup>57</sup> *Id.* at 401.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.* at 402.
- <sup>60</sup> 315 U.S. 568 (1942).
- <sup>61</sup> G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L.REV. 829, 918 (2002).
- <sup>62</sup> *Id.* at 920.
- <sup>63</sup> *Id.* at 919.
- <sup>64</sup> *Id.* at 921.
- <sup>65</sup> *Id.* at 933.
- <sup>66</sup> *Id.* at 935.
- <sup>67</sup> Michael Rosenfeld, Conference: Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 CARDOZO L. REV. 1523, 1537 (2003).
- <sup>68</sup> *Id.*
- <sup>69</sup> *Id.*
- <sup>70</sup> *Id.* at 1539.
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.*
- <sup>73</sup> Roger C. Hartley, *Cross Burning – Hate Speech As Free Speech: A Comment on Virginia v. Black*, 54 CATH. U.L. REV. 1, 4 (2004).
- <sup>74</sup> *Id.* at 3.
- <sup>75</sup> *Id.* at 31.
- <sup>76</sup> *Id.*
- <sup>77</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).
- <sup>78</sup> *Virginia v. Black*, 538 U.S. 343 (2003).
- <sup>79</sup> *Id.* at 358.
- <sup>80</sup> *Id.*
- <sup>81</sup> *Id.*
- <sup>82</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).
- <sup>83</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *Virginia v. Black*, 538 U.S. 343 (2003).
- <sup>84</sup> *Id.*
- <sup>85</sup> 395 U.S. 444 (1969).
- <sup>86</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- <sup>87</sup> *Id.* at 445. The Ohio Criminal Syndicalism statute criminalized “advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform...” It also banned the “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism...”
- <sup>88</sup> *Id.* at 446.
- <sup>89</sup> *Id.*
- <sup>90</sup> *Id.*
- <sup>91</sup> *Id.* Other statements condemning African Americans and Jews include: “Send the Jews back to Israel;” “Bury the niggers;” and “Nigger will have to fight for every inch he gets from now on.”
- <sup>92</sup> *Id.* at 446.
- <sup>93</sup> *Id.* at 447.
- <sup>94</sup> *Id.*
- <sup>95</sup> *Id.* at 448. The Court’s decision differs from its early Twentieth Century “Clear and Present Danger” cases in that in *Brandenburg* the Court states speech loses its protection at the point violence is imminent. In *Schenck v. U.S.*, *Abrams v. U.S.*, and *Gitlow v. New York*, the Court was worried about speech that could lead to violence, i.e. a clear and present danger. In all three cases, the Court ruled that Congress had the authority to pass laws that limited speech that had the potential for violence in order to keep the country safe from Communists and anarchists.

<sup>96</sup> *Id.* at 448.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 433.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 449.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 434.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 457.

<sup>105</sup> *Id.* at 456.

<sup>106</sup> 505 U.S. 377 (1992).

<sup>107</sup> *Id.* at 379.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> The St. Paul Bias-Motivated Crime Ordinance stated: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

<sup>111</sup> *Id.* at 381.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 391.

<sup>114</sup> *Id.* at 394.

<sup>115</sup> *Id.* at 390.

<sup>116</sup> *Id.* at 383.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 409.

<sup>119</sup> *Id.* at 414.

<sup>120</sup> *Id.* at 393.

<sup>121</sup> 538 U.S. 343 (2003).

<sup>122</sup> *Id.* at 348.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 349.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 365. The Virginia statute stated that “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place...Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

<sup>127</sup> *Id.* at 350.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 347.

<sup>133</sup> *Id.* at 366.

<sup>134</sup> *Id.* at 365.

<sup>135</sup> *Id.* at 364.

<sup>136</sup> *Id.* at 365.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 360.

<sup>139</sup> *Id.* at 359.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 357.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 360.

<sup>144</sup> Montgomery Advertiser, *Klan raises anti-immigrant clamor at*:  
<http://www.montgomeryadvertiser.com/apps/pbcs.dll/article?AID=/20060508/NEWS02/605080319/1009> (May 7, 2006).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Brady McCombs, *City man arrested after Mexican-flag burning* Arizona Daily Star (April 12, 2006).

<sup>149</sup> *Id.*

<sup>150</sup> Southern Poverty Law Center, *Immigration fervor fuels racist extremism at*:  
<http://www.splcenter.org/news/item.jsp?aid=186> (May 17, 2006).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> David Marino, *Illegal Immigration activist may sue over email from Mexican flag burner* (May 14, 2006) KVOA TV4.

<sup>156</sup> Rob O'Dell, *City, county approve budgets* The Arizona Daily Star (May 17, 2006).

<sup>157</sup> *Texas v. Johnson*, 491 U.S. 397 (1989). In this case the Court ruled that burning the American flag is a form of protected speech as expressive conduct. Writing for the majority Justice William J. Brennan said "a principal 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." *Id.* at 409. The Court also noted: "Attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment. *Id.* at 405.

<sup>158</sup> 538 U.S. 343, 359 (2003).

<sup>159</sup> *Id.* at 358.

<sup>160</sup> *Id.* at 359.

<sup>161</sup> *Id.*