

## **Free Speech & Cross Burning**

**VIRGINIA, PETITIONER V. BARRY ELTON BLACK, RICHARD J. ELLIOTT,  
AND JONATHAN O'MARA**

**No. 01-1107**

**SUPREME COURT OF THE UNITED STATES**

*123 S. Ct. 1536; 155 L. Ed. 2d 535; 2003 U.S. LEXIS 2715; 71 U.S.L.W. 4263; 2003  
Cal. Daily Op. Service 2954; 2003 Daily Journal DAR 3767; 16 Fla. L. Weekly Fed. S  
203*

**December 11, 2002, Argued  
April 7, 2003, Decided**

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**PRIOR HISTORY:** ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA. *Black v. Commonwealth*, 262 Va. 764, 553 S.E.2d 738, 2001 Va. LEXIS 144 (2001)

**DISPOSITION:** Affirmed in part, vacated in part, and remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Respondents were convicted in separate cases of burning crosses with the intent to intimidate as proscribed by Va. Code Ann. § 18.2-423 (1996) which also provided that any cross-burning was prima facie evidence of intent to intimidate. Upon the grant of a writ of certiorari, petitioner Commonwealth of Virginia appealed the judgment of the Supreme Court of Virginia which reversed the convictions on the ground that § 18.2-423 was unconstitutional.

**OVERVIEW:** The first respondent burned a cross during a Ku Klux Klan rally, and the second and third respondents burned a cross in the yard of an African-American neighbor who complained about one respondent's use of his backyard as a firing range. Respondents contended that their expressive conduct in burning the crosses was protected by their constitutional right to freedom of speech. The United States Supreme Court held, however, that the prohibition of cross-burning with the intent to intimidate under § 18.2-423 was not unconstitutional since it banned conduct rather than expression. While cross-burning could constitute expression, such expressive conduct was not proscribed unless it was done with the intent to intimidate, and

targeting cross-burning was reasonable because burning a cross was historically a particularly virulent form of intimidation. However, a plurality of the Supreme Court asserted that the statutory provision that any cross-burning was prima facie evidence of intent to intimidate, which was interpreted under state law to mean that cross-burning by itself could support a conviction without further evidence of intent, was an unconstitutional restraint on speech.

**OUTCOME:** The judgment reversing respondents' convictions was affirmed with regard to the first respondent whose conviction implicated the statutory provision that cross-burning constituted prima facie evidence of intent to intimidate. The judgment was vacated with regard to the second and third respondents whose convictions did not implicate the evidentiary provision, and the cases of such respondents were remanded for further proceedings.

**COUNSEL:** William H. Hurd argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

Rodney A. Smolla argued the cause for respondents.

**JUDGES:** O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion. SCALIA, [\*\*\*10] J., filed an opinion concurring in part,

concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion.

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**OPINION BY: O'CONNOR**

**OPINION:**

[\*1541] [\*\*544] JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the *First Amendment*. Va. Code Ann. § 18.2-423 (1996). We conclude that while a State, consistent with the *First Amendment*, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately [\*\*\*11] of violating [\*\*545] Virginia's cross-burning statute, § 18.2-423. That statute provides:

"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 person who shall violate [\*1542] any provision of this section shall be guilty of a Class 6 felony.

"Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses [\*\*\*12] were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see what [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.*, at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.*, at 106. The speakers "talked real bad about the blacks and the Mexicans." *Id.*, at 109. One speaker told the assembled gathering that "he would love to take a .30/.30 and just randomly shoot the blacks." *Ibid.* The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to . . . the black people." *Ibid.* Sechrist testified that this language made her "very . . . scared." *Id.*, at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden . . . went up in a flame." *Id.*, at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. [\*\*\*13] Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id.*, at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.*, at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.*, at 74. Black responded, "I guess I am because I'm the head of the rally." *Ibid.* The sheriff then told Black, "There's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this." *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423. At his trial, the [\*\*546] jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.*, at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient [\*\*\*14] evidence from which you may infer the required intent." *Ibid.* When Black objected to this last instruction on *First Amendment*

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

grounds, the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.*, at 134. The jury found Black guilty, and fined him \$ 2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581-99- 3 (Va. App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door [\*1543] neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee [\*\*\*15] for complaining about the shooting in the backyard. *Id.*, at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee 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." *Id.*, at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him \$ 2,500. The judge also suspended 45 days of the sentence and \$ 1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Id.*, at 221-222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the [\*\*\*16] defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.*, at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$ 2,500 fine. The Court of Appeals of Virginia affirmed the convictions of

both Elliott and O'Mara. [\*\*547] *O'Mara v. Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2-423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S. E. 2d 738 (2001). It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V. v. St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)." *Id.*, at 772, 553 S. E. 2d, at 742. The Virginia statute, [\*\*\*17] the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." *Id.*, at 774, 553 S. E. 2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because "the enhanced probability of prosecution under the statute chills the expression of protected speech." *Id.*, at 777, 553 S. E. 2d, at 746.

\* \* \*

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* 145 (1991). Sir Walter Scott used cross burnings for dramatic [\*\*\*19] effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. See W. Scott, *The Lady of The Lake*, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. [\*\*548] The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed "a veritable reign of terror" throughout the South. S. Kennedy, *Southern Exposure* 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 48-49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a [\*\*\*20] message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 722, 105 L. Ed.

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

2d 598, 109 S. Ct. 2702 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the *Ku Klux Klan Act*. See "An Act to enforce the Provisions of the *Fourteenth Amendment to the Constitution* of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U.S.C. § § 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's *The Clansmen: An Historical Romance of the Ku Klux Klan*. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses [\*\*\*21] to celebrate the execution of former slaves. *Id.*, at 324-326; see also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 770-771, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie *The Birth of a Nation* in 1915, the association between [\*1545] cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little [\*\*\*22] over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain [\*\*549] that was "visible throughout" Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.*, at 147-148 (internal quotation marks omitted). Violence was also an elemental

part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few throats and see what happens." *Ibid.* (internal [\*\*\*23] quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town . . . . When the law fails you, call on us." *Id.*, at 176 (internal quotation marks omitted). And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. *Id.*, at 180. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police . . . after the burning of a cross in his front yard." *Richmond News Leader*, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation [\*\*\*24] in any form by the Klan or any other organization." D. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, e.g., Chalmers 349-350; Wade 302-303. Members of the Klan burned crosses on the lawns of those associated [\*1546] with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared [\*\*550]

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of [\*\*\*25] that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See Wade 226, 489.

\* \* \*

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who [\*\*\*26] "were married in full Klan regalia beneath a blazing cross." *Id.*, at 271

\* \* \*

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S., at 771 (THOMAS, J., concurring). And while cross burning sometimes [\*\*\*27] carries no intimidating message, at other times the intimidating message is the *only* message conveyed.

\* \* \*

In sum, while a burning cross does not inevitably convey a message of intimidation [\*1547], often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

III

A

The *First Amendment*, [\*\*\*28] applicable to the States through the *Fourteenth Amendment*, provides that "Congress shall make no law . . . abridging the freedom of speech." 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. *Abrams v. United States*, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17 (1919) (Holmes, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) ("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"). Thus, the *First Amendment* "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast

majority of its citizens believes to be false and fraught with evil consequence.

\* \* \*

The protections afforded by the *First Amendment*, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The *First Amendment* permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R. A. V. v. City of St. Paul*, *supra*, at 382-383 (quoting *Chaplinsky v. New Hampshire*, *supra*, at 572).

Thus, for example, a State may punish those words "which by their [\*\*\*30] very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, *supra*, at 572; see also *R. A. V. v. City of St. Paul*, *supra*, at 383 [\*\*552] (listing limited areas where the *First Amendment* permits restrictions on the content of speech). We have consequently held that fighting words -- "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" -- are generally proscribable under the *First Amendment*. *Cohen v. California*, 403 U.S. 15, 20, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971); see also *Chaplinsky v. New Hampshire*, *supra*, at 572. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969) (*per curiam*). And the *First Amendment* also permits a State to ban a "true threat." [\*\*\*31] *Watts v. United States*, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 89 S. Ct. 1399 (1969). . . .

"True threats" encompass those statements where 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. See *Watts v. United States*, *supra*, at 708 ("political hyperbole" is not a true threat); *R. A. V. v. City of St. Paul*, 505 U.S., at 388. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is [\*\*\*32] a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

## B

The Supreme Court of Virginia ruled that in light of *R. A. V. v. City of St. Paul, supra*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. *262 Va., at 771-776, 553 S. E. 2d, at 742-745.* It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals [\*\*553] burn crosses as opposed [\*\*\*33] to other means of communication because cross burning carries a message in an effective and dramatic manner. n2

\* \* \*

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V. v. City of St. Paul, supra*, to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R. A. V.*, we held that a local ordinance [\*\*\*34] that banned certain symbolic conduct, including cross burning, 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" was unconstitutional. *Id., at 380* (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. *505 U.S., at 391.* The ordinance did not cover "those who wish to use 'fighting words' in connection with other [\*1549] ideas -- to express hostility, for example, on the

basis of political affiliation, union membership, or homosexuality." *Ibid.* This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects." *Ibid.*

We did not hold in *R. A. V.* that the *First Amendment* prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated [\*\*\*35] that some types of content discrimination did not violate the *First Amendment*:

"When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from *First Amendment* protection, is also neutral enough to form the basis of distinction within the class." *Id., at 388.*

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "The Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the *First Amendment* . . . have special force when applied to the person of the President." *Ibid.* And a State may "choose to prohibit only that obscenity which is the most patently offensive *in its prurience* -- *i.e.*, that which involves the most lascivious displays of sexual [\*\*554] activity." *Ibid.* (emphasis in original). Consequently, while the holding of *R. A. V.* does not permit a State to ban only obscenity [\*\*\*36] based on "offensive *political* messages," *ibid.*, or "only those threats against the President that mention his policy on aid to inner cities," *ibid.*, the *First Amendment* permits content discrimination "based on the very reasons why the particular class of speech at issue . . . is proscribable," *id., at 393.*

Similarly, Virginia's statute does not run afoul of the *First Amendment* insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id., at 391.* It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e.g., supra*, at 8 (noting the instances of cross burnings directed at union members); *State v. Miller, 6 Kan. App. 2d 432, 629 P.2d 748 (1981)* [\*\*\*37] (describing the case of a defendant who burned a cross in

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See *262 Va., at 791, 553 S. E. 2d, at 753* (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus

The *First Amendment* permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit [\*1550] only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross [\*\*\*38] burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the *First Amendment*.

#### IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Va. Code Ann. § 18.2-423* (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1-17.1 ("The provisions of all statutes [\*\*555] are severable unless . . . it is apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated [\*\*\*39] that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." *262 Va., at 778, 553 S. E. 2d, at 746*. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence

provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction [\*\*\*40] of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E.g., Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949)* . . . As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right [\*\*\*41] not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a [\*1551] person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "would create an [\*\*556] unacceptable risk of the suppression of ideas." *Secretary of State of Md. v. Joseph H. Munson Co., supra, at 965, n. 13* (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)*). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute -- and potentially convict -- somebody [\*\*\*42] engaging only in lawful political speech at the core of what the *First Amendment* is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, 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,

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

"burning a cross at a political rally would almost certainly be protected expression." *R. A. V. v. St. Paul*, 505 U.S., at 402, n. 4 (White, J., concurring in judgment) (citing *Brandenburg v. Ohio*, 395 U.S., at 445). Cf. *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L. Ed. 2d 96, 97 S. Ct. 2205 (1977) (*per curiam*). Indeed, occasionally 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*.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the [\*\*\*43] purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post*, at 6 (opinion concurring in judgment and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have [\*\*\*44] drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas [\*\*557] with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 *Stan. L. Rev.* 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The *First Amendment* does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through [\*1552] the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike JUSTICE

SCALIA, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the *First Amendment*. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, [\*\*\*45] the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2-423.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

\* \* \*

**DISSENT:**

*JUSTICE THOMAS*, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, 491 U.S. 397, 422-429, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

[\*1563] Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with intent to intimidate," see maj. op., at 17, I believe that the majority errs in imputing an expressive component to the activity in question, see maj. op., at 17 (relying on one of the exceptions to the *First Amendment's* prohibition on content-based discrimination outlined in *R. A. V. v. St. Paul*, 505 U.S. 377, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)). [\*\*\*47] In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

A

"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.'" *Texas v. Johnson, supra, at 421* (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co. v. Eisner, 256 U.S. 345, 349, 65 L. Ed. 963, 41 S. Ct. 506 (1921)*).

"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 [\*\*\*48] United States." M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* vii (1991).

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those its dislikes, uses the most brutal of methods.

Such methods typically include cross burning -- "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995)* (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more [\*\*571] extreme measures, such as beatings and murder. Juan Williams, *Eyes on the Prize: America's Civil Rights Years 1954-1965*, at 39 (1965). As the Solicitor General points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for the United States at 3-4 & n. 2. n1 [\*1564] Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

[\*\*\*49]

"After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person.' Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this*

*criminal conduct.*" *United States v. Skillman, 922 F.2d 1370, 1378 (CA9 1991)* (emphasis added).

But the perception that a burning cross is a threat and a precursor of [\*\*572] worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radicals," to include Catholics, Jews, most immigrants, and labor unions, Newton & Newton, *supra*, at ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly [\*\*\*50] agree with the observation made by the Commonwealth of Virginia that

"A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief of Petitioner, at 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

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In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia 'might well consider passing legislation' to restrict the activities of the Ku Klux Klan." '*State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments*, Richmond Times-Dispatch, Feb. 6, 1952, at 7. As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of terrorism." . . .

That in the early 1950s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation." W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 185, 279 (1987).

Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. . . .

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[\*\*\*55]

123 S. Ct. 1536, \*; 155 L. Ed. 2d 535, \*\*;  
2003 U.S. LEXIS 2715, \*\*\*; 71 U.S.L.W. 4263

. . . 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.