**From case supplements**

**FACTS**

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County Virginia. The meeting took place in a privately owned field adjacent to Highway 690 near the town of Cana and could be seen from the highway and from about ten houses located nearby. Approximately thirty people attended. During the meeting, participants gave speeches of a generally racist nature. At the end of the rally, a thirty-foot cross was burned while the attendees played "Amazing Grace" over a loudspeaker. At this point, the sheriff, who had been observing the rally from the highway, drove to the gathering and asked who was in charge. When Black acknowledged that he was the organizer, the sheriff placed him under arrest for violating section 18.2-423 of the state code, which declared:

*"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 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."*

At Black's trial, the jury was instructed that "the burning of the cross by itself is sufficient evidence from which you may infer the required intent" to intimidate. Black objected to this instruction on First Amendment grounds, but because it was taken from the state's model jury instructions, the trial judge allowed it. The jury found Black guilty, and he was fined $2,500. Black appealed to the Virginia Supreme Court. His appeal was consolidated with similar ones filed by Richard Elliott and Jonathan O'Meara, both of whom had been convicted of cross burning in a separate incident. Based on the U.S. Supreme Court's decision in *R.A.V. v. St. Paul* (1992), the Virginia Supreme Court struck down the cross burning statute. The state asked the U.S. Supreme Court to review the decision.

**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.

(Case facts: omitted)

II.

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other.... 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. 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.... The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder.... 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 message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure."...In response, Congress passed what is now known as the Ku Klux Klan Act.... 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*....

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology.....

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."... 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....

The Klan continued to use cross burnings to intimidate after World War II....

The decision of this Court in *Brown v. Board of Education* (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.... Members of the Klan burned crosses on the lawns of those associated 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 group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings.... At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross....

For its own members, the cross was a sign of celebration and ceremony.... In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

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* (THOMAS, J., concurring). And while cross burning sometimes 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, 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, 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....

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.... Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."*Chaplinsky v. New Hampshire;* see also *R.A. V. v. City of St. Paul*....

"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.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] 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."... Intimidation in the constitutionally proscribable sense of the word is 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, ... 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,* 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....

In *R.A.V.* , we held that a local ordinance 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.... 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. The ordinance did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality."... This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects."...

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 that some types of content discrimination did not violate the First Amendment....

... 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."... 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."...

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 only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross 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 ... that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."...

... The court in Barry Black's case ... 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."... This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia....

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 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.... 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 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 person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'"... 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 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.... 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 purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim....

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.... 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 the jury instruction and as applied in Barry Black's case, is unconstitutional on its face....

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....

*It is so ordered.*

**JUSTICE THOMAS, DISSENTING.**

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred ... and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban ... cross burning carried out with intent to intimidate," ... I believe that the majority errs in imputing an expressive component to the activity in question....

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.'"... To me, the majority's brief history of the Ku Klux Klan only reinforces [the] 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."... For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder.... Indeed, the connection between cross burning and violence is well ingrained....In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

... [T]his 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.

II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

A

... A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts....

Both the majority and the dissent below classified the clause in question as an "inference," and I see no reason to disagree, particularly in light of the instructions given to the jury in Black's case, requiring it to find guilt beyond a reasonable doubt both as to the fact that "the defendant burned or caused to burn a cross in a public place," and that "he did so with the intent to intimidate any person or persons."... But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape.... That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. ... The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs.... As with statutory rape, the presumption of intent in such statutes is irrebuttable--not only can a person be arrested for the crime of possession with intent to distribute (or "trafficking") without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our Due Process precedents to sustain this statute.

B

The plurality, however, is troubled by the presumption because this is a First Amendment case....

... [T]he plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

III

Because I would uphold the validity of this statute, I respectfully dissent.

**JUSTICE SOUTER WITH WHOM JUSTICE KENNEDY AND JUSTICE GINSBURG JOIN, CONCURRING IN THE JUDGMENT IN PART AND DISSENTING IN PART.**

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction we considered in *R.A.V*. v. *St. Paul* (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R.A.V*. or any acceptable variation of it.

The ordinance struck down in *R.A.V.* , as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative "'on the basis of race, color, creed, religion or gender.'"... Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone....

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments....