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VIRGINIA v. BLACK
538 U.S. 343; 123 S. Ct. 1536 (2003)

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

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. Eight to ten houses 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.

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

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.” As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel “awful” and “terrible.”

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.” The sheriff then went down the driveway, entered the rally, and asked “who was responsible for burning the cross.” 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.”

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 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.” The trial court also instructed the jury that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” When Black objected to this last instruction on First Amendment grounds, the prosecutor

responded that the instruction was “taken straight out of the [Virginia] Model Instructions.” The jury found Black guilty, and fined him \$ 2,500. The Court of Appeals of Virginia affirmed Black’s conviction.

[Black appealed to the Supreme Court of Virginia. That Court reversed his conviction holding that the statute was unconstitutional based upon its reading of R.A.V. v. St. Paul, 505 U.S. 377 (1992), because the Virginia statute discriminated on the basis of content since it “selectively chooses only cross burning because of its distinctive message.”]

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. 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. 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 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*. 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 to celebrate the execution of former slaves. 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 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. 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. 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.

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. 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.” 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. 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. 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 in any form by the Klan or any other organization.” D. Chalmers, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 333 (1980). 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*, 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. According to the Klan constitution (called the kloran), the “fiery cross” was the “emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused.”

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. Typically, a cross burning would start with a prayer by the “Klavern” minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang *The Old Rugged Cross*. Throughout the Klan’s history, the Klan continued to use the burning cross in their ritual ceremonies.

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*. And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, 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. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan.

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.

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 discomfoting. 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 First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.

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. 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.’”

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*. 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*. 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*. And the First Amendment also permits a State to ban a “true threat.” *Watts v. United States*.

“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 “protects 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 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.

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. 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 burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner. 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*, 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 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 “those who wish to use ‘fighting words’ in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.” 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:

“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.”

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.” 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 activity.” Consequently, while the holding of *R.A.V.* does not permit a State to ban only obscenity based on “offensive political messages,” *ibid.*, or “only those threats against the President that mention his policy on aid to inner cities,” the First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue . . . is proscribable.”

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.” 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.” Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. 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.

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.” 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. 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 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.” 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. Thus, “burning a cross at a political rally would almost certainly be protected expression.” 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 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.

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. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. 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.

[Concurrence of JUSTICE STEVENS omitted]

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*, and the profane. I believe that cross burning is the paradigmatic example of the latter.

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. 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.

In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic."

"The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." 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 it 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*. For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder.

But the perception that a burning cross is a threat and a precursor of 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, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly 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.”

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

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.”

Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests. Because I would uphold the validity of this statute, I respectfully dissent.

[JUSTICE SCALIA’s concurrence in part and dissent in part omitted.]

[JUSTICE SOUTER’s opinion, concurring in part and dissenting in part, omitted].