Volume 2, Chapter 10: Freedom of Speech and Press
Part I, Section XV. Hate Speech
Page 1309. Insert after Note on *Wisconsin v. Mitchell*.

Virginia *v.* Black
538 U.S. __ (2003)

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, 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.

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 of violating 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 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. ...

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. ...

[T]he speakers "talked real bad about the blacks and the Mexicans." ...

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross [which suddenly ignited]. 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." ... [A neighbor, viewing this,] stated that the cross burning made her feel "awful" and "terrible." ...

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. ...

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 neighbor in Virginia Beach, Virginia. [Prior to the incident, Jubilee had complained about Elliot firing his guns in his backyard.] 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 for complaining about the shooting in the backyard. Respondents were not affiliated with the Klan. ...

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. ...

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." At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the 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." ... 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. ...

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. 553 S. E. 2d 738 (Va. 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 (1992)]." The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech."

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R. A. V.*, the Virginia statute does not just target cross burning "on the basis of race, color, creed, religion or gender." Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari.

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 [1866 and] fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process, [imposing] 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], Congress passed what is now known as the Ku Klux Klan Act. ... By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905. ... Although the first Klan never actually practiced cross burning, [a book published that year] 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 [the] book into the movie *The Birth of a Nation* in 1915, the association between cross burning and the Klan became indelible. ... [I]n 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 new Klan's ideology did not differ much from that of the first Klan. ... Violence was also an elemental part of this new Klan. ...

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." 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." 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. ...

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

The decision of this Court in *Brown* v. *Board of Education*, 347 U. S. 483 (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. ... Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. ... And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. 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,* 515 U. S., at 771 (Thomas, J., concurring). 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. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

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. ... 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." ...

[However,] we have long recognized that the government may regulate certain categories of expression consistent with the Constitution [such as fighting words, see *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), and advocacy of illegal conduct, see *Brandenburg v. Ohio*, 395 U. S. 444 (1969)]. ...

And the First Amendment also permits a State to ban a "true threat." *Watts* v. *United States,* 394 U. S. 705, 708 (1969) *(per curiam).* ...

"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." *Watts.* 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. ... [S]ome cross burnings fit within this meaning of intimidating speech. ...

III-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. ... We disagree. ...

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." *Id.,* at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he 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 activity." *Ibid.* (emphasis in original). 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," *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* (noting the instances of cross burnings directed at union members); *State* v. *Miller*, 629 P. 2d 748 (Kan. App. 1981) (describing the case of a defendant who burned a cross in 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 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. ...

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 "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." ... [Respondents] 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. ... The [trial] 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." This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. ...

The prima facie evidence provision, as interpreted by [Black's] jury instruction, renders the statute unconstitutional [on its face]. ... 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. ...

"[B]urning 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).

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 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 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 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). 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. ... [A]ll we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, 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. ...

JUSTICE STEVENS, concurring. (Omitted)

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part. (Omitted)

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*, 505 U. S. 377 (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.

I . 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. ...

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R. A. V.*'s general condemnation of limited content-based proscription within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R. A. V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R. A. V.* opinion called an exception for content discrimination on a basis that "consists entirely of the very reason the entire class of speech at issue is proscribable." This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. ...

II . *R. A. V.* defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," and the explanation was rounded out with some illustrative examples. None of them, however, resembles the case before us.

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. *Kucharek* v. *Hanaway*, 902 F. 2d 513, 517–518 (1990). The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

[T]his [does not] present any analogy to the statute prohibiting threats against the President, the second of *R. A. V.*'s examples of the virulence exception and the one the majority relies upon. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning. ...

III . [N]o content-based statute should survive ... under ... *R. A. V.* without a high probability that no "official suppression of ideas is afoot." ... I believe the prima facie evidence provision stands in the way of any finding of such a high probability here. ...

As I see the likely significance of the evidence provision, its primary effect is to 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. ... The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression ...

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. ... Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. ...

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assuming any circumstances suggesting intimidation are present. ... Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

IV . 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. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

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 (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 . 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, (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 (1992)). 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. ...

I-A. [T]he 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." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring). 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 "radical[s]," 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.

Virginia's experience has been no exception. ...

[I]n the early 1950s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror ...

[A]t the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.[1] ...

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[1]See, e.g., Va. Code §18-327 (1952) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code §20-54 (1950) (repealed 1968) (prohibited racial intermarriage); Va. Code §22-221 (1952) (repealed 1972) ("White and colored persons shall not be taught in the same school");

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. 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.

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. ...

The plurality laments the fate of an innocent cross-burner who burns a cross, but does so without an intent to intimidate. ... First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable ...

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

Va. Code §24-120 (1952) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code §38-281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code §53-42 (1950) (amended to remove "race" 1968) (required racial separa tion in prison); Va. Code §56-114 (1950) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code §56-326 (1950) (repealed 1970) (required motor carries to "separate" their "white and colored passengers," violation was misdemeanor); Va. Code §56-390 and 396 (1950) (repealed 1970) (same for railroads); Va. Code §58-880 (1950) (repealed 1970) (required separate personal property tax books for "whites" and "colored").