threat of violence more likely to satisfy the First Amendment than was the ordinance invalidated in R.A.V.? Is a ban on cross-burning intended to intimidate analogous to the ban on threats of violence against the President, which Justice Scalia suggested in dicta in R.A.V. is a permissibly proscribable subcategory of unprotected speech? The Court answered these questions affirmatively in the case that follows:

Virginia v. Black

538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (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 CHIEF JUSTICE [REHNQUIST], 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 [were convicted] 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."

[Black was convicted under the statute after a jury trial in which the jury was instructed that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent" to intimidate. The Supreme Court of Virginia upheld the conviction, holding that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in R.A.V."]

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 [fought] Reconstruction and the corresponding drive to allow freed blacks to participate in the political process, [imposing] "a veritable reign of terror" throughout the South. [In] response, 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. [From] the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. [Often,] the Klan used cross burnings as a tool of intimidation and a threat of impending violence. [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. [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." 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.

III. A. [We] have long recognized that the government may regulate certain categories of expression consistent with the Constitution [such as fighting words and incitement. Chaplinsky; Brandenburg]. And the First Amendment also permits a State to ban a "true threat." Watts v. United States, (1969); p. 1033 above]. "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. [Some] cross burnings fit within this meaning of intimidating speech.

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. [Indeed,] we noted that it

would be constitutional to ban only a particular type of threat [such as] "those threats of violence that are directed against the President." [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.

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] prima facie evidence provision, as interpreted by the jury instruction [in Black's case], renders the statute unconstitutional. 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] 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 provision makes no effort to distinguish among these different types of cross burnings. [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 [Black's] case, is unconstitutional on its face.

Justice STEVENS, concurring.

Cross burning with "an intent to intimidate" unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in R.A.V., that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct.

Justice SCALIA, with whom Justice THOMAS joins, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in R.A.V., a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. [But] I believe there is no justification for the plurality's apparent decision to invalidate [the prima-facie-evidence] provision on its face.

I. ["Prima] facie evidence" [is] evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted. [Presentation] of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate only until the defendant comes forward with some evidence in rebuttal.

II. The question presented, then, is whether, given this understanding of the term "prima facie evidence," the cross-burning statute is constitutional. [The] plurality is correct [that] some individuals who engage in protected speech may, because of the prima-facie-evidence provision, be subject to conviction. [But the] class of persons that the plurality contemplates could impermissibly be convicted under § 18.2–423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment overbreadth doctrine. [The] notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute substantially overbroad is fanciful.

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. 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.

[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. [This] case [does not] present any analogy to the statute prohibiting threats against the President. 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.

[No] 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. [To] the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. [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.

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. 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] 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. [In] the early 1950s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror. [At] the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. [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. [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.

SECTION 5. SEXUALLY EXPLICIT EXPRESSION

Introduction. Recall that in Chaplinsky, p. 1040 above, the Court categorized "obscenity," like libel and fighting words, as expression outside of First Amendment protection, because it is "of such slight social value as a step to truth that any benefit that may be derived from [it] is outweighed by the social interest in order and morality." The Court has continued to regard obscenity as