

Opinion of SOUTER, J.

SUPREME COURT OF THE UNITED STATES

No. 01–1107

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VIRGINIA

[April 7, 2003]

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." *Id.*, at 380 (quoting St. Paul, Minn., Legis. Code §292.02 (1990)). 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

Opinion of SOUTER, J.

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, as was apparently the choice of respondents Elliott and O'Mara. *Ante*, at 8–11, 16.

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." *R. A. V.*, *supra*, at 388. This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. *Ante*, at 17.

I do not think that the Virginia statute qualifies for this virulence exception as *R. A. V.* explained it. The statute fits poorly with the illustrative examples given in *R. A. V.*, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the

Opinion of SOUTER, J.

version in *R. A. V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R. A. V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R. A. V.*'s general rule.

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. 505 U. S., at 388. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," *ibid.*, and the explanation was rounded out with some illustrative examples. None of them, however, resembles the case before us.¹

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," *ibid.* (emphasis deleted), 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

¹Although three examples are given, the third may be skipped here. It covers misleading advertising in a particular industry in which the risk of fraud is thought to be great, and thus deals with commercial speech with its separate doctrine and standards. *R. A. V. v. St. Paul*, 505 U. S. 377, 388–389 (1992).

Opinion of SOUTER, J.

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.

Nor does this case 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. *Ante*, at 15–16. 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.

I thus read *R. A. V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that

Opinion of SOUTER, J.

are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R. A. V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. *Ante*, at 17. Actually, another way of looking at today's decision would see it as a slight modification of *R. A. V.*'s third exception, which allows content-based discrimination within a proscribable category when its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot." *R. A. V.*, *supra*, at 390. The majority's approach could be taken as recognizing an exception to *R. A. V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others, *ante*, at 16–17.

III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R. A. V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R. A. V.* without a high probability that no "official suppression of ideas is afoot," *R. A. V.*, *supra*, at 390. I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

Virginia's statute provides that burning a cross on the property of another, a highway, or other public place is "prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. §18.2–423 (1996). While that language was added by amendment to the earlier portion of the statute criminalizing cross burning with intent to intimidate, *ante*, at 17, it was a part of the pro-

Opinion of SOUTER, J.

hibitory statute at the time these respondents burned crosses, and the whole statute at the time of respondents' conduct is what counts for purposes of the First Amendment.

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 understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. *Ante*, at 9–11. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in respondent Black's case, *ante*, at 3, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since

Opinion of SOUTER, J.

any guilty verdict will survive sufficiency review unless the defendant can show that, “viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U. S. 307, 319 (1979). The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as JUSTICE O’CONNOR notes. *Ante*, at 18 (plurality opinion).

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute’s prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute’s terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute’s prohibition some expression that is doubtfully threatening though certainly distasteful.

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. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia’s content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.*

Opinion of SOUTER, J.

is warranted on the ground “that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot,” 505 U. S., at 390.² 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, *id.*, at 395–396, 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.

²The same conclusion also goes for the second *R. A. V.* exception relating to “secondary effects.” 505 U. S., at 389 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). Our “secondary effects” jurisprudence presupposes that the regulation at issue is “unrelated to the suppression of free expression.” *Renton, supra*, at 48.