

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VIRGINIA, :

4 Petitioner :

5 v. : No. 01-1107

6 BARRY ELTON BLACK, :

7 RICHARD J. ELLIOTT, AND :

8 JONATHAN O'MARA. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, December 11, 2002

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:02 a.m.

15 APPEARANCES:

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17 Virginia; on behalf of the Petitioner.

18 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Petitioner.

22 RODNEY A. SMOLLA, ESQ., Richmond, Virginia; on behalf
23 of the Respondents.

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3 JUSTICE STEVENS: We'll hear argument now in
4 Virginia against Black.

5 Mr. Hurd, please, you may proceed.

6 ORAL ARGUMENT OF WILLIAM H. HURD

7 ON BEHALF OF THE PETITIONER

8 MR. HURD: Justice Stevens, and may it please
9 the Court:

10 Our Virginia cross-burning statute protects a
11 very important freedom, freedom from fear, and it does so
12 without compromising freedom of speech. Our statute does
13 not ban all cross-burning, only cross-burning used to
14 threaten bodily harm. And unlike the ordinance in R.A.V.,
15 our statute does not play favorites. It bans
16 cross-burning as a tool of intimidation by anyone, against
17 anyone, and for any reason. Surely, for all the reasons
18 why we can ban threats of bodily harm, 100 times over we
19 can ban this exceedingly virulent weapon of fear.

20 QUESTION: Mr. Hurd, I -- there's one part of
21 the statute that may be troublesome, and that is the prima
22 facie evidence provision. I suppose you could have a
23 cross-burning, for instance, in a play, in a theater,
24 something like that, which in theory shouldn't violate the
25 statute, but here's the prima facie evidence provision.

1 Would you like to comment about that, and in the process,
2 would you tell me if you think it's severable, or what's
3 the story on that --

4 MR. HURD: Justice O'Connor, I would like to
5 comment about that. There are three major points I would
6 like to make.

7 First is the inference is simply a common sense
8 rule of evidence. It says that a burning cross may be
9 presumed to mean what we all know it ordinarily does mean,
10 a threat of bodily harm. And so it says no more than what
11 a prosecutor could argue if the inference were not there.

12 QUESTION: And the jury is instructed
13 accordingly by the judge?

14 MR. HURD: The jury is not required to accept.
15 It's --

16 QUESTION: No. Is the jury so instructed by the
17 judge?

18 MR. HURD: Where the inference is given, yes,
19 Your Honor, it -- it is so instructed, and was so
20 instructed in -- in the Black case, though not in the
21 Elliott case.

22 QUESTION: Do we have the instruction that was
23 given in the Black case?

24 MR. HURD: Yes, Justice Ginsburg. It appears in
25 the appendix. The instruction is a burning cross --

1 QUESTION: What page? Are you talking about the
2 joint appendix?

3 MR. HURD: Yes, Your Honor.

4 QUESTION: And where would that be?

5 MR. HURD: Instruction number 9 in the joint
6 appendix. I apologize for the delay.

7 QUESTION: Well, maybe you -- maybe you should
8 tell us later, and proceed.

9 MR. HURD: On page 146. The burning of a cross
10 by itself is sufficient evidence from which you may infer
11 the required intent.

12 QUESTION: It didn't say that they -- it just
13 said the positive, that they could make such an inference.

14 MR. HURD: Yes, Justice Ginsburg. It is a
15 purely permissive inference. The prosecution retains the
16 burden of proving beyond a reasonable doubt that there was
17 an intent to intimidate.

18 QUESTION: In this -- in the particular cases
19 before us, what evidence, other than the burning itself,
20 was there to show intimidation?

21 MR. HURD: What we had in the case of -- of
22 Barry Black was he heard that -- he's from Pennsylvania,
23 and he heard that down in Carroll County, blacks and
24 whites were holding hands on the sidewalk. And so they
25 came down. He came down, and they had this event. They

1 chose a spot near an open stretch of highway where they
2 erected a 30-foot cross. That's as high as these columns.
3 And they burned it at night with a loudspeaker and talk
4 about taking a .30/.30 and randomly shooting blacks.

5 QUESTION: Now, was that -- did that intimidate
6 everyone who drove by in their passenger vehicle or --
7 let's put it this way -- racial minorities who drove by in
8 their passenger vehicle? All of those were intimidated?

9 MR. HURD: Whether or not there was actual
10 intimidation of minorities who drove by was not clearly
11 established by the record. There was evidence in the
12 record that a black family did drive by, pause, saw it,
13 and took off at a higher than normal rate of speed.

14 QUESTION: Yes, but surely they were in no fear
15 of immediate violence, and our -- our Brandenburg line of
16 cases says there must be an element of immediacy --

17 MR. HURD: Justice Kennedy --

18 QUESTION: -- before you can punish speech by
19 reason of its content.

20 MR. HURD: Brandenburg was an incitement case,
21 not -- not a threat case, although there was a
22 cross-burning in Brandenburg --

23 QUESTION: Well, then if I -- if I have a
24 picture of a burning cross, and I -- and I give it to
25 somebody, that's --

1 MR. HURD: No, Your Honor. There has to be a --
2 a burning cross. In Brandenburg --

3 QUESTION: Isn't that because there's an
4 immediacy element to the threat?

5 MR. HURD: Well, we believe, Your Honor, that --
6 that if you read into the -- the threat jurisprudence an
7 immediacy element, then -- two points I would make.
8 Number one is that you would -- you would
9 constitutionalize threats when someone said, I'm going to
10 kill you, but it won't be for a little while. Surely that
11 can't be the case. A threat, say, against the President
12 would be constitutional so long as the -- the time when
13 the threat was going to be delivered was delayed.

14 QUESTION: Well, that -- that may be -- that may
15 be a different -- so -- so in your view if a burning cross
16 is just put on a hill outside of the city, everybody in
17 the city can be deemed intimidated?

18 MR. HURD: Not necessarily, Your Honor. The --
19 the burning cross carries not merely a message of
20 intimidation, but -- a -- a threat of bodily harm, but a
21 threat of bodily harm soon to arrive. Now, the --

22 QUESTION: Why doesn't Virginia just have a
23 statute making it a crime to threaten bodily harm that's
24 soon to arrive --

25 MR. HURD: Well, we --

1 QUESTION: -- burning cross or not?

2 MR. HURD: We could have such a statute, Your
3 Honor, but the -- the availability of other options does
4 not mean the option we have chosen is unconstitutional.

5 QUESTION: Do other States have criminal
6 statutes that have the broad-based intimidation
7 prohibition that I've just described?

8 MR. HURD: Your Honor, some -- some very well
9 may. Again --

10 QUESTION: I have not found one.

11 MR. HURD: Respectfully, that -- that event
12 would not -- would not be the test we believe established
13 by this Court in R.A.V.

14 Moreover, Your Honor, there's a -- there's a
15 down side to having a broad statute, and it is this. That
16 whenever you prohibit a proscribable category of speech,
17 there will be a -- a zone of protected speech that looks a
18 lot like the proscribed category and in which people must
19 be somewhat careful or they may be arrested mistakenly, as
20 happened with Mr. Watts in the Watts case.

21 QUESTION: I thought the key here is that this
22 is not just speech. It is not just speech. It's action
23 that -- that is intended to convey a message.

24 MR. HURD: It is --

25 QUESTION: Surely -- surely your State could

1 make it unlawful to brandish -- brandish an automatic
2 weapon with the intent of -- of intimidating somebody,
3 couldn't it?

4 MR. HURD: Justice Scalia, we -- we have
5 statutes that prohibit brandishing of firearms. In fact,
6 a -- a burning cross is very much like a brandishing of a
7 firearm.

8 QUESTION: That's your point.

9 MR. HURD: It is virtually -- it is virtually
10 a -- a present offer of force. That makes it an
11 especially virulent form of -- of intimidation.

12 Let me, if I may, come back to Justice
13 O'Connor's point about the inference. Justice O'Connor,
14 you asked whether the inference could be struck down,
15 severed. We believe the answer to that question is -- is
16 absolutely. If this Court were to decide it was
17 problematic, under Virginia law, as we cite in our briefs,
18 it is -- it is severable. We have a general severability
19 statute in Virginia so that if the Court were not to agree
20 with us that this inference is constitutional, it should
21 not declare the entire statute invalid, but should sever
22 the inference and remand these cases for further action.

23 QUESTION: Well, just to make it clear, anytime
24 in Virginia a burning cross is put near a highway, that is
25 an -- a criminal offense.

1 MR. HURD: Your Honor, it is a criminal offense
2 to burn a cross with intent to intimidate. Now, what --
3 QUESTION: Even on your own property.
4 QUESTION: No, not on your own --
5 MR. HURD: On your own property if it is a -- a
6 public place. A public place is defined in our statute --
7 actually on a jury instruction -- as being not public
8 ownership, but public view.
9 QUESTION: And intimidate means to cause fear of
10 violence at some unspecified time in the future --
11 MR. HURD: To -- to --
12 QUESTION: -- from some unspecified people.
13 MR. HURD: To instill fear of -- of bodily harm.
14 The specificity of the people is not hard to figure out.
15 It's whoever burns the cross is the one who is delivering
16 the threat. Justice Kennedy, there -- there are --
17 QUESTION: May I ask -- may I ask you a question
18 on -- about instruction 9 to which you called our
19 attention? It says, the court instructs the jury that the
20 burning of a cross by itself is sufficient evidence from
21 which you may infer the required intent. Does that mean
22 it is sufficient beyond a reasonable doubt by which you
23 can do it?
24 MR. HURD: Certainly the jury could, by this
25 instruction, by the burning cross infer -- infer guilt.

1 QUESTION: So that in -- in a case in which
2 there was a cross burned out in the middle of a desert
3 somewhere, and that's all that's proved, that would be
4 enough to sustain the conviction.

5 MR. HURD: That would be enough to -- to get you
6 past a motion to strike. Of course, sustaining a --

7 QUESTION: Let's say there's no -- the defendant
8 puts in no evidence, just rests on the -- on -- on just
9 remains mute. He could be convicted on it in that case,
10 I think.

11 MR. HURD: If the instruction were given, he
12 could be convicted. Of course, in this case, we have more
13 than a burning cross. And his -- his argument, Your
14 Honor --

15 QUESTION: I understand that. But then my next
16 question is -- I'm asking about whether there's content
17 discrimination. Supposing he burned a -- a circle, he
18 could not be convicted on the same evidence.

19 MR. HURD: He could not. A burning circle,
20 unlike a burning cross, carries no particular message.

21 And, Justice Stevens, I would -- I would point
22 out that where this Court has previously struck down
23 evidentiary inferences, it has done so under the Due
24 Process Clause.

25 QUESTION: In the case of a desert, he's out in

1 the desert, and he's burning the cross for symbolic
2 purposes and nobody else is around. I guess wouldn't the
3 judge have to set aside the conviction on -- on First
4 Amendment grounds.

5 MR. HURD: Justice Breyer, absolutely.
6 There's -- there's -- the General Assembly chose this word
7 very carefully when it said a prima facie case. The State
8 supreme court was very careful when they said, based on
9 that language, it would survive a motion to strike, but
10 there's no attempt in the statute to preclude the kind of
11 independent post-conviction review as required in First
12 Amendment cases.

13 So absolutely in that case, if -- if -- first of
14 all, if the police made an arrest, which is doubtful, and
15 if it was prosecuted, which is doubtful, and if the jury
16 found guilt, which is doubtful, then the court could in
17 that case and should in that case vacate the conviction.

18 QUESTION: Well, that -- that's fine if you use
19 the term prima facie case, which is what the statute says.
20 But the instruction here said the burning of a cross by
21 itself is sufficient evidence from which you may infer the
22 required intent. And you think that's an accurate -- an
23 accurate conveyance to the jury of what is meant by prima
24 facie case.

25 MR. HURD: The -- the -- that obviously was not

1 the only instruction given, Justice Scalia.

2 QUESTION: I understand.

3 MR. HURD: There was also instructions given
4 that -- that required the prosecution to prove its case
5 beyond a -- a reasonable doubt. And --

6 QUESTION: But -- but then it goes on to say the
7 burning of a cross is sufficient evidence from which you
8 may infer the -- the required intent.

9 MR. HURD: May, but -- but need not necessarily.

10 QUESTION: Need -- no, not necessarily. But
11 that seems to me to be much more than what you now
12 describe as the consequence of a prima facie case.
13 Just -- just one that gets you past a -- a motion to
14 dismiss.

15 MR. HURD: Well, the -- the jury --

16 QUESTION: It says it's sufficient evidence to
17 find it if -- if that's all you --

18 MR. HURD: And Justice Scalia, if there were a
19 problem with that instruction, it would be in our view
20 a -- a due process problem, not a First Amendment problem.

21 QUESTION: Well, I thought there would be a
22 First Amendment problem in the unusual hypothetical
23 instance of the desert, where they gave this instruction
24 and the very thirsty jury convicted the person under this
25 instruction. Were that to happen, then that might violate

1 the First Amendment since there was no evidence in the
2 case that this was going to intimidate a person, and the
3 only basis for a conviction would have been the
4 instruction of the State. And under those circumstances,
5 I guess the State instruction permitting conviction would
6 violate the First Amendment.

7 QUESTION: In other words, every due process
8 violation in a First Amendment case is a First Amendment
9 violation.

10 QUESTION: Not necessarily.

11 QUESTION: But that's quite a far --

12 (Laughter.)

13 MR. HURD: Justice Scalia, Justice Breyer, in
14 any event that very unusual case would present an
15 as-applied challenge.

16 QUESTION: May I ask you --

17 QUESTION: I agree it's unusual.

18 QUESTION: -- about a more -- a more -- case of
19 immediate concern? You have said that the cross --
20 burning cross is a symbol like no other. And so this is a
21 self-contained category. What about other things that are
22 associated with the Klan? For example, the white robes
23 and the mask? Are they also symbols that the State can
24 ban, or is there something about the burning cross that
25 makes it unique?

1 MR. HURD: Justice Ginsburg, there -- there are
2 several things about the burning cross that make it
3 unique.

4 First, it is the symbol that the Klan has used
5 to -- to threaten bodily harm. The connection, if you
6 will, in our history is -- is between the burning cross
7 and ensuing violence, not so much between people wearing
8 white sheets and ensuing violence.

9 QUESTION: Isn't there a Federal statute that
10 makes it -- makes it an offense to go on the highway
11 wearing a -- wearing a sheet?

12 QUESTION: In disguise.

13 MR. HURD: And going in disguise on the highway
14 with a particular intent -- I believe there is. And we
15 have a statute in -- in Virginia.

16 One of the things -- let me -- let me make this
17 point about the burning cross --

18 QUESTION: I -- I --

19 MR. HURD: -- and why it's -- why it's unique.

20 QUESTION: You're saying it's not unique then if
21 you could also make going on the highway in disguise a
22 crime.

23 MR. HURD: Well, I think going on the highway in
24 disguise is -- is a different kind of -- of concern.
25 It's -- it's the same kind of concern that might, in a

1 variety of cases, prevent people from disguising their
2 identity from -- from law enforcement.

3 But in terms of -- of delivering symbols and
4 delivering threats, it really is unique. It says -- it
5 says, we're close at hand. We don't just talk. We act.
6 And it deliberately invokes the precedent of 87 years of
7 cross-burning as a tool of intimidation.

8 Burn anything else. Burn the flag. Burn a
9 sheet. The message is opposition to the thing that the
10 symbol unburned represents. Burning a cross is not
11 opposition to Christianity. The message is a threat of
12 bodily harm, and it -- it is unique. And it's not simply
13 a message of bigotry. It's a message that -- that whoever
14 has it in their hands, a message of bodily harm is coming.
15 That is the primary message --

16 QUESTION: It sounds to me like you're defending
17 the statute on the ground that the message that this
18 particular act conveys is particularly obnoxious.

19 MR. HURD: Obnoxious. Justice Stevens, we have
20 a lot of obnoxious speech, and it's all perfectly fine.
21 This is not obnoxious speech. This is a -- a threat of
22 bodily harm.

23 Justice Souter made the point in the concurrence
24 in -- in *Hill v. Colorado* the Government may punish
25 certain types of expressive conduct even though that

1 conduct is associated with a particular point of view.
2 Those who burn draft cards typically oppose the draft.
3 Those who engage in sidewalk counseling typically oppose
4 abortion. But we can oppose restrictions on those
5 activities.

6 Similarly, we can ban cross burning as a tool of
7 intimidation even though many people who practice
8 cross-burning may also carry with that cross-burning some
9 message of bigotry. But the primary message -- the
10 fundamental message is a threat of bodily harm.

11 And this is not something that we just made up.
12 Cross-burning has that message because for decades the
13 Klan wanted it to have that message because they wanted
14 that tool of intimidation. And so it rings a little
15 hollow when the Klan comes to court and complains that our
16 law treats that message -- treats that burning cross as
17 having exactly the message that they for decades have
18 wanted it to have.

19 And so, we do believe that our statute is -- is
20 quite constitutional. They may have a political rally
21 with a burning cross, but what they cannot do is use a
22 Klan ceremony as a way to smuggle through real threats of
23 bodily harm with a specific intent to intimidate. That is
24 what happened in the Barry Black case, as the jury found.
25 The sufficiency of the evidence in that case has -- has

1 not been contested.

2 For these reasons, we would ask the Court to
3 reverse the decision below and, Justice Stevens, I'd like
4 to reserve the balance of my time.

5 QUESTION: Thank you, Mr. Hurd.
6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN
8 ON BEHALF OF THE UNITED STATES,
9 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

10 MR. DREEBEN: Thank you, Justice Stevens, and
11 may it please the Court:

12 Virginia has singled out cross-burning with the
13 intent to intimidate because it is a particularly
14 threatening form of such conduct. History has revealed
15 that cross-burning has been used as a tool to intimidate
16 and put people in fear of bodily violence in a way that no
17 other symbol has been used.

18 QUESTION: Does it fall under the fighting words
19 notion, or is it a separate category of constitutionally
20 proscribable speech do you suppose?

21 MR. DREEBEN: Justice O'Connor, our analysis of
22 the intimidation element is that it's akin to a threat to
23 put somebody in bodily harm. And as such --

24 QUESTION: Is it -- is it a defense under the
25 statute for someone to prove that they didn't intend to

1 threaten anyone, but just purely to express a viewpoint?

2 MR. DREEBEN: Apart from the presumption or
3 prima facie case provision that Your Honor called
4 attention to earlier, the prohibitory language of the
5 statute does not reach cross-burning when it is done
6 solely for the point of expressing a particular view.

7 QUESTION: And how -- how do you look at the
8 statute in light of the prima facie evidence provision?

9 MR. DREEBEN: Justice O'Connor, it raises
10 separate issues that are distinct from whether a
11 cross-burning statute can single out that particular
12 activity and prohibit it on the basis of its
13 threatening --

14 QUESTION: But that's part of this statute that
15 we have to look at, isn't it?

16 MR. DREEBEN: It is, but the Virginia Supreme
17 Court approached the issue by first asking whether the
18 cross-burning provision, insofar as it targeted
19 cross-burning --

20 QUESTION: Yes.

21 MR. DREEBEN: -- ran afoul of this Court's
22 decision in R.A.V., and it only then turned to the prima
23 facie case provision --

24 QUESTION: Yes.

25 MR. DREEBEN: -- and concluded that it rendered

1 the statute overbroad.

2 The United States has not taken a position on
3 the validity of the prima facie case provision, which does
4 raise distinct issues because it could allow a jury in
5 certain instances to infer solely from the act of
6 cross-burning, without any other evidence at all --

7 QUESTION: And that was the instruction given
8 here.

9 MR. DREEBEN: That was the instruction given in
10 one of the two cases. In the Elliott case, there was no
11 instruction --

12 QUESTION: Yes.

13 MR. DREEBEN: -- whatsoever on the prima facie
14 case provision, and so Elliott's case is somewhat
15 similar -- differently situated from -- from the Black
16 case.

17 But a cross-burning statute like this functions
18 not like a fighting words statute which seeks to avert
19 breaches of the peace by the use of particularly obnoxious
20 language that would induce anybody to strike back with a
21 violent reaction. It functions instead on the theory that
22 a signal to violence, or a warning that violence will come
23 is not protected within the First Amendment. It is a
24 prohibited form of conduct, and when done as here by an
25 act of putting a flaming cross in a place with the intent

1 to actually put somebody in fear of bodily harm, it's not
2 a form of protected conduct that directly implicates the
3 First Amendment. It's --

4 QUESTION: Is it -- is it unlawful in Virginia
5 to put somebody in fear of bodily harm in some other
6 fashion, not to burn a cross, but to say I'm going to
7 lynch you? Is that -- is that unlawful in Virginia?

8 MR. DREEBEN: Justice Scalia, my understanding
9 of Virginia law is that it has a -- a written threats
10 statute which would cover any threat of any kind in
11 writing, but it does not have a general intimidation or
12 threat statute that would reach other means of oral
13 expression.

14 QUESTION: It's sort of peculiar, isn't it?

15 MR. DREEBEN: Well, what Virginia has done is
16 take something which has historically been used as a
17 particularly dangerous means of intimidation because it
18 has so often been followed up by actual violence and
19 establish a prohibition that is limited to that. Rather
20 than sweeping in other classes of speech that may raise
21 questions when you come close to the line of whether it is
22 or isn't intimidating and therefore might chill free
23 expression, Virginia has chosen to focus on what conduct
24 occurred within its borders that caused particular harms.

25 And what --

1 QUESTION: Was -- was there a common law of
2 intimidation, a tort -- a tort that went beyond assault?

3 MR. DREEBEN: There is a common law of -- of
4 putting somebody in fear of bodily harm through the tort
5 law. And there were similarly antecedent criminal
6 provisions that are --

7 QUESTION: Is there -- is there an immediacy
8 component to that as there is with assaults?

9 MR. DREEBEN: No, there is not, Justice Kennedy,
10 and it's crucial to underscore why that is. The harms
11 that can be brought about by threat statutes are not only
12 putting somebody in fear of bodily harm and thereby
13 disrupting their movements, but providing a signal that
14 the violence may actually occur. It may not occur
15 tomorrow, the next day, or next week, but it's like a
16 sword of Damocles hanging over the person whose head --
17 who has been threatened. And in that sense it creates a
18 pervasive fear that can be ongoing for a considerable
19 amount of time.

20 QUESTION: Mr. Dreeben, aren't you understating
21 the -- the effects of -- of the burning cross? This
22 statute was passed in what year?

23 MR. DREEBEN: 1952 originally.

24 QUESTION: Now, it's my understanding that we
25 had almost 100 years of lynching and activity in the South

1 by the Knights of Camellia and -- and the Ku Klux Klan,
2 and this was a reign of terror and the cross was a symbol
3 of that reign of terror. Was -- isn't that significantly
4 greater than intimidation or a threat?

5 MR. DREEBEN: Well, I think they're coextensive,
6 Justice Thomas, because it is --

7 QUESTION: Well, my fear is, Mr. Dreeben, that
8 you're actually understating the symbolism on -- of and
9 the effect of the cross, the burning cross. I --
10 I indicated, I think, in the Ohio case that the cross was
11 not a religious symbol and that it has -- it was intended
12 to have a virulent effect. And I -- I think that what
13 you're attempting to do is to fit this into our
14 jurisprudence rather than stating more clearly what the
15 cross was intended to accomplish and, indeed, that it is
16 unlike any symbol in our society.

17 MR. DREEBEN: Well, I don't mean to understate
18 it, and I entirely agree with Your Honor's description of
19 how the cross has been used as an instrument of
20 intimidation against minorities in this country. That has
21 justified 14 States in treating it as a distinctive --

22 QUESTION: Well, it's -- it's actually more than
23 minorities. There's certain groups.

24 And I -- I just -- my fear is that the -- there
25 was no other purpose to the cross. There was no

1 communication of a particular message. It was intended to
2 cause fear --

3 MR. DREEBEN: It --

4 QUESTION: -- and to terrorize a population.

5 MR. DREEBEN: It absolutely was, and for that
6 reason can be legitimately proscribed without fear that
7 the focusing on a cross -- burning of a cross with the
8 intent to intimidate would chill protected expression.

9 This is a very different case than the R.A.V.
10 case that was before the Court. There the Court was
11 confronted with a statute that prohibited the use of
12 language based on particular messages of group-based
13 hatred. And in singling out speech based on the content,
14 the State was expressing disagreement with particular
15 messages.

16 In the Virginia statute, and in the other
17 statutes that the States have, the focus is not on any
18 particular message. It is on the effect of intimidation,
19 and the intent to create a climate of fear and, as Justice
20 Thomas has said, a climate of terror.

21 QUESTION: So your argument would be the same
22 even if we assumed that the capacity of the cross to
23 convey this message was limited to certain groups, blacks,
24 Catholics, or whatnot.

25 MR. DREEBEN: I would, Justice Souter, and I

1 think it's for the reason that Your Honor pointed out in
2 his concurrence in Hill versus Colorado. Merely because a
3 particular activity might have become the signature of a
4 certain ideological group does not prevent the State from
5 addressing and regulating what is proscribable about that
6 activity.

7 QUESTION: But it seems to me from this
8 argument, if the message is as powerful as Justice Thomas
9 suggests it is -- and I'm sure he's -- he's right about
10 that -- why is it necessary to go beyond the message
11 itself? Why -- why wouldn't it still be proscribable even
12 if the person burning it didn't realize all of this
13 history, just did it innocently, but it nevertheless had
14 that effect?

15 MR. DREEBEN: Well, that would --

16 QUESTION: Why do you need the intent?

17 MR. DREEBEN: I think that would raise a much
18 more difficult question because notwithstanding the fact
19 that there is a very powerful linkage in our society such
20 that the State is justified in singling out the cross, it
21 may be that under certain contexts, a particular
22 individual is attempting to express a message rather than
23 attempting to intimidate.

24 And it -- it is important to note that merely
25 expressing a message of race-based hatred is not something

1 that the State can proscribe --

2 QUESTION: Surely -- surely one can burn a cross
3 in the sanctity of one's bedroom. Right?

4 (Laughter.)

5 MR. DREEBEN: There -- there are -- there are
6 hypothetical cases that one can imagine, the desert, the
7 bedroom --

8 QUESTION: No, but my assumption is that the
9 geographic scope of the statute is just like this statute.
10 It doesn't apply to your own property, but on anyone
11 else's property, or in public view. If the message is as
12 powerful as -- as we're assuming as it is, why isn't that
13 a sufficient basis for just banning it?

14 MR. DREEBEN: It might well be, Justice Stevens,
15 but I think that a law that is more tailored, as this one
16 is, and reaches those acts of cross-burning where it is
17 the very intent of the actor to put a person or group of
18 people in fear of bodily harm makes it quite clear that
19 a -- that statute aims at the proscribable feature of that
20 conduct and not at the protected feature, namely
21 race-based hatred.

22 QUESTION: But if you can infer the -- the
23 intent to intimidate just from the act, even when this is
24 done on one's own property, as it was in one of these
25 cases, doesn't that go beyond the line, if -- if you --

1 cross-burning on your own property?

2 MR. DREEBEN: Justice Stevens, may I answer?

3 Justice Ginsburg, the inference provision is
4 problematic because it does raise the potential that a
5 wholly protected act of cross-burning, which this Court
6 might find within the scope of the First Amendment, could
7 serve as the exclusive source of evidence from which a
8 conviction could be rendered for unprotected conduct. And
9 it's for that reason that most States don't have any sort
10 of analogous provision. The Federal Government doesn't,
11 and it raises distinct problems from the targeting focus
12 of the law that's at issue here.

13 QUESTION: Thank you, Mr. Dreeben.

14 Mr. Smolla, we'll -- we'll hear from you.

15 ORAL ARGUMENT OF RODNEY A. SMOLLA

16 ON BEHALF OF THE RESPONDENTS

17 MR. SMOLLA: Justice Stevens, and may it please
18 the Court:

19 At the heart of our argument is that when the
20 State targets a particular symbol or a particular symbolic
21 ritual, it engages in content and viewpoint discrimination
22 of the type forbidden by the First Amendment.

23 QUESTION: What -- what about the symbol of
24 brandishing an automatic weapon in -- in somebody's face?

25 MR. SMOLLA: Justice Scalia, I think --

1 QUESTION: You're next.

2 MR. SMOLLA: I think that a core element of our
3 argument is that there is a fundamental First Amendment
4 difference between brandishing a cross, and brandishing a
5 gun. The physical properties of the gun as a weapon add
6 potency to the threat, and so if the State makes a threat
7 committed with a firearm an especially heinous type of
8 threat, it is acting within the confines of what is
9 permissible under R.A.V. because it is creating a subclass
10 of threat and defining that subclass of threat for the
11 same reasons that allow it to define the outer perimeter
12 of threat law, things going to the danger posed by that
13 threat.

14 But the properties of the cross are not physical
15 properties, and the burning element of a burning cross are
16 not what communicate the threat.

17 QUESTION: But is -- isn't the -- isn't your
18 argument an argument that would have been sound before the
19 cross, in effect, acquired the history that it has? If we
20 were in the year 1820, and you had a choice between
21 somebody brandishing the loaded gun, and somebody
22 brandishing a cross and nobody knew how the cross had been
23 used because it had not been used, your argument, it seems
24 to me, would be -- would be a winning one.

25 How does your argument account for that fact

1 that the cross has acquired a potency which I would
2 suppose is at least as equal to that of the gun?

3 MR. SMOLLA: Justice Souter, I think that our
4 argument is that in fact it works the reverse way, that
5 what the cross and the burning cross have acquired as a
6 kind of secondary meaning, somewhat akin to the way that
7 trademarks acquire secondary meaning in intellectual
8 property law, are a multiplicity of messages. Undoubtedly
9 a burning cross identified as -- as effectively the
10 trademark of the Ku Klux Klan carries horrible
11 connotations of terrorism of the kind --

12 QUESTION: But it -- it carries something else,
13 doesn't it? Isn't it not merely a -- a trademark that has
14 acquired a meaning? Isn't it also a kind of Pavlovian
15 signal so that when that signal is given, the natural
16 human response is not recognition of a message, but fear?

17 MR. SMOLLA: No, Your Honor. Respectfully
18 I think that that overstates what is being communicated.
19 Any symbol in its pristine state that has gathered
20 reverence in our society -- the American flag, the Star of
21 David, the cross, the symbols of government -- is a
22 powerful, emotional symbol in -- in its revered state.

23 QUESTION: But they don't make -- they don't
24 make you scared, and if you start -- for your own safety.
25 And if you start with the proposition that State can, in

1 fact, prevent threats that scare people reasonably -- for
2 their own safety, this is in a separate category from
3 simply a -- a symbol that has acquired a potent meaning.

4 QUESTION: I dare say --

5 MR. SMOLLA: Your Honor, the word scared is
6 important in answering your question because it's -- it's
7 what we mean by being scared, or what we mean by being
8 intimidated. If I see a burning cross, my stomach may
9 churn. I may feel a sense of loathing, disgust, a vague
10 sense of --

11 QUESTION: Yes.

12 MR. SMOLLA: -- of being intimidated because I
13 associate it --

14 QUESTION: How about a cross -- how about a
15 cross --

16 MR. SMOLLA: But that's not fear of bodily harm.

17 QUESTION: How about a cross on your lawn?

18 QUESTION: Yes. I dare say that you would
19 rather see a man with a -- with a rifle on your front
20 lawn -- If you were a black man at night, you'd rather see
21 a man with a rifle than see a burning cross on your front
22 lawn.

23 MR. SMOLLA: Your Honor, I concede that.

24 However -- however --

25 QUESTION: The whole purpose of that is -- is to

1 terrorize.

2 MR. SMOLLA: -- as -- as powerful as that point
3 is -- and I totally accept it, and totally accept the
4 history that Justice Thomas has -- has recounted, and that
5 the United States recounts in its brief as accurate. As
6 powerful as all of those points are, there's not a single
7 interest that society seeks to protect in protecting that
8 victim that cannot be vindicated perfectly as well,
9 exactly as well with no fall-off at all, by
10 content-neutral alternatives, not merely general
11 run-of-the-mill threat laws, or incitement laws, or
12 intimidation laws which may have an antiseptic and sterile
13 quality about them. You can go even beyond that --

14 QUESTION: But why isn't this just a regulation
15 of a particularly virulent form of intimidation? And why
16 can't the State regulate such things?

17 MR. SMOLLA: Your Honor, it is not a
18 particularly virulent form of intimidation.

19 QUESTION: Well, it is for the very reasons
20 we've explored this morning. What if I think it is? Why
21 can't the State regulate it?

22 MR. SMOLLA: Because, Justice O'Connor, it is
23 also an especially virulent form of expression on ideas
24 relating to race, religion, politics --

25 QUESTION: You were -- you were saying that the

1 State can go -- doesn't have to have a sterile law on
2 intimidation. It can go further, but not as far as this.
3 What --

4 MR. SMOLLA: Justice --

5 QUESTION: What is this midpoint?

6 MR. SMOLLA: Justice Kennedy, it is the
7 Wisconsin versus Mitchell bias enhancement-style model
8 where the interest of the State goes beyond just
9 preventing physical crime. It goes to preventing racism,
10 acts of violence, threats, intimidation that are done out
11 of bias and animus. That captures the fullness of all the
12 conceivable State interests that there could possibly
13 be --

14 QUESTION: Well, that was in conjunction with an
15 actual physical assault.

16 MR. SMOLLA: But -- but, Your Honor, in any
17 instance in which the State were operating upon some
18 conduct that it is constitutionally permissible to
19 proscribe, such as a threat, the State could then enhance
20 the penalty. If you threaten out of racial animus, you
21 get double the penalty, triple the penalty. And that
22 would work in any cross-burning case --

23 QUESTION: Suppose -- suppose if you threaten by
24 use of a cross -- burning cross, would that be a specific
25 statutory category that allows the penalty be -- to be

1 enhanced?

2 MR. SMOLLA: Yes, Your Honor, and even more --

3 QUESTION: Well, how can you have a statutory
4 category which enhances the penalty that you can't also
5 use to -- to describe the underlying offense?

6 MR. SMOLLA: The -- the answer to that question,
7 Justice Kennedy, lies in Wisconsin versus Mitchell where
8 this Court held that the mere evidentiary use of speech to
9 prove intent does not implicate the First Amendment. And
10 although the line is thin, it is gigantic in terms of our
11 First Amendment values. It is the difference --

12 QUESTION: Well, let me ask you this. Supposing
13 you have a statute that prohibits intimidation by burning
14 circles, any -- any design of any kind, and the maximum
15 penalty is a year in jail, but if you burn a cross, it's
16 2 years in jail. Would that be permissible?

17 MR. SMOLLA: It would not be permissible, Your
18 Honor, and the reason it --

19 QUESTION: And -- and it's --

20 MR. SMOLLA: -- would not be permissible is the
21 cross has acquired this meaning as an ideological symbol.

22 QUESTION: Because it's content-based
23 discrimination within the category of activity that can be
24 entirely proscribed.

25 MR. SMOLLA: That is precisely our argument.

1 QUESTION: Now, is there any support for that
2 proposition other than the majority opinion in R.A.V.?

3 MR. SMOLLA: Your Honor, R.A.V. is the only case
4 that dealt squarely with this puzzle of what happens when
5 you're dealing with a category of speech that you have the
6 right to proscribe, and then you draw gratuitous content-
7 or viewpoint-based distinctions within it.

8 However, Justice Stevens, I would say that it
9 isn't alone in this Court's powerful condemnation of
10 viewpoint discrimination, and a key element to this
11 Court's First Amendment history is that we don't want to
12 cut matters too finely.

13 QUESTION: What was involved in R.A.V.? Was
14 it -- was it activity? What kind of activity was
15 involved.

16 MR. SMOLLA: Well, the -- the fact pattern in
17 R.A.V. was identical to one of the fact patterns here. It
18 was going on to the yard of an African-American family --

19 QUESTION: Yes --

20 MR. SMOLLA: -- and burning a cross in the
21 middle of the night, Your Honor.

22 QUESTION: Yes, but what was made a crime was
23 the burning it with a particular motivation, wasn't it?

24 MR. SMOLLA: The -- the --

25 QUESTION: It wasn't the mere act.

1 MR. SMOLLA: And -- and at the core of our
2 argument, Justice Scalia, is the claim that the concept of
3 viewpoint discrimination is, and ought to be broad enough
4 to encompass not only viewpoint discrimination articulated
5 linguistically, the way that it was done in the statute in
6 R.A.V., but also viewpoint discrimination through the
7 singling out of a symbol because symbols acquire meaning
8 in precisely the same way that words acquire meaning.

9 QUESTION: But words -- words are even more.
10 I mean, your argument applies a fortiori to words. Right?

11 MR. SMOLLA: It does, Justice Breyer.

12 QUESTION: I guess you could have statutes, if
13 the need were great, that forbid you from using certain
14 words with a certain intent like, for example,
15 impersonating somebody or -- or counterfeiting, or -- I
16 mean, if -- I've never heard of a case which said you
17 couldn't have a statute that in -- if the circumstances
18 were right, forbid a person to use certain words.

19 MR. SMOLLA: Justice Breyer, the -- the First
20 Amendment speaks to this, and -- and it's --

21 QUESTION: You can't have that? To have a
22 statute that says --

23 MR. SMOLLA: In fact --

24 QUESTION: -- you cannot say I am the President
25 with the intent to confuse people that I'm the President,

1 I mean, that would be unconstitutional.

2 MR. SMOLLA: The -- the normal -- the normal
3 legislative process, Justice Breyer, is not to name the
4 words, not to put in the statute if you utter these --

5 QUESTION: I know that's not normal. I -- I --
6 that's why --

7 MR. SMOLLA: -- but to describe -- but to
8 describe the conduct that you are attempting to get at,
9 and then various combinations of words may fit into it.

10 But let's take the example of naming a set of
11 words. Even that is enormously problematic for First
12 Amendment purposes.

13 QUESTION: It is a crime to impersonate the
14 Great Seal of the United States --

15 MR. SMOLLA: The --

16 QUESTION: -- for purposes of obtaining money.
17 It violates the First Amendment.

18 MR. SMOLLA: But -- but the -- but the -- it
19 could, Your Honor, in -- in an appropriate circumstance.
20 Take --

21 QUESTION: In other words, all it -- all it --
22 all you're saying is that heightened scrutiny applies.

23 MR. SMOLLA: We are certainly saying that,
24 and --

25 QUESTION: That's all you're saying. You can't

1 possibly say more than that once you acknowledge that --
2 that symbols can be proscribed.

3 MR. SMOLLA: We -- we say that --

4 QUESTION: And so the question before us is
5 whether burning a cross is such a terrorizing symbol in
6 American -- in American culture that even on the basis of
7 heightened scrutiny, it's okay to proscribe it. That's
8 basically the --

9 MR. SMOLLA: That is a -- that is a fair
10 characterization of the question. And -- and accepting
11 strict scrutiny as the -- the test here, but strict
12 scrutiny we would argue bumped up a bit in its intensity
13 if this is viewpoint discrimination because --

14 QUESTION: Well, why shouldn't we apply --

15 MR. SMOLLA: -- this Court's been hostile to
16 viewpoint --

17 QUESTION: -- the O'Brien test? Why -- why some
18 tougher test than that here?

19 MR. SMOLLA: Your Honor, whether you apply
20 O'Brien or strict scrutiny, it's our submission we win
21 because when you get to the point at which you look at
22 alternatives, there are content-neutral alternatives that
23 work perfectly as well.

24 But to answer directly your question, Justice
25 O'Connor, this Court has never allowed the use of the

1 O'Brien test or any of the cousins of O'Brien, such as the
2 secondary effects doctrine or time, place, or manner
3 jurisprudence, when the harm that the government seeks to
4 prevent is a harm that flows from the communicative impact
5 of the expression.

6 And there is no getting around the fact that the
7 harm the government seeks to prevent here indubitably
8 flows only from the formation of this symbol. If I --

9 QUESTION: So I would think then that if the
10 test suggests that you cannot have a statute which says
11 you cannot use the words, I'll kill you, with an intent to
12 kill somebody or threaten him, then there's something
13 wrong with the test, not that there's something wrong with
14 the statute. That's --

15 MR. SMOLLA: Your Honor, take the -- take the
16 words -- take the words, if you do that again, I swear
17 I'll kill you. Those words in a given context might be
18 breakfast banter, might be a joke.

19 QUESTION: Correct, they might.

20 MR. SMOLLA: It might be something a teacher --

21 QUESTION: So what we put in the --

22 MR. SMOLLA: -- says to a student, or might be a
23 true objective threat. And the -- a core element of this
24 Court's commitment to freedom of speech has been to
25 separate abstract advocacy from palpable harm.

1 QUESTION: -- fails to do that.

2 QUESTION: If it's intended to be --

3 QUESTION: -- the requirement of intent.

4 QUESTION: -- a threat, you can get it. Right?

5 MR. SMOLLA: Pardon me, Your Honor?

6 QUESTION: You're saying if it's intended to be

7 a threat, it can proscribed.

8 MR. SMOLLA: If it meets the Watts true threats

9 test, it -- it is permissible. This law -- this law,

10 however, is a fusion of true threat law, and a gratuitous

11 addition to the true threat law, cross-burning. The law

12 would have been --

13 QUESTION: Mr. -- Mr. Smolla --

14 MR. SMOLLA: -- perfectly sufficient --

15 QUESTION: -- on the question of perfectly

16 sufficient laws, we have in the appendix to the United

17 States brief several laws. They don't mention

18 cross-burnings. Are all those adequate under your test?

19 Would they be constitutional?

20 MR. SMOLLA: Yes, Justice Ginsburg. The Federal

21 model, for example. There are a variety of Federal civil

22 rights laws that punish conduct that the United States

23 uses routinely to punish acts of cross-burning are

24 perfectly permissible.

25 And the difference, which is enormous for First

1 Amendment purposes, is that both at the front end of that
2 legislation and at the back end, there is breathing space
3 for the First Amendment. It's important to remember that
4 our First Amendment jurisprudence is not just about
5 deliberate censorship and realized censorship. It is also
6 about possibility, about chilling effect, and about
7 breathing -- about breathing space.

8 In effect, in Virginia --

9 QUESTION: But this statute --

10 MR. SMOLLA: -- you burn a cross at your peril.

11 QUESTION: -- this statute incorporates the
12 intent to intimidate feature.

13 MR. SMOLLA: That is true, Justice O'Connor, but
14 even if it does, the learning of R.A.V., we'd submit, is
15 that that alone does not rest in the statute.

16 QUESTION: Well, this --

17 MR. SMOLLA: A law can't be half constitutional.

18 QUESTION: -- this seems to fall within the
19 first exception mentioned in R.A.V. This does address
20 conduct and with a certain intent. I mean, to apply
21 R.A.V. is to extend R.A.V.

22 MR. SMOLLA: Your Honor, it's our submission
23 that in fact the two cases are identical, and the reason
24 they don't seem identical perhaps is that it is harder --
25 it is harder -- to locate the viewpoint and content

1 discrimination in our minds when we think of the burning
2 cross than when we think of the language of R.A.V., which
3 talked about anger or resentment on the basis of race,
4 color, creed. And that may well be because of the kind of
5 Pavlovian connection that you have identified where we
6 feel this loathing, and we feel this -- this generalized
7 fear when we see the sight of the burning cross.

8 But our point is that ought never be sufficient
9 because even if at a given moment in time, you could take
10 some symbol and freeze it and you could say at this second
11 this symbol always seems associated with violence --
12 imagine you had a terrorist group that was on a serial
13 killing spree and every time they committed an act of
14 violence, they left a little calling card, and that symbol
15 became a terribly frightening --

16 QUESTION: Well, I guess what -- you have a very
17 interesting point. And as I've been thinking about it, it
18 seems to me that the -- a difficulty, possible difficulty
19 with it is that the First Amendment doesn't protect words.
20 It protects use of words for certain purposes. And it
21 doesn't protect, for example, a -- a symbol. It protects
22 a thing that counts as a symbol when used for symbolic
23 purposes.

24 MR. SMOLLA: That's correct.

25 QUESTION: So just as it doesn't protect the

1 words, I will kill you, but protects them when used in a
2 play, but not when used as a threat --

3 MR. SMOLLA: That is correct.

4 QUESTION: -- so it doesn't protect the burning
5 of the cross when used as a threat --

6 MR. SMOLLA: That is correct.

7 QUESTION: -- and not as a symbol.

8 MR. SMOLLA: That is -- that --

9 QUESTION: And now we have a statute that says
10 you can use it as a symbol, but you can't use it as a
11 threat. And therefore, the First Amendment doesn't apply.

12 MR. SMOLLA: And -- and --

13 QUESTION: Now, if that's the right analysis,
14 then what's your response?

15 MR. SMOLLA: Your Honor, that -- that everything
16 you said up until the very end --

17 (Laughter.)

18 MR. SMOLLA: -- we would not accept.

19 (Laughter.)

20 MR. SMOLLA: I have a -- I have a hunch I have
21 to at least say that much.

22 (Laughter.)

23 MR. SMOLLA: And -- and, Justice Breyer, it
24 comes to this, that you cannot make the judgment that this
25 law in its actual impact only penalizes those acts of

1 cross-burning that result in threat. It certainly chills,
2 Justice Breyer, a wide range of expression, as it did in
3 this case, that cannot plausibly be understood as a threat
4 of bodily harm in any realistic sense.

5 Every time the Ku Klux Klan conducts one of its
6 rallies, at the height of its rally, it burns a large
7 cross, and it plays a hymn such as the Old Rugged Cross,
8 or Onward Christian Soldiers or Amazing Grace, and this is
9 a ritual that it engages in. Now, it is inconceivable --
10 there is absolutely nothing in this record that says that
11 every time the Klan does that, that is, in fact, a true
12 threat.

13 QUESTION: No, it isn't, so long as the Klan
14 doesn't do it in -- in sight of a public highway, or on
15 somebody else's property, there's not a chance that this
16 statute would apply to them.

17 MR. SMOLLA: Your Honor, but the --

18 QUESTION: They have to do in sight of a public
19 highway?

20 MR. SMOLLA: The -- the -- all the statute
21 requires is that it be visible to others. And of course,
22 the First Amendment value here in our view is that speech,
23 particularly disturbing and offensive speech that runs
24 contrary to our -- our mainstream values that the majority
25 of us embrace, is ineffective unless it is put out to the

1 world where others can see it.

2 And as Justice Brandeis said in Whitney versus
3 California in his concurring opinion, you don't make the
4 world safer by driving the speech of hate groups such as
5 the Ku Klux Klan underground. In many societies in this
6 world, you can ban racial supremacist groups.

7 QUESTION: I want you just to address -- but
8 it's hard for you because you have clients with different
9 interests here perhaps. But -- but if -- if it's right
10 that you can ban speech, i.e., the use of words for
11 purposes of threatening people with bodily harm, which I
12 think we can, then what about this prima facie
13 prohibition?

14 The way I was thinking about it, to get you to
15 respond, is if you did have a statute that was
16 constitutional that said it is a crime to use the words, I
17 will kill you, with the intent to threaten someone with
18 death. That statute might go on to say, and the jury may
19 infer from the use of the words themselves on a particular
20 occasion that the threat existed. And I think --

21 MR. SMOLLA: And I accept that, Your Honor.

22 QUESTION: -- if all that's true, then I guess
23 that the -- the prima facie presumption here is no
24 different. It says the jury may infer from the -- the
25 burning cross on a particular occasion, just like the use

1 of the words, I kill you, on a particular occasion --

2 MR. SMOLLA: There's a world of difference, Your
3 Honor, and the difference is that the words, I will kill
4 you, are words of threat that have no additional
5 emanations. They have no additional secondary meaning in
6 this society either as the symbol of a group, or as the
7 symbol of an idea such as bigotry. They partake of the
8 same rationale, the same defining parameters that allow
9 you to attack threats in the first instance.

10 Whereas the burning cross -- the burning cross,
11 whether it's the 19th century burning cross before the
12 Klan began, or today, introduces a symbol -- first of all,
13 just a cross before we get to the burning part, a symbol
14 that you must concede is one of the most powerful
15 religious symbols in -- in human history. It is the -- it
16 is the symbol of Christianity, the symbol of the
17 crucifixion of Christ. When the cross is burned, in much
18 the same way as when the flag is burned, undoubtedly the
19 burner is playing on that underlying positive repository
20 of meaning to make the intense negative point, often a
21 point that strikes as horrible and as evil and disgusting,
22 but that's --

23 QUESTION: Mr. Smolla --

24 MR. SMOLLA: -- what the person is trying to do.

25 QUESTION: -- there's a huge difference between

1 a flag and a burning cross, and it's been pointed out in
2 the briefs. The flag is a symbol of our government, and
3 one of the things about free speech is we can criticize
4 the President, the Supreme Court, anybody, and feel
5 totally free about doing that. It's the symbol of
6 government.

7 But the cross is not attacking the government.
8 It's attacking people, threatening their lives and limbs.
9 And so I don't -- I think you have to separate the symbol
10 that is the burning cross from other symbols that are
11 critical of government, but that don't -- that aren't a
12 threat to personal safety.

13 MR. SMOLLA: Justice Ginsburg, I only partially
14 accept that -- that dichotomy. In fact, when the Klan
15 engages in cross-burning, as it did in *Brandenburg* versus
16 Ohio, and as it did here, it is -- it is a melange of
17 messages. Yes, to some degree, it is a horizontal message
18 of hate speech, the Klan members attacking Jews and
19 Catholics and African-Americans and all of the various
20 people that have been the -- the point of its hatred over
21 the years.

22 But it's also engaged in dissent and in a
23 political message. If you remember in *Brandenburg* versus
24 Ohio, *Brandenburg* says if the Congress doesn't change
25 things, some revenges will have to be taken. In this

1 case, President Clinton was talked about by the Klan
2 members. Hillary Clinton was talked about by the Klan
3 members. Racial preferences and the idea that the --
4 where they're using taxes to support minority groups.

5 There is a jumble of political anger, of --

6 QUESTION: Mr. Smolla, I would -- I would like
7 to take exception to your suggestion in response to
8 Justice Breyer that the words, I will kill you, always
9 have a threatening meaning.

10 MR. SMOLLA: They may not, Justice Stevens.

11 QUESTION: I think they're often used in casual
12 conversation without any such threatening meaning at all.

13 MR. SMOLLA: Justice Stevens, I accept that.
14 But I -- I'm merely making the argument that you can fit a
15 phrase such as the words, I will kill you, within the
16 exceptions to R.A.V. in a way that you cannot fit
17 cross-burning within the exceptions to R.A.V. or
18 flag-burning within the exceptions to R.A.V. because
19 cross- and flag-burning and any symbol, the burning of the
20 Star of David, the swastika -- Virginia has a law
21 virtually identical to the cross-burning law that singles
22 out the swastika. The -- you could -- you can go through
23 the universe of symbols --

24 QUESTION: Your argument is not the same with --
25 I mean, it's an -- your argument, I take it, is that if

1 you actually have a statute that criminalizes the use of
2 particular words, or -- or the burning of a -- of a
3 symbol, even if you qualify that by saying you -- it's
4 criminal to use them for certain purposes, you've
5 monopolized those words because people who are using them
6 from different purposes will be afraid to use them.

7 MR. SMOLLA: And chilled --

8 QUESTION: And then they can't express what they
9 want even though that expression is not to hurt someone.

10 MR. SMOLLA: And not merely monopolize,
11 Justice Breyer, but --

12 QUESTION: That's right, yes.

13 MR. SMOLLA: But chilled the use of that
14 combination of words or chilled the use of that symbol --

15 QUESTION: Yes. All right. `I see your point.

16 MR. SMOLLA: So that in effect it becomes --

17 QUESTION: That -- that seems to give them a
18 free ride when they really want to intimidate and -- and
19 threaten.

20 MR. SMOLLA: Justice Kennedy, there's no free
21 ride if the government employs content-neutral
22 alternatives, which really --

23 QUESTION: Well, why isn't -- why can't we say
24 there's no three -- free ride when the government imposes
25 scienter?

1 MR. SMOLLA: Your Honor, because the First
2 Amendment requires that we flip the question. It is not
3 why can't the government single out this particular form
4 of expression. It is why do you need to. And if you have
5 no need to --

6 QUESTION: Wait, wait, wait. I think -- I don't
7 think our cases say you have to use the least restrictive
8 alternative. I'm sure there are other ways of getting at
9 the person who brandishes an automatic weapon, but surely
10 you can make brandishing an automatic weapon a crime --

11 MR. SMOLLA: Your Honor --

12 QUESTION: -- even though there are other ways
13 you could get at it.

14 MR. SMOLLA: Justice Scalia, you do not need to
15 use the least restrictive alternative when you are not
16 regulating a fundamental right, or engaged in a suspect
17 classification.

18 QUESTION: A symbol -- I mean, that's a symbol
19 too. Brandishing a weapon is a symbol just as burning a
20 cross is a symbol.

21 MR. SMOLLA: Except, Your Honor, under -- under
22 the Brandenburg test -- excuse me -- under the O'Brien
23 test, the government has functional elements of -- of --
24 that relate to the weapon that allow it to cite things
25 utterly unrelated to the content of expression that

1 empower it to say you may not -- you may not brandish a
2 weapon.

3 QUESTION: I don't know what you're talking
4 about.

5 MR. SMOLLA: That -- that it's -- it's like the
6 difference, Justice Scalia, between burning a draft card
7 and burning a cross or burning a flag, that -- that the
8 reason O'Brien -- the draft card case -- allowed the
9 government to punish burning the draft card was that the
10 draft card had a functional purpose -- the administration
11 of the Selective Service System -- that had nothing to do
12 with what was being expressed when one burned the draft
13 card.

14 The gun is like that. When the government says
15 you may not threaten someone by brandishing a gun, there
16 is a functional element to the gun. It's a weapon that
17 the government can cite as its basis.

18 But a symbol only has symbolic meaning.

19 QUESTION: Okay, but --

20 QUESTION: It's an unloaded gun. This is an
21 unloaded gun that's being brandished.

22 (Laughter.)

23 QUESTION: So once it's unloaded, it's nothing
24 but a symbol.

25 MR. SMOLLA: It is -- it is --

1 QUESTION: It is nothing but a symbol.

2 MR. SMOLLA: It is -- it's still -- it's still a
3 weapon, Your Honor, and -- and it is gigantically
4 different from a cross.

5 If -- if I -- take a torch. What would be the
6 difference between brandishing a torch and brandishing a
7 cross? If I -- if I take two wooden sticks --

8 QUESTION: 100 years -- 100 years of history.

9 (Laughter.)

10 MR. SMOLLA: Exactly, Justice Kennedy, that's
11 the difference. And that 100 years of history is on the
12 side of freedom of speech, that it is 100 years of history
13 that a particular group has -- has capitalized on this
14 particular ritual to make not only points that are
15 threatening, but to advance their agenda.

16 QUESTION: All right. We'll -- we'll accept --
17 I mean, I think we accept that, but we -- our problem is
18 that the 100 years have also added something else, and
19 that is the kind of specific Pavlovian quality that I
20 spoke of. And if that is giving us difficulty in deciding
21 whether we should classify this in the O'Brien direction,
22 or the flag direction, what's the -- what's the -- in
23 effect, the tie-breaker?

24 MR. SMOLLA: Your Honor, I think the tie-breaker
25 is what I've kept coming back to a number of times, which

1 is really would there be any fall-off through
2 content-neutral alternatives, and if there would not be
3 any fall-off through content-neutral alternatives, then
4 err on the side of freedom of speech.

5 Imagine that you have two rallies going on
6 side-by-side. The -- the Klan is going to make -- engage
7 in a rally, and then a group that wants to counter the
8 Klan's message, a Christian group, has a counter-rally in
9 a public forum in Richmond. And imagine that at the
10 height of those two rallies, the Klan ignites its cross.
11 Under this statute, the Klan can be prosecuted, the other
12 group cannot. It's --

13 QUESTION: Mr. Smolla, I thought that --

14 QUESTION: What if the other group all are
15 brandishing guns as Justice Scalia said?

16 (Laughter.)

17 MR. SMOLLA: Then -- then round them up, Your
18 Honor.

19 (Laughter.)

20 QUESTION: I thought Mr. Hurd told us that in
21 the Brandenburg case, where it was just burned at a rally
22 as part of the ceremony, that's not what this statute is
23 getting at. It's only when it's used as a signal of
24 intimidation, and that what sparked this particular
25 cross-burning at this rally -- this was no ordinary rally.

1 This was in response to something that the Klan opposed.

2 MR. SMOLLA: And -- and I think, Justice
3 Ginsburg, again to think about this in content-neutral
4 terms, the First Amendment would not forbid the government
5 charging the Klan in the case that we have with an
6 ordinary, run-of-the-mill threat law, or a hate crime law,
7 such as a bias enhancement statute, and then introducing
8 the fact that the cross was burned as evidence of the
9 threat, and as part of the emotional atmospheric of the
10 case to try to convince a jury of the heinousness and the
11 seriousness of the threat.

12 That was approved by this Court in Wisconsin
13 versus Mitchell, and it may seem not worth the candle. It
14 may seem that it's just a way to get to the same result
15 through some other formality, but our position is that
16 that is enormous for First Amendment purposes. It is the
17 central divide of modern First Amendment law in which the
18 Court insists that you use content-neutral alternatives
19 when you can accomplish the governmental ends equally well
20 through them.

21 Thank you, Your Honor.

22 QUESTION: Thank you, Mr. Smolla.

23 Mr. Hurd, you have 2 minutes in which to discuss
24 all these hypotheticals.

25 (Laughter.)

1 REBUTTAL ARGUMENT OF WILLIAM H. HURD

2 ON BEHALF OF THE PETITIONER

3 MR. HURD: Very briefly.

4 Justice Souter, the tie-breaker is the intent to
5 intimidate which is in our statute. If there's no intent
6 to intimidate, there's no violation here.

7 Opposing counsel's problem is how does the Klan
8 go out in public and burn a cross and have it viewed not
9 as its common, ordinary meaning backed up by 100 years of
10 history. Well, one thing they could do is not talk about
11 shooting blacks with a .30/.30. That might suggest
12 there's no intent to intimidate.

13 Opposing counsel suggests that there should be a
14 broader law. Well, Congress could pass a broader law, one
15 that didn't focus on threats against the President, one
16 that focused on threats against any Federal employee, but
17 this Court has said a broader law is not needed because
18 threats against the President are especially problematic.

19 So is cross-burning. It is not just hate
20 speech. It doesn't just say I don't like you because you
21 are black. In the hands of the Klan, the message is the
22 law cannot help you if you're black or Catholic or Jewish
23 or foreign-born, or we just don't like you, and if you try
24 to live your life as a free American, we are going to kill
25 you. That is the message of cross-burning backed up by

1 100 years of history. That's why it is especially
2 virulent. And that's why under R.A.V., this Court can
3 allow us to proscribe it without having to pass any other
4 law, or pretend it is the same as something quite
5 different than what it is.

6 We have not interfered with freedom of speech.
7 We have not tried to suppress any idea. All we have tried
8 to do is to protect freedom from fear for all of our
9 citizens by guarding against this especially virulent form
10 of intimidation.

11 We ask that the decision below be reversed and
12 the statute upheld. Thank you.

13 JUSTICE STEVENS: Thank you, Mr. Hurd.

14 The case is submitted.

15 (Whereupon, at 11:03 a.m., the case in the
16 above-entitled matter was submitted.)
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