Winter 2023

Crying Wolf: Neo-Patriots, Critical Race Theory, and the Constitutional Protection of "Dangerous" Ideas

Bryan K. Fair
University of Alabama School of Law, bfair@law.ua.edu

Crying Wolf: Neo-Patriots, Critical Race Theory, and the Constitutional Protection of "Dangerous" Ideas

BRYAN K. FAIR * †

† I wish to thank Sam Ford and the Alabama State Bar for the opportunity to share remarks on behalf of the State Bar's Diversity Committee about Free Speech and CRT at the 2022 annual meeting. I also wish to thank Dr. Krystal L. Williams for encouraging me to write this article, Richard Delgado and Jean Stefancic for their trenchant feedback on the article, and Dean Mark Brandon and the Law School Foundation for research support. Finally, I wish to thank Patricia Lovelady Nelson for her editorial assistance on all of my research projects over the past three decades.

TABLE OF CONTENTS

Abstract

Most Americans do not realize that, notwithstanding the First Amendment's free speech guarantee, for most of our nation's history, judges sent men and women to prison for expressing ideas considered too "dangerous." It was not until the late 1960s that the Supreme Court rejected the clear and present danger doctrine, insisting that statutes banning speech must draw a distinction between advocacy of ideas and

advocacy of imminent lawless action. The Court held that under that constitutional norm, the government could not send a Klansman to prison for expressing racist, anti-Semitic, or otherwise dangerous or offensive ideas. Since then, banning the advocacy of ideas has been presumptively unconstitutional.

In recent months, however, a number of state and federal measures have aimed to ban discussion of so-called divisive concepts, including Critical Race Theory ("CRT") in public schools and workplaces. Others target books, such as The 1619 Project, or the use of selected curricular materials from groups, for example, like the Southern Poverty Law Center's Learning for Justice Project. Still others target anti-racist diversity, equity, and inclusion trainings for government employees. Such materials and trainings have been declared anti-American, dangerous, hateful, or even racist by neo-patriots, persons in and outside government who seek to use the law to ban the expression of ideas they find objectionable. Remarkably, without any discussion of core First Amendment doctrine, what CRT is, or what critical race theorists have written, governments have once again responded to public pressure and declared some ideas and materials too dangerous and sought to punish some speakers.

Recalling similar periods of viewpoint censorship during the last century, this essay examines the constitutional implications of bans on CRT, The 1619 Project, and other materials, and provides a constitutional roadmap for challenging such bans on First and Fourteenth Amendment grounds.

Introduction: Patriots, Neo-Patriots, and the Banning of Ideas

I am an American patriot.[1] I am also a constitutional law professor who, over the past thirty-five years, has read and written extensively and taught broadly about racial caste in the United States;[2] and I embrace the

---

[1] Stephen Nathanson defines patriotism as including four features: a special affection for one's country; a sense of personal identification with the country; a special concern for the well-being of the country; and a willingness to sacrifice to promote the country's common good. STEPHEN NATHANSON, PATRIOTISM, MORALITY, & PEACE 34–35 (1993). *See also* Stephen Nathanson, *In Defense of 'Moderate Patriotism*, 99 ETHICS 535 (1989); Marcia Baron, *Patriotism and 'Liberal' Morality*, *in* MIND, VALUE, & CULTURE: ESSAYS IN HONOR OF E. M. ADAMS 269, 269–300 (D. Weissbord ed., 1989) (arguing that moderate patriotism permits the individual to criticize her nation's failings and to support remedies for such failings). A full exposition of various forms of patriotism is beyond the scope of this essay, but *see generally* Igor Primoratz, *Patriotism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 16, 2020), https://plato.stanford.edu/archives/win2020/entries/patriotism/.

[2] *See, e.g.*, ISABEL WILKINSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020); BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS & THE END OF AFFIRMATIVE

core tenets of Critical Race Theory ("CRT").[3]

CRT has given patriots like me a tool to lay bare and a lexicon to describe what we observe and experience every day regarding the many traumatic intersections of racism and law in the United States. Critical race theorists do not just critique the consequences of our discriminatory history. We also propose strategies to reform and heal our nation. It never occurred to me that our nation would undertake a second Red Scare, like the one from the 1920s through the 1950s, seeking to prosecute and punish Americans for expressing their ideas or for associating with others with similar viewpoints.

I oppose the sweeping efforts by neo-patriots[4] who seek to use their wealth, political power, or racial privilege to vilify and criminally harass critical race theorists, or to suppress our ideas. Neo-patriots do not advance equality, liberty, democracy, or the common good. They are decidedly unpatriotic. They demand loyalty to an idealized, "exceptional" nation on a hill where everyone has gotten a square deal, ignoring four-plus centuries of evidence to the contrary. While decrying all limitations on their own ideas and rights, neo-patriots espouse a double standard declaring that other Americans' ideas, viewpoints, and rights should be banned or restricted. This is the height of constitutional hypocrisy. Neo-patriots do not have the

---

ACTION (1997); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999).

[3] *See generally* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8–11 (3d. ed. 2017) [hereinafter INTRODUCTION]; CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter KEY WRITINGS]; Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), www.nytimes.com/article/what-is-critical-race-theory.html; Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 20, 2021), www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory.

[4] I am using the term "neo-patriot" to describe those Americans, in and out of government, who, under the guise of patriotism, seek to use the government to assign outsider status to other Americans who are critical of the country's racially discriminatory history and its legacy. While shrouding their rhetoric in terms of personal liberty and nationalism, they seek to use laws to ban ideas they find objectionable or hurtful. Their neo-patriotism is insular and ethnocentric, requiring critics to stay quiet or to take their complaints and go to another country. For neo-patriots, white supremacy and white privilege are invisible and thus nonexistent. Additionally, any current racial discrimination is not the result of systemic, institutional policies and practices compounded over generations, but rather is the action of a few bad actors. Moreover, neo-patriots assert that racism was addressed long ago by anti-discrimination laws. Under that post-racial fantasy, any current racial disparities for Black, Indigenous, and People of Color ("BIPOC") are the result of private choices or the cultural or intellectual shortcomings of "those people." Neo-patriots are reviving Senator Joseph McCarthy's 1950s playbook, deploying the powers of government against Americans who dare to think, write, or speak ideas they dislike.

constitutional power to ban any theory of legal reasoning or legal analysis on the basis of viewpoint, including CRT.

In recent months, a considerable body of commentary has analyzed recently-enacted or proposed bans or limits on CRT[5]—even though the legal theory emerged in academic writings over fifty years ago.[6] According to the Brookings Institute, for example, Fox News mentioned CRT over 1,300 times over a four-month period in 2022.[7] In 2021 and 2022, a number of state legislatures enacted or proposed bans or limits on discussing CRT, *The 1619 Project*,[8] or certain 'divisive concepts'[9] having to do with race, gender, or gender identity in public K-12 schools, colleges and universities, and workplaces.[10] Proposed federal bills would withhold funds from

---

[5] *See, e.g.*, Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES (Nov. 8, 2021), www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html; Fortin, *supra* note 3; Cobb, *supra* note 3.

[6] INTRODUCTION, *supra* note 3, at 3–4.

[7] Rashawn Ray & Alexandra Gibbons, *Why are states banning critical race theory?*, BROOKINGS INST. (Nov. 2021), www.brookings.edu/blog/fixgo/2021/07/02/why-are-states-banning-critical-race-theory/.

[8] NIKOLE HANNAH-JONES, THE 1619 PROJECT: A NEW ORIGIN STORY (2021).

[9] "Divisive concepts," as defined by President Trump's Executive Order on Combating Race and Sex Stereotypes means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating. Exec. Order No. 13950, 3 C.F.R. 13950 (2020), [hereinafter "EO"]. Other concepts deemed "divisive" by state legislatures include gender identity or sexual orientation. *See, e.g.*, H.B. 616, 134th Gen. Assemb., Reg. Sess. (Oh. 2022).

[10] Fifteen states (Ariz., Ark., Fla., Ga., Idaho, Iowa, Ky., Miss., N.H., N.D., Okla., S.C., S.D., Tenn., Tex.) have passed such legislation. *See PEN America Index of Educational Gag Orders,* PEN AM. (last accessed Nov. 9, 2022), https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870 (live spreadsheet managed by PEN America tracking state educational gag orders in the United States, last updated Jan. 7, 2023). Only Idaho and N.D. mention CRT explicitly. *Id.* Most of the legislation bans the discussion, training, and teaching that the U.S. is inherently racist, as well as discussions of conscious or unconscious bias, white privilege, discrimination, and oppression. State school boards in Fla., Ga., Utah, and Ala. have adopted guidelines barring

institutions that teach CRT, divisive concepts, or *The 1619 Project*, or that sponsor diversity, equity, or inclusion training programs in government workplaces.[11] With a few exceptions, most of the legislation does not mention CRT in its text, but CRT is often the catchall term used to attack diversity, equity, and inclusion training or discussion of divisive subjects or concepts.

Local school board meetings have been another recent battleground in which parents have insisted that school officials ban teachers from introducing CRT, certain curricula, specific books, or other divisive concepts in public school classrooms.[12] Responding to these parent's demands, officials threaten budget reductions, fines, or terminations for those found in violation of bans.[13]

What is lacking in most discussions of these bans is an examination of relevant First Amendment doctrine protecting the advocacy of ideas, engagement with the core tenets of CRT as a mode of legal analysis and legal reasoning, or reflection on specific CRT scholarship. This essay seeks to fill that void by examining the significant constitutional principles that come into play with the recently-enacted or proposed bans. Lower courts are just beginning to review such bans,[14] but Supreme Court precedent supplies ample grounds for challenging them.

As the reader will see, I posit that bans on CRT, *The 1619 Project*, and discussion of "divisive concepts" should be struck down on First and Fourteenth Amendment grounds. In Part I, I review core First Amendment principles protecting speech from government overreach.[15] In Part II, I set forth the principal tenets of CRT, explaining its emergence, what it is, and what it is not.[16] In Part III, I apply the guiding free speech doctrine to anti-CRT legislation as a reviewing court might: first applying overbreadth and void for vagueness doctrines as facial challenges, then considering

---

CRT-related discussions. Nearly twenty additional states are considering similar legislation. Ray & Gibbons, *supra* note 7. *See also* Jonathan Friedman & James Tager, *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach*, PEN AM. (2022), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [hereinafter PEN America].

[11] *See, e.g.*, The Saving History Act, S. 2035, 117th Cong. (2022); The Stop CRT Act, S. 2346, 117th Cong. (2022); END CRT Act, S. 2221, 117th Cong. (2022), among others cited in PEN America, *supra* note 10, at 33.

[12] PEN America, *supra* note 10, at 31–32.

[13] *Id.*

[14] *See, e.g.*, Arce v. Douglas, 793 F.3d 968 (9th Cir. 2015); Gonzalez v. Douglas, 269 F. Supp. 3d 948 (D. Ariz. 2017).

[15] *See infra* pp. 7–17 and accompanying notes.

[16] *See infra* pp. 17–23 and accompanying notes.

categories of speech considered subject to government restriction, and ultimately explaining why regulating ideas—including CRT—is fundamentally at odds with these principles.[17] Finally, the conclusion explains why individuals and groups should challenge anti-CRT policies and why I expect courts to declare such bans unconstitutional.[18]

I. First Principles of Free Speech

As a person with self-autonomy, I may develop my mind and ideas, free of government compulsion or threat. I may also criticize those who govern, past and present, who have repeatedly failed to honor the principle of equality throughout our Nation's history, causing a crushing legacy of systemic, institutional racism for millions of Americans. Such criticism does not render me unpatriotic, but rather is the essence of patriotism. Patriotism does not require unthinking devotion to a broken nation or turning a blind eye to a centuries-old history of brutal discriminatory practices. Moreover, I can share my ideas with all others who will consider them, knowing that debate on public issues is supposed to be robust and can at times be caustic.

Neo-patriots assert an ideology of American innocence under which candid criticisms of the Nation's racial history are tantamount to racist attacks on whites, including innocent white schoolchildren, who must receive protection from hurtful, radical ideas. Under that acontextual, revisionist framing, anti-racism policies are declared racist, and whites are the racial victims of a government that has neglected their interests.

Neo-patriots are crying wolf. Theirs is a cry for the "good-old-days," a time when many Americans had no rights which a white man was bound to respect.[19] Neo-patriotism seeks to whitewash, and thereby cleanse, the American story without confronting indisputable facts and reckoning with how laws and institutions created myriad castes in the United States. Neo-patriotism is an ideology of white backlash.[20]

Nonetheless, no matter how misguided neo-patriotism may be,

---

[17] *See infra* pp. 23–32 and accompanying notes.

[18] *See infra* p. 32 and accompanying notes.

[19] *See* Dred Scott v. Sandford, 60 U.S. 393, 407 (1857) (holding that when the Constitution went into force it was universally understood that persons of African descent, whether enslaved or free, were not intended to be citizens, and were so inferior to whites "that they had no rights which the white man was bound to respect").

[20] Some commentators believe that the backlash is a response to the election of President Barack Obama. Others point to a backlash following demonstrations reacting to the murder of George Floyd, or to the larger Black Lives Matter movement challenging continuing anti-Black racism. Still others point to demographic changes in many states and some people's fear that by mid-century, the Nation could be majority nonwhite.

under existing free speech doctrine[21] all ideologies are protected expression under the First and Fourteenth Amendments.[22] That same constitutional protection, which effectively shields hateful, offensive, and outlandish claims of neo-patriots, protects critical race theorists and our scholarship, and those who wish to read or learn from it.

A. Protecting the Advocacy of Ideas

The Court has held that First Amendment protections "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[23] But although the Constitution commands that "Congress shall make no law . . . abridging freedom of speech,"[24] the Court long ago declared that this command is not absolute. As Justice Oliver Wendell Holmes, Jr. wrote, "[T]he most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic."[25]

Broad speech protection is a relatively recent interpretation of the First Amendment.[26] Barely a century ago under the clear and present danger doctrine, for example, the Supreme Court sustained convictions of persons prosecuted for advocating certain ideas, including communism and socialism, or for membership in certain "dangerous" organizations.[27] Men and women received lengthy prison sentences for advocating unpopular ideas that legislators and judges considered dangerous to the Nation.

Eventually, Justices Holmes and Brandeis dissented from that malleable doctrine, asserting:

---

[21] A number of scholars have offered important critiques of existing free speech doctrine which often places free speech in a preferred position relative to other constitutional values such as equality or human dignity. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY (2018); MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993). I would also elevate equality and dignity interests when deciding whether certain speech is proscribable. However, in this essay, I posit that under existing free speech doctrine, the government cannot ban CRT, *The 1619 Project*, or discussion of divisive concepts.

[22] *See* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting.").

[23] Gitlow v. New York, 268 U. S. 652, 666 (1925).

[24] U.S. CONST. amend. I.

[25] Schenck v. United States, 249 U.S. 47, 52 (1919).

[26] It was not until 1925 in *Gitlow v. New York*, *supra* note 23, that the Supreme Court declared that the free speech guarantees of the First Amendment imposed limitations on both the states and the federal government.

[27] *See, e.g.*, Gitlow, 268 U. S. at 667; Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out. That at any rate is the theory of our Constitution.... We should be eternally vigilant against attempts to check the expression of opinions we loathe [unless] they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[28]

Over time, the Holmesian marketplace of ideas theory became a central justification for defending free speech in the United States.[29] Holmes and Brandeis also defended unfettered public debate and discussion, writing:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds

---

[28] Abrams, 250 U.S. at 630 (Holmes, J. dissenting). *See also* Gitlow, 268 U. S. at 672-73 (Holmes, J., and Brandeis, J., dissenting). For an earlier articulation of the marketplace of ideas theory, see JOHN STUART MILL, ON LIBERTY 18-20 (1859).

[29] Other commentators have offered additional justifications for protecting free speech, including self-autonomy, allowing dissenters to be heard, and democratic self-government. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). For a brief summary of competing underlying values and contemporary viewpoints on justifications for freedom of speech, *see* RUSSELL L. WEAVER ET AL., CONSTITUTIONAL LAW, CASES, MATERIALS, AND PROBLEMS 1041-50 (4th ed. 2017).

> repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[30]

Brandeis' classic explanation for why the drafters of the Constitution included protections for free speech and free assembly is as important today as it was nearly a century ago. Repression of unpopular ideas or viewpoints is antithetical to our Constitution and our democracy.

Justices Black, Douglas, and Harlan expanded on the views of Holmes and Brandeis, arguing against the convictions of Dennis, Scales, Yates, and others under the clear and present danger standard.[31] They insisted that speech bans must draw a distinction between advocacy of ideas versus advocacy of imminent unlawful action. The Court adopted this principle in *Brandenburg v. Ohio*,[32] holding "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[33]

In *Brandenburg*, the Court concluded that Ohio could not convict a Klansman under its criminal syndicalism law for racist, anti-Semitic, or other noxious statements, where the statute did not distinguish between advocacy of ideas and advocacy of imminent lawless action.[34] A statute that fails to draw such a distinction impermissibly intrudes upon freedoms guaranteed by the First and Fourteenth Amendments.[35] It sweeps within its condemnation speech that our Constitution immunizes from governmental control.[36]

Government bans on CRT, *The 1619 Project*, and on divisive concept discussions would appear to run headlong against *Brandenburg*. Advocacy of ideas, discussion of divisive concepts, and reading controversial books should all fall squarely within *Brandenburg*'s protection. Next, I consider how such challenges might proceed.

---

[30] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[31] Scales v. United States, 367 U.S. 203, 259–275 (1961); Dennis v. United States, 341 U.S. 494, 579–591 (1951).
[32] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[33] *Id.* at 447.
[34] *Id.* at 448–49.
[35] *Id.*
[36] *Id.*

B. A Roadmap for Challenging Bans on CRT and Other Materials

Because dozens of states have recently enacted or are considering proposed legislation banning what they call CRT or divisive concepts, and in some cases punishing speakers,[37] it is essential to understand how courts would likely review challenges to such laws. If a court were to encounter such a ban, it would likely begin by considering the following doctrines as facial challenges.

1. The Void for Vagueness Doctrine

First, many government regulations on expression fail to pass constitutional muster because they are impermissibly vague. The Supreme Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendment require that the government give persons notice of what precise conduct is proscribed by regulations.[38] For example, in *Coates v. Cincinnati* the Court invalidated a regulation that prohibited three or more persons from gathering on a sidewalk and conducting themselves in a manner that was "annoying" to others.[39] A reasonably intelligent person would not know what precise conduct is proscribed or punishable under such a regulation, and thus it did not afford the speaker due process.

In situations where the language of the statute is imprecise such that a reasonable person would have difficulty understanding what speech is prohibited, a vagueness challenge would lie under *Coates* and related cases. I will apply this principle to anti-CRT and divisive concepts statutes in Part III.

2. The Substantial Overbreadth Doctrine

Second, even if a regulation survives a constitutional vagueness review, the Court has also ruled that regulations colliding with speech interests cannot be substantially overbroad.[40] The overbreadth doctrine requires the government to adopt narrow statutes that proscribe specific conduct and do not also "sweep up" a substantial amount of protected

---

[37] *See* PEN America, *supra* note 10, 25–28.

[38] Coates v. Cincinnati, 402 U.S. 611 (1971). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (voiding a vagrancy statute on vagueness and arbitrary application grounds); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965) (voiding a conviction for failure to "move on"); Thornhill v. Alabama, 310 U.S. 88, 100 (1940) (voiding a loitering statute on free speech and free association grounds).

[39] *Coates*, 402 U.S. at 614–16.

[40] *See, e.g.*, Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987); City of Houston, Tex. v. Hill, 482 U.S. 451, 466–67 (1987); Broadrick v. Okla., 413 U.S. 601 (1973).

speech as collateral damage.[41] In other words, regulations may not be overly broad, reaching substantially more expressive conduct than the government may proscribe.[42] For example, imagine a regulation banning all residential picketing versus one that bans only residential picketing targeting a single home.[43] The first regulation is much broader than the second and sweeps within its reach a substantial amount of constitutionally protected expressive activity.[44] One can read *Brandenburg* to mean that the Ohio Criminal Syndicalism statute at issue, which did not distinguish between imminent lawless action and advocacy of ideas, was substantially overbroad and thus unconstitutional.

In sum, a court would need to consider a substantial overbreadth challenge to speech regulations in addition to the void for vagueness doctrine. Importantly, both vague and substantially overbroad regulations have the secondary effect of chilling protected speech, causing people to halt or consider refraining from expressive activities for fear of violating the law.[45] These doctrines likely have significant applications to sweeping anti-CRT or divisive concepts laws, which Part III examines.

3. Categories of Proscribable Speech

i. Specifically Enumerated Categories

After analyzing for vagueness and substantial overbreadth, the next issue a court may consider is whether the speech ban implicates one of the "slight social value" speech categories for which the Court has permitted greater regulation. In *Chaplinsky v. New Hampshire*, the Court wrote:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the *lewd and obscene, the profane, the libelous, and the insulting 'fighting words'*—those which by their very utterance inflict injury and tend to incite an immediate breach of the peace. It has been well observed that such

---

[41] *See, e.g.*, Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. at 574 (by prohibiting all protected expression, airport officials essentially created an unconstitutional "First Amendment Free Zone").

[42] United States v. Stevens, 559 U.S. 460 (2010) (invalidating a statute criminalizing videos depicting cruelty to animals that would have also swept up protected expression such as hunting videos).

[43] *See* Frisby v. Schultz, 487 U.S. 474 (1988).

[44] *Id.* at 479–88.

[45] *See also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").

> utterances are no essential part of any exposition of ideas, and are of such a slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[46]

The Court has adopted a categorical approach to reviewing speech regulations on the merits. The reader may recall many of the proscribable categories set out by the Court, such as advocacy of imminent lawless action,[47] defamation,[48] true threats,[49] harassment,[50] obscenity,[51] child pornography,[52] commercial speech,[53] student speech in schools,[54] government workplace speech,[55] and campaign speech.[56]

If the government regulation implicates one of the judicially-crafted categories for which the Court has permitted additional regulation, the rule(s) for that category would of course be applied. The Court has announced rules for each of the categories mentioned above. For instance, obscenity regulations would be examined under the rules announced in *Miller v. California*.[57] With incitement regulation, the rules of

---

[46] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942) (emphasis added).

[47] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[48] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding public officials cannot recover for libel unless they show actual malice by the author).

[49] Virginia v. Black, 538 U.S. 343, 359 (2003) ("'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.").

[50] Meritor Savings Bank v. Vinson, 477 U.S. 57, 63–69 (1986) (A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII of the 1964 Civil Rights Act).

[51] Miller v. California, 413 U.S. 15 (1973) (announcing that "obscene material," characterized by applying a three-step test using contemporary community standards, is not protected by the First Amendment).

[52] New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is unprotected under the First Amendment).

[53] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (holding that commercial speech has limited constitutional value and establishing a four-part test to determine the constitutionality of regulations pertaining to commercial speech).

[54] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students may express opinions even on controversial subjects as long as they do so without materially and substantially interfering with appropriate discipline in the normal operation of the school).

[55] Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

[56] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Buckley v. Valeo, 424 U.S. 1 (1976).

[57] 413 U.S. at 24.

Brandenburg;[58] with true threats regulation, the rules announced in *Virginia v. Black*;[59] with defamation regulation, the rules of *New York Times Co. v. Sullivan*;[60] and so on for the other categories.

ii. Speech in Public Schools and Workplaces

The enumerated categories of proscribed speech are relatively narrow, however, begging the important question of to what extent the Court has announced rules permitting the government to control what is taught in public schools or government workplaces. Can government officials ban certain ideas or books from the classroom by controlling curricula or by issuing gag orders on teachers?

Thus far, the Court has said that while students and teachers do not "shed their constitutional rights to freedom of speech of expression at the schoolhouse gate,"[61] public school administrators retain some authority to restrict expressive activities that materially disrupt the educational mission of the school;[62] that promote violation of the law, such as drug use;[63] or that are unsuitable for another clearly defined reason.[64] The Court has also held that school officials can censor school newspapers that are part of the curricular offerings,[65] but may not be able to determine—at least in some circumstances—which books can be removed from a school's library based on viewpoint.[66] The question is whether any of these precedents would allow the government to ban ideas or "divisive concepts" such as CRT, or specific books like *The 1619 Project*. Part III examines those questions in the context of teachers engaging in both public and—arguably—private speech.

Another area for inquiry is whether the government can ban certain

---

[58] 395 U.S. at 447–48.
[59] 538 U.S. at 359–61.
[60] 376 U.S. at 279–82.
[61] *Tinker*, 393 U.S. 503 at 506.
[62] *Id.* at 513.
[63] Morse v. Frederick, 551 U.S. 393, 397 (2007).
[64] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").
[65] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 271 (1988) ("These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.").
[66] Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) (issuing a split decision that only controlled the narrow question concerning a motion for summary judgment).

speech in its workplaces, such as certain diversity, equity, and inclusion training programs. Here, the leading case is *Pickering*, in which the Court accorded First Amendment protection for statements on matters "of public importance" by public employees.[67] While *Pickering* and its progeny would seemingly protect speech on matters of public concern, it is clear that the government still possesses significant leeway to regulate the speech of public employees when they are acting pursuant to their official duties.[68] Generally, when the government is the speaker, the First Amendment limitations do not apply.[69]

If the government regulation does not implicate one of the proscribable categories and the government speech exception does not apply, private speech is entitled to full protection, and any government regulation must meet the strict scrutiny standard of review by establishing a compelling interest and narrow tailoring.[70] This is the heaviest burden that the Court imposes on the government. The government must establish that it has a compelling justification for the regulation, and the government must show that its regulation is narrowly tailored to achieve its compelling interest. In most cases when the Court applies strict scrutiny, including in free speech cases, the government policy is struck down because the government cannot show a compelling justification for the regulation or because the regulation is not narrowly tailored (that is, more restrictive than necessary).[71]

---

[67] Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) ("[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

[68] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *see also* Connick v. Myers 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

[69] *See* Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 208 (2015) (holding that purely government speech is not subject to First Amendment scrutiny) ("[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."); Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

[70] *See generally* Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163–65 (2015).

[71] *See, e.g.,* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817 (2000) ("'Content-based regulations are presumptively invalid,' . . . and the Government bears the burden to rebut that presumption.") (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)) (internal citation omitted).

iii. Time, Place, and Manner Restrictions and Viewpoint Neutrality

In addition, a Time, Place, and Manner ("TPM") doctrine applies to some regulations; usually ones that do not proscribe all expressive activity, but that instead place limits upon where, when, or how one can engage in expression. For such restrictions, the Court employs special rules depending on the type of government property implicated—that is, whether the property is a traditional public forum, a limited public forum, or a nonpublic forum.[72] The Court also evaluates whether the regulation is content-based or content-neutral. Content-based restrictions—ones that target speech based on viewpoint or subject matter—are presumptively invalid under strict scrutiny.[73] Content-neutral restrictions—ones that apply to all without regard to perspective—are subject to a slightly lower standard of review, akin to intermediate scrutiny.[74] The leading case for TPM restrictions is *Perry Education Ass'n v. Perry Local Education Ass'n*.[75] Another instructive case is *Frisby v. Schultz*.[76]

In sum, government regulations of private speech that are not viewpoint-neutral are generally invalid. Government restrictions that single out particular viewpoints for regulation are presumptively invalid and nearly always fail the strict scrutiny test.[77] Such regulations violate the Nation's profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.[78] Bans on CRT, gag orders in schools and universities, and bans on books like *The 1619 Project* may accordingly violate the above-mentioned principles.

---

[72] *See* Frisby v. Schultz, 487 U.S. 474, 479–80 (1988); Perry Educ. Ass'n v. Perry Loc. Educ. Ass'n, 460 U.S. 37, 45 (1983).

[73] *See* Playboy Entertainment Group, 529 U.S. at 817.

[74] *Id.*

[75] 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.").

[76] 487 U.S. 474 (1988) (upholding a narrowly construed ban on residential picketing targeting a single home).

[77] R.A.V., 505 U.S. 377, 387 (1992) ("[T]he First Amendment imposes ... a 'content discrimination' limitation upon a State's prohibition of proscribable speech.").

[78] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting Roth v. U.S., 354 U.S. 476, 484 (1957)).

II. Critical Race Theory 101

A. A Scholarly Critique of American Laws and Institutions

According to a leading reference book, "CRT is a movement of scholars and activists engaged in studying and transforming the relationship among race, racism and power."[79] The CRT movement grows out of the Critical Legal Studies ("CLS"), Feminist, Black Power, and Chicano movements of the 1960s and 1970s,[80] in which legal scholars offered various critiques of law. These scholars concluded that law is not neutral, is often indeterminate, and reflects the views and interests of dominant groups who make and uphold the law.[81]

CRT is one of many academic legal theories. If the government has the power to ban it, may it ban law and economics, critical legal theory, feminist theory, or queer theory, among others? If the government can ban *The 1619 Project*, can it ban any book? The implications of such boundless and arbitrary governmental power are disquieting and should concern every person, whatever the person's ideological perspective.

Critical race theorists such as Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Jean Stefancic, Roy Brooks, Lani Guinier, Mari Matsuda, Charles Lawrence, Neil Gotanda, Alan Freeman, Patricia Williams, John Calmore, Regina Austin, Gary Peller, Angela Harris, Jerome Culp, Margalynne Armstrong, Kendall Thomas, Stephanie Wildman, Anthony Cook, Montré Carodine, Robert Chang, Margaret Montoya, Harlan Dalton, Frank Valdes, Cheryl Harris, Devon Carbado, Ian Haney Lopez, Richard Thompson Ford, Laura Gomez, Mitu Gulati, Jerry Kang, Eric Yamamoto, Kevin Johnson, Juan Perea, Paul Butler, Lani Guinier, Angela Onwuachi-Willig, Robert Williams, Nancy Levit, andré cummings, and Tom Ross,

---

[79] INTRODUCTION, *supra* note 3, at 3.

[80] *Id.* at 4–6. For more on the CLS Movement, *see generally* RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE (1996); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK (1983). For more on Feminist Legal Theory, *see* NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER (2d ed. 2016); NANCY E. DOWD & MICHELLE S. JACOBS, FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (2003). For more on the Chicano Movement, El Movimiento, *see* F. ARTURO ROSALES, CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (1997); CYNTHIA E. OROZCO, NO MEXICANS, WOMEN, OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (2009). For more on the Black Power Movement, *see* THE BLACK POWER MOVEMENT: RETHINKING THE CIVIL RIGHTS—BLACK POWER ERA (Peniel E. Joseph ed., 2006); KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA (Knopf Doubleday Publishing Group 2011, 1967).

[81] INTRODUCTION, *supra* note 3, at 5–6.

among many others, expanded on the CLS critique, contending that not only is the law not neutral, and not only does it reflect the interests of the dominant racial group in the U.S.—namely whites—it also masks extant racism and racial subordination of BIPOC in the U.S.[82]

While race crits[83] agree on certain principles, their research and writing diverge in focus, with some writing about Asian Pacific Islanders and the law, Latino/a persons and the law, Indigenous persons and the law, African American persons and the law, or white immigrants and the law.[84] Other crits write at the intersection of race, gender, sexual orientation, gender identity, or class and the law.[85]

CRT is a scholarly critique of American law. It is an academic movement that seeks to expose the centrality of racism in the laws, customs, institutions, and culture of the United States and its people. Derrick Bell was one of the first legal scholars to describe white racism as a permanent feature of American life and law and coined the term "interest convergence" to explain the unspoken reasons why white elites supported certain moments of legal reform in the U.S.[86] Richard Delgado was another founder of CRT and for over forty years has written extensively about race and racism in the U.S. In one article, Delgado showed how two-dozen leading civil rights scholars—all white and male—habitually cited each other's work, without citing civil rights scholarship written by faculty of color,

---

[82] The late Professor Derrick Bell is widely regarded as the CRT movement's intellectual founder. INTRODUCTION, *supra* note 3, at 6. For more on Bell's early life and professional career, *see* Cobb, *supra* note 3. Bell was joined quickly by many others, including Alan Freeman, Richard Delgado, Kimberlé Crenshaw, Mari Matsuda, Chuck Lawrence, Angela Harris, Cheryl Harris, and Patricia Williams as early major figures in CRT. INTRODUCTION, *supra* note 3, at 6. On the CRT critiques of CLS, see Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Harlon L. Dalton, *The Clouded Prism: Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); cited in KEY WRITINGS, *supra* note 3.

[83] A term sometimes used by critical race theorists to refer to themselves.

[84] INTRODUCTION, *supra* note 3, at 7–8 (noting critical race theory spin-off movements and the adoption of CRT in numerous academic disciplines and several other countries). *See also* Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 4 DUKE L.J. 625 (1990).

[85] INTRODUCTION, *supra* note 3, at 3.

[86] DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1979); Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter *Interest Convergence Dilemma*].

causing such scholarship to be skewed and blunted.[87] Later, Kimberlé Crenshaw, likely in collaboration with others, such as Bell, Delgado, Patricia Williams, Mari Matsuda, Charles Lawrence, and Angela Harris, coined the phrase Critical Race Theory to describe an emerging body of scholarship on race and American law.[88] Crenshaw also joined other scholars to develop intersectionality theory to describe how the law often fails to acknowledge or reform multi-layered identity discrimination.[89]

Race crits draw on the lived experiences of nonwhites in the U.S. to understand how American laws and institutions sustain the subordinate status of most BIPOC.[90] These scholars use their critiques to promote equality and to improve the everyday lives of BIPOC.[91] Race crits reject notions of formal equality, seeking substantive equality for BIPOC relative to whites.[92]

Critical race theorists seek to dismantle racial hierarchy and specifically the nation's commitment to white supremacy and its protection of white racial privilege.[93] For race crits, the endgame is racial equality for

---

[87] Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). *See also* RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995).

[88] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For a history of the CRT movement and a discussion of the scope of scholarship, *see* INTRODUCTION, *supra* note 3. For a shorter description, *see* Fortin, *supra* note 3. *See also* Cobb, *supra* note 3.

[89] KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (2014). *See also* Dorothy E. Roberts, *Punishing Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); cited in KEY WRITINGS, *supra* note 3.

[90] INTRODUCTION, *supra* note 3, at 44–55. *See also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46(3) STAN. L. REV. 747 (1994) (reviewing KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992)); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992); Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1990); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990(4) DUKE L.J. 705 (1990); cited in KEY WRITINGS, *supra* note 3.

[91] INTRODUCTION, *supra* note 3, at 44–55.

[92] *Id.*

[93] *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515 (1989); cited in KEY WRITINGS, *supra* note 3.

all through laws and institutions that take seriously the lived experiences of people of color, and not only when equality benefits whites via interest convergence.[94]

B. The Core Tenets of CRT

The main tenets or themes of critical race theory are as follows. First, most critical race theorists agree that racism is an ordinary feature of life in the U.S.; it is not aberrational, or only the actions of a few bad persons or groups. "It is the common, everyday experience of most people of color in the country."[95] A second aspect of racism is that white-over-color ascendancy serves important purposes, both material and psychic, for the dominant group.[96] Racism is invisible for whites. And, as beneficiaries of racism, whites have little incentive to reform what is beneficial to them. Both features combine to make racial reform an arduous endeavor.[97]

Another significant theme of CRT is that race is a socio-legal construction, not a biological fact.[98] "Race and races are products of social thought and relations...they correspond to no biological or genetic reality; races are categories that society invents, manipulates, and retires when convenient."[99] A related concern among critical race theorists is differential racialization, the ways the dominant group racializes different minority groups at different times; at times ascribing positive, favorable characteristics, but at other times, denigrating them as undesirables or outcasts, based on the economic or political needs of the dominant group.[100]

Critical race theorists have argued that Derrick Bell's interest convergence theory explains many periods of racial reform in the U.S., including the Court's decision to ban school segregation in *Brown*.[101] Under that theory, at certain moments, white elites recognize personal benefit in a particular racial reform. The reform is thus driven by such interests, not by a liberatory intent to end racial oppression of BIPOC.

---

[94] *See Interest Convergence Dilemma*, *supra* note 87. *See also* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1598 (1992); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); cited in KEY WRITINGS, *supra* note 4.

[95] INTRODUCTION, *supra* note 3, at 8.

[96] *Id.*

[97] *Id.* at 8–9.

[98] *Id.* at 9.

[99] *Id.*

[100] INTRODUCTION, *supra* note 3, at 9–10.

[101] *Id.* at 20–24.

In addition to traditional academic scholarship, critical theorists have written allegorical tales, parables, and narrative stories, including narratives of lived experiences of BIPOC, as a central aspect of their legal reasoning and analysis critiquing racism in the U.S. They contend that such materials constitute an important epistemology—a knowledge or truth—from which the dominant group (whites) can learn.[102]

Critical race theorists further argue that anti-discrimination law, including modern civil rights legislation, is constituted in ways that make legal reform difficult for BIPOC.[103] For example, anti-discrimination laws often implicitly frame racism as the bad acts of a few persons instead of being endemic to American society.[104] The law also fails to address multi-layered, intersectional discrimination. People with many identities are forced to choose one facet—race, gender, sexual orientation, etc.—against which to challenge discrimination, potentially erasing the distinct experience of someone at the intersection of multiple identities, for example, a lesbian woman of color who is a single mom.[105]

While any of these CRT tenets or themes may be objectionable or contested by other commentators as undermining traditional notions of scholarship and meritocracy,[106] none is anti-American, seditious, or within any of the proscribable speech categories created by the Court. Critical race theorists offer their analyses for consideration in the marketplace of ideas. Those ideas deserve examination and consideration, not reflexive rejection out of hand.

C. Branding CRT as an Existential Threat to the Nation

The recent weaponization of CRT can be traced to Christopher Rufo, a relatively obscure filmmaker and recently-appointed senior fellow at the Manhattan Institute.[107] According to Benjamin Wallace-Wells, Rufo became alarmed by various anti-racism, diversity and inclusion training programs which Rufo asserted were part of a political correctness, "wokeness," and cancel culture.[108]

---

[102] *Id.* at 11. Narrative analysis even helps lawyers understand the ebb and flow of legal argument in a course of litigation. *Id.*
[103] *Id.* at 38.
[104] *Id.*
[105] INTRODUCTION, *supra* note 3, at 10–11, 58–63.
[106] For a summary of the external criticisms of CRT by Daniel Farber, Susanna Sherry, and Randall Kennedy, *see* INTRODUCTION, *supra* note 3, at 102–04.
[107] Benjamin Wallace-Wells, *How A Conservative Activist Invented The Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory.
[108] *Id.*

As Rufo researched those programs, he began to find references to Ibram Kendi's[109] and Robin DiAngelo's[110] recent books and citations to critical race theorists' scholarship.[111] Based on those references, Rufo—out of whole cloth and without any serious engagement with the writings of CRT scholars, or CRT's core tenets—coopted "CRT" to mean all things that neo-patriots oppose and declared it an existential threat to the Nation.[112] According to Wallace-Wells, Rufo's goal was to villainize CRT and to render the term toxic.[113]

Rufo used Tucker Carlson's Fox News program to share his views and to encourage then-President Trump to use his authority to ban anti-racism trainings for federal employees.[114] Shortly thereafter, Rufo received an invitation to the White House to help shape and draft a Trump Executive Order ("the Order") banning such trainings (later reversed by President Biden).[115] Many of the state statutes banning CRT, *The 1619 Project*, or the teaching of divisive concepts are styled after the Order.[116]

Contrary to Rufo's sleight of hand and misappropriation of the CRT label, critical race theory is not an existential threat to the Nation, and critical race theorists are not villains. CRT is a method of legal reasoning and legal analysis for examining the intersection of race, institutions, and policies in the United States. Race crits seek to expose systemic, institutional racism in American life and to propose strategies for reform. Neo-patriots seek to silence them by banning their ideas.

III. The Dangers of Banning Ideas

Justice Hugo Black once stated that many Americans hold a simple view of the Constitution: "Each one of them believes that the Constitution prohibits that which they think should be prohibited, and permits that which they think should be permitted."[117] This seems to be the view of neo-patriots. The Supreme Court, however, has expressed a different principle, stating: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

---

[109] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST (2019).

[110] ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

[111] *See* Wallace-Wells, *supra* note 107.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] PEN America, *supra* note 10, at 17.

[117] Interview by Martin Agronsky and Eric Sevareid, CBS-TV, with Justice Hugo L. Black, U.S. Supreme Court, in Harlan, Alabama (1969), *available at* https://www.loc.gov/item/afc1986022.afc1986022_sr33a03/.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[118] When governments ban certain ideas, they violate this cornerstone value of the First Amendment.

As stated earlier, this principle does not apply when the government is the speaker,[119] and may have a narrower scope of operation when the government subsidizes private speakers,[120] but it has full force when the government regulates private expression based on disagreement with the private speaker's viewpoint.[121] Such viewpoint discrimination seems to be at the heart of recent bans on CRT, *The 1619 Project*, and teaching divisive concepts.

A. Banning CRT, The 1619 Project, and Divisive Concepts

Republican-controlled legislatures across the country adopted Rufo's aforementioned playbook, passing various laws banning the teaching of CRT, *The 1619 Project*, or teaching "divisive concepts" in K-12 and beyond.[122] CRT is rarely studied even at the law and graduate school level, and is highly unlikely to be part of any K-12 curriculum.[123] Nonetheless, CRT has been weaponized by some to galvanize voters, as was the case in the recent gubernatorial races in Virginia[124] and Alabama,[125] as well as at raucous school board meetings across the country.[126]

According to PEN America, a leading nonprofit dedicated to defending free expression, "between January and September of 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12, higher education, and state agencies."[127] Many of the bills target discussion of "divisive concepts"[128] in public schools and workplaces.[129] PEN America describes much of the legislation as educational gag orders.[130] This legislation poses grave risks to free inquiry, discourse on racism and sexism, academic freedom, and the

---

[118] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[119] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).
[120] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–90 (1998).
[121] *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[122] *See, e.g.*, PEN America, *supra* note 10, 4–8, 25–29.
[123] *Id.* at 24.
[124] *Id.* at 8–11.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 4.
[128] *See, e.g.*, S.B. 377, 156th Gen. Assemb., Reg. Sess. (Ga. 2022); H.B. 1775, 58th Leg., Reg. Sess. (Ok. 2022); S.B. 148, 124th Leg., Reg. Sess. (Fl. 2022).
[129] PEN America, *supra* note 10, at 4.
[130] *Id.*

teaching of accurate American history. Neo-patriots are using the machinery of government to limit the viewpoints they oppose.[131] That is censorship, plain and simple.[132]

PEN America offered four important observations about the gag orders:[133]

1. Each of the bills represents an effort to impose content- and viewpoint-based censorship.
2. Individually and collectively, these bills will have a foreseeable chilling effect on the speech of educators and trainers. . . .
3. These bills are based on a misrepresentation of how intellectual frameworks are taught, and threaten to constrain educators' ability to teach a wide range of subjects.
4. Many of these bills include language that purports to uphold free speech and academic inquiry . . . [but this language] does little or nothing to change the essential nature of these bills as instruments of censorship.[134]

Although the fifty-four bills identified by PEN America exhibit wide variations, some targeting CRT or *The 1619 Project* specifically, others ban the teaching of "divisive concepts."[135] Other legislation restricts diversity, equity, and inclusion training programs in schools or workplaces.[136] As mentioned, bills targeting speech by public officials or at government workplaces may find a safe harbor under *Pickering* or *Walker*. Nonetheless, there should be no safe harbor for banning ideas.

Following the encouragement of Rufo, Trump's Executive Order, Tom Cotton's Saving America History Act,[137] or Stanley Kurtz's Partisanship Out of Civics Act,[138] Mississippi,[139] Arkansas,[140] and Iowa[141]

---

[131] *Id.* at 4–5.

[132] *See generally* Near v. Minnesota, 283 U.S. 697, 713 (1931) (holding that preliminary restraints on publication are the "essence of censorship" and have the purpose and effect of silencing critical views).

[133] PEN America, *supra* note 10, at 38–58.

[134] *Id.* at 8.

[135] For an overview of all bills, *see* PEN America, *supra* note 10, at 8–11. For state legislation, *see* PEN America, *supra* note 10, at 25–29. For federal legislation, *see* PEN America, *supra* note 10, at 33.

[136] PEN America, *supra* note 10, at 8–11.

[137] Saving American History Act of 2020, S. 4292, 116th Congress (2020).

[138] Stanley Kurtz, *The Partisanship Out of Civics Act*, NAT'L ASS'N OF SCHOLARS (Feb. 15, 2021), https://www.nas.org/blogs/article/the-partisanship-out-of-civics-act.

[139] S.B. 2538, Reg. Sess. (Miss. 2021).

[140] H.B. 1231, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021).

[141] H.F. 222, 89th Gen. Assemb. (Iowa 2021).

introduced bills barring the expenditure of public funds on curriculum derived from *The 1619 Project*. Arkansas also proposed a "prohibition on any public school or college allowing a 'course, class, event, or activity' that 'promotes division between, resentment of, or social justice for' a race, gender, ... or particular class of people."[142] The South Dakota legislature quickly followed suit.[143] Missouri legislators went further to ban any curriculum implementing CRT or using *The 1619 Project*, the Learning for Justice Curriculum of the Southern Poverty Law Center, or similar materials from other progressive organizations.[144]

Many of the initial bills failed or were withdrawn, but a series of new ones quickly followed barring discussions of 'divisive concepts' (borrowing that phrase from the Executive Order) and related terms. Arizona, Arkansas, Oklahoma, Tennessee, West Virginia, Rhode Island, Iowa, Texas, North Carolina, Louisiana, New Hampshire, Idaho, Missouri, South Carolina, Michigan, Ohio, Pennsylvania, Wisconsin, and Kentucky all proposed such bills in early- to mid-2021.[145] North Carolina, for example, proposed a bill mandating that students encounter "'balanced political viewpoints' on all subject matter in schools."[146]

Because of what Patricia Williams has aptly called "definitional theft" by Rufo and others,[147] CRT has become a boogeyman for persons who oppose racial justice-conscious curricula and diversity, equity, or inclusion training programs, without any substantial analysis of CRT scholarship or its tenets. Rufo sought a new, toxic label for his campaign against DEI programs. He found it in CRT.

B. Applying Free Speech Principles to the Latest Bans on Ideas

This article now considers why these bans are likely unconstitutionally vague, substantially overbroad, and violative of the viewpoint discrimination principle under the strict scrutiny standard of review. If the courts reviewing such bans follow Supreme Court precedent, invalidation should follow in short order.

First, the court will apply facial challenges by examining whether the specific statute is either unconstitutionally vague or substantially

---

[142] H.B. 1218, 93rd Gen. Assemb. (Ark. 2021).
[143] H.B. 1157, 96th Leg. Sess. (S.D. 2021).
[144] H.B. 952, 101st Gen. Assemb. (Mo. 2021).
[145] PEN America, *supra* note 10.
[146] S.B. 700, Gen. Assemb. (N.C. 2021). A similar bill in Tennessee proposes to ban any curricular materials that "promote, normalize, support, or address lesbian, gay, bisexual, or transgender (LGBT) issues or lifestyles." H.B. 800, 112th Gen. Assemb. (Tenn. 2021).
[147] PEN America, *supra* note 10, at 21. Patricia Williams has referred to the ongoing mischaracterization of CRT as "definitional theft." *See* Cobb, *supra* note 3.

overbroad. If the answer is yes, for either question, the court should find the statute unconstitutional. If the statute survives vagueness and substantial overbreadth analyses, then a reviewing court will consider whether the regulation applies to one of the enumerated proscribable categories of speech or a broader category—such as speech by public officials—that receives less protection than purely private speech. If so, the court will apply the legal standard applicable to that category. If not, the speech is presumptively protected, and the court will apply strict scrutiny to the regulation.

Consider, for example, the term "divisive concepts," as it appeared in the Trump Executive Order.[148] The Order prohibited the expression of these concepts in any federal employee training programs, from military training programs, and with employees of institutions contracting with the federal government.[149] Since many University faculty have research contracts and grants from federal agencies, the Executive Order prohibitions threatened basic academic freedom on campus. The scope of the Order was sweeping, and when coupled with state legislation, the ban threatened teachers and trainers across the country.

1. Void for Vagueness Doctrine

What does it mean to tell a teacher and a diversity trainer that they cannot teach or discuss "divisive concepts"?[150] For example, can a teacher discuss the Western-hegemonic principle of manifest destiny, or the racist doctrines of conquest and discovery as announced by the Supreme Court in *Johnson v. M'Intosh*?[151] Can a trainer discuss why Congress enacted Title

---

[148] *See* EO, *supra* note 9. The irony, of course, is that President Trump has been known to promote racist stereotypes himself, suggesting for instance that Mexicans coming to the United States were rapists and criminals, and enacting what many refer to as a "Muslim ban" prohibiting entry from designated countries. One wonders if President Trump's own words before and during his presidency would have violated his own EO. *See, e.g.*, Amber Phillips, *'They're rapists.' President Trump's campaign launch speech two years later, annotated*, WASH. POST (June 16, 2017), www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/; Vahid Niayesh, *Trump's travel ban really was a Muslim ban, data suggests*, WASH. POST (Sept. 26, 2019), www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest/.

[149] PEN America, *supra* note 10, at 20.

[150] *See supra* note 9.

[151] 21 U.S. 543, 570 (1823) ("According to every theory of property,. the Indians had no individual rights to land. . . All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis. . .").

VII of the 1964 Civil Rights Act? Can teachers discuss Jefferson's views on slavery or on Indigenous or Black people? Can teachers discuss the causes of the Civil War or Reconstruction? Can teachers or trainers assign the writings of Frederick Douglass, W.E.B. DuBois, or Reverend Dr. Martin Luther King, Jr.'s, *Letter From Birmingham Jail*? Which race and sex discussions are considered prohibited stereotyping? Which books about racism or sexism in the United States are to be banned and which are allowed? How is a teacher or trainer supposed to determine the prohibited teachings or trainings? How do teachers or trainers talk about discrimination in American history? Must university officials suspend writing anti-discrimination policies and enforcing them against violators? These questions are anything but rhetorical and illustrate the unconstitutional vagueness of laws using such an ambiguous term.

Proposed or enacted regulations predicated on the term "divisive concepts" would almost certainly be considered impermissibly vague because the language utterly fails to provide requisite notice of what speech is prohibited. As described *supra* Part I, the Court in *Coates v. City of Cincinnati* established the void for vagueness doctrine because the term "annoying" was too ambiguous for ordinary people to be able to understand what conduct was criminalized.[152] In addition to general ambiguity, the phrase "divisive concepts," like the term "annoying," is utterly subjective. The meaning of these terms will differ from individual to individual, providing an entirely unworkable standard. In sum, the term "divisive concepts" fails to specify the proscribed expression, meaning that "'[persons] of common intelligence must necessarily guess at its meaning.'"[153]

Furthermore, while conservative legislators may have assumed that the divisive concepts ban would only apply to left-leaning speakers, it could just as easily be applied to censor right-leaning viewpoints on racism and sexism. Surely, no one thinks that teachers will simply cease to teach American history. So, who will decide if a teacher has crossed the line? And which teachers will risk fines or termination for crossing an ambiguous line?

2. Substantial Overbreadth Doctrine

For many of the same reasons that a ban on "divisive concepts" is vague, such a ban would also be considered substantially overbroad because it would likely sweep within its purview a significant amount of expressive activity that the Constitution has immunized from government limitation. As I explained in Part I, the Court in Ashcroft held that the substantial

---

[152] *See generally* Coates v. City of Cincinnati, 402 U.S. 611 (1971).

[153] *Id.* at 614 (quoting Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926)).

overbreadth doctrine requires the government to adopt narrow regulations banning specific conduct.[154] In that case, the Court struck down a federal law banning so-called virtual child porn, holding that the regulation banned substantial protected material[155] that was neither child pornography or obscenity.[156] Also, recall the example of a regulation banning all residential picketing versus one regulating picketing in front of a single home.[157] The former is substantially overbroad, while the latter is narrow and bans specific conduct. The "divisive concepts" term is not narrow and it's not specific. Again, can a teacher discuss voter suppression devices, or the use of gender identity pronoun preferences? Can a school district preclude students and teachers from discussing gun violence and open carry laws? Can teachers forbid students from wearing Black Lives Matter armbands and discussing racial injustice?

When challenging a state or federal statute that uses this "divisive concepts" term, the court should examine both vagueness and substantial overbreadth in light of the language in the specific statute or policy. It is likely that one or both of these facial challenges would succeed. But even if a court decided that the term "divisive concepts" is neither vague nor substantially overbroad, the bans on CRT, *The 1619 Project*, and teaching "divisive concepts" may run afoul of other core speech principles, including the prohibition on viewpoint discrimination. The following sections will briefly explore these alternative possibilities.

3. Proscribable Categories of Speech

If the court determined "divisive concepts" was neither vague nor substantially overbroad the reviewing court would then examine whether the relevant statute banned materials that fell within one of the categories for which the Supreme Court has announced more limited protection or no protection at all. Neither CRT, *The 1619 Project*, nor the term "divisive concepts" generally falls with any of the narrowly-defined categories. Neither is advocacy of imminent lawless action under *Brandenburg*. Neither is a true threat under the rules in *Virginia v. Black*. Neither is defamatory under *Sullivan*. None constitutes fighting words under *Chaplinsky*. Neither is obscene under *Miller*. Neither is materially disruptive under *Tinker*.

If no proscribable category applies, private speech concerning CRT, *The 1619 Project*, and "divisive concepts" is fully protected and

---

[154] *Ashcroft*, 535 U.S. at 236.
[155] *Id.* at 252–53.
[156] *Id.* at 249.
[157] *See Frisby*, 487 U.S. at 474.

government limits on it are subject to strict scrutiny, as explored *supra* subsection five. First, however, the following subsection will consider the significance of the public-school setting for many of these regulations.

4. Speech in Public Schools

The government—particularly the state government and local school boards—does retain fairly broad discretion to determine curricular issues.[158] But this discretion is not limitless, and arguably does not extend to public school teachers when they are not speaking pursuant to their official duties.[159] In *Garcetti*, the Court found that the petitioner had acted "pursuant to his duties" because the contested action—writing a memo—was what he was employed to do.[160] Key to the Court's analysis was the fact that the speech in question "owe[d] its existence to [this] public employee's professional responsibilities. . . ."[161] In the K-12 context, this might entail—for instance—creating lesson plans, assigning homework, or conducting lectures.

But while there are admittedly narrow parameters in which a public-school teacher's speech may be characterized as private while at school, examples of such expression are not inconceivable, nor are they unimportant. For example, if a student goes up to their teacher and asks their opinion about a recent protest for racial justice, or a new bill infringing on the rights of transgender students, does the government really have the right to force the teacher or the student to self-censor? What if teachers expressly cabin their statement with the fact that they are speaking solely for themselves in their capacity as a private citizen? If it is true that teachers do not shed their First Amendment rights when they enter the school, it must be equally true that they retain some of their private speech capacity in at least limited circumstances.

The free speech values behind the decision in *Pickering* may also be read to provide support for this conclusion. There the Court placed great emphasis on the "public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment . . . ."[162] While this decision did rest on an expressive

---

[158] *See, e.g.*, Julie Underwood, *Under the Law: The Legal Balancing Act Over Public School Curriculum*, 100 Phi Delta Kappan 74 (2019). *See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("[Academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

[159] *See generally* Garcetti, 547 U.S. 410.

[160] *Id.* at 421.

[161] *Id.*

[162] *Pickering*, 391 U.S. 563 at 573.

activity that occurred outside of the context of the classroom, the values anchoring this holding could not be more relevant to the topic at hand.

Finally, there is plainly positive Supreme Court precedent in at least one arena of free expression in public schools: the curation of the school library. In *Island Trees School District v. Pico*,[163] a divided Court ruled that school officials generally could not remove books from public school libraries based on disagreement with or dislike of the viewpoints presented in the books.[164] Although that case appeared to be a victory for students' free speech rights, the case did not clearly address situations where school officials refuse to purchase books for the library, leaving a significant potential loophole for mischief. It is important to challenge the ban on *The 1619 Project* to force the Court to decide if government actors can single out books for exclusion because of the supposedly radical, anti-American, racist viewpoints of their authors. *Pico* suggests that this action would be impermissible, but the Court's decision was so fragmented that it is hard to rely on it as controlling precedent today. A Texas bill has become law[165] and similar bills have been proposed banning *The 1619 Project* in Michigan,[166] New York,[167] and South Carolina.[168]

5. Application of Strict Scrutiny

If it can be demonstrated that these proposed or enacted regulations would in fact regulate some elements of private speech—and if, as demonstrated above, that speech does not fall into one of the narrow categories of unprotected speech—then any content-based restrictions must be subjected to the difficult hurdle of strict scrutiny. Consider bans on CRT. To satisfy strict scrutiny, the government must establish a compelling interest in regulating CRT and show that the selected regulation is narrowly tailored to achieving that interest. What is the government's compelling interest, saving American history? Protecting children from hurtful views? Seeking balanced presentations? It seems unlikely that the Court would find any such justifications as compelling. If the government cannot meet the compelling state interest standard, it would fail the first prong of strict

---

[163] 457 U.S. 853, 857 (1982) (a school board sought to remove a list of books it characterized as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy").

[164] *Id.* at 863-72 ("Our Constitution does not permit the official suppression of ideas. . . . If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.").

[165] 2021 Tex. Sess. Law Serv. Ch. 772 (H.B. 3979) (Vernon's).

[166] S.B. 0460, 101st Leg. (Mich. 2021).

[167] A.B. 8253, 244th Leg. Reg. Sess. (N.Y. 2021).

[168] H.B. 4343, 124th Leg. Sess. (S.C. 2021).

scrutiny.

The second prong, narrow tailoring, is equally robust. To justify a ban on protected speech, including CRT, *The 1619 Project*, or discussing "divisive concepts," the government would have to show that its regulation is the least restrictive alternative available for achieving its compelling interest. Of course, this assumes the government sets forth a compelling interest. Government animus towards others' ideas is neither compelling nor legitimate.

Singling out CRT for a ban is likely the worst kind of content-based, viewpoint discrimination. As the Court has written, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[169] None other than Justice Scalia authored those words.

Banning books, such as *The 1619 Project*, based on the ideas expressed by the authors, or discussion of "divisive concepts" generally should fare no better than limits on CRT. The government has no general power to ban ideas, including, for example, discourse on racial discrimination in the Nation's history. The primary lesson of the Court's *Tinker* opinion is that the government cannot punish people or exclude them because the government disagrees with ideas they express. For the same reasons that banning CRT is prohibited viewpoint discrimination, banning certain perspectives on race and racism in American history or discussion of "divisive concepts" should trigger the same objection.

Conclusion

Critical race theorists have the same rights as all Americans to share our ideas and writings. The government has no power to ban ideas because it disagrees with the speaker's viewpoints. The First Amendment precludes content-based, viewpoint discrimination. Where the government singles out one academic legal theory for banishment, it violates a cardinal principle of First Amendment law. This rule protects the conservative and the liberal writer/speaker alike. Each ban should be challenged on constitutional grounds.

---

[169] Rosenberger v. Univ. of Va., 515 U.S. 819, 829 (1995) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)). As this article was being written, school and public librarians are beginning to receive demands and queries about their book selection policies, suggesting that this area may be the next target for the thought-control crowd. *See* Alexandra Alter and Elizabeth A. Harris, *Attempts to Ban Books are Accelerating and Becoming More Divisive*, N.Y. TIMES (Sept. 16, 2022), www.nytimes.com/2022/09/16/books/book-bans.html#:~:text=Book%20banning%20efforts%20have%20grown,social%20media%20and%20political%20campaigns (last visited Dec. 13, 2022).

The Court has ruled that the proper remedy for noxious doctrine or speech is not censorship, but rather more speech.[170] "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[171] This has been the clear rule in the United States for the past fifty plus years. Critical race theory falls into no proscribable category of speech. It is presumptively protected. Likewise, *The 1619 Project* is simply a book of essays and poems by various writers reflecting on the many faces of race and racism in American life. Neo-patriots cannot use the law to ban speech they dislike. Their remedy is not censorship, but rather more speech.

All restrictions on fully protected, private speech are subject to strict scrutiny. If the Court follows its precedent, bans on CRT, *The 1619 Project*, and discussion of divisive concepts will lead short lives.

[170] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market. . . .").
[171] *Rosenberger*, 515 U.S. at 829.