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First Amendment Protections for “Good Trouble”

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Introduction

The more things change, the more they stay the same. This unfortunately is true with respect to the efforts of civil rights activities and the response of the dominant power structure in the United States. In the classical era of the Civil Rights Movement in the 1950s, 1960s, and 1970s, activists and protestors sought to march, demonstrate, stage sit-ins, speak up, and denounce the system of racial oppression in our country.[2] This was met not just by counterspeech—the preferred response within our constitutional framework—but also by efforts by the dominant power structure to censor and shut down those forms of public rebuke of our nation's racist practices.[3] Fast forward seventy years, and the tactics of the dominant power structure have essentially remained the same in response to today's civil rights activists who seek to protest police brutality, other forms of oppression, and disregard of Black lives, and who seek to educate the public about our nation's legacy and practice of systemic racism. Today's civil rights activists have been met not just with counterspeech but also with efforts to silence them—for example, by the anti-protest statutes enacted in many states, by efforts to financially cripple protest movements through the novel theory of "negligent protest" liability, and by so-called anti-Critical Race Theory laws that originated in a Trump-era executive order and that have now been enacted in many states, which muzzle the teaching of concepts of systemic racism in our public education systems (including at the college level).[4]

Fortunately, the successes of the classical era of the Civil Rights Movement were not limited to addressing racial discrimination and segregation: they also brought about powerful changes in First Amendment doctrines and ushered in the development of powerful doctrinal tools that can now be wielded by modern day civil rights activists to defeat these modern-day efforts to silence their messages of antiracism. In this classical era of the Civil Rights Movement in the 1950s, 1960s, and 1970s, civil rights activists successfully advanced a host of novel First

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[2] *See generally Responses Coming from the Civil Rights Movement*, PBS, https://www.pbs.org/wgbh/americanexperience/features/eyesontheprize-responses-coming-civil-rights-movement/ (last visited Feb. 5, 2023).

[3] *See id.*

[4] *See infra* notes 245–381 and accompanying text.

Amendment arguments to protect them in the exercise of their freedom of speech, assembly, association, rights to protest, demonstrate, criticize public officials, and petition the government for redress of grievances.[5] While these activists were protesting racial discrimination and segregation, they were also advancing the development of now-fundamental First Amendment doctrines, including the prior restraint doctrine, the vagueness and overbreadth doctrines, the public forum doctrine, the expressive conduct doctrine, the right to associate (without incurring liability for protest-related harms), and the right to fairly criticize public officials (without fear of defamation liability).[6] These classical era cases strengthened and developed the First Amendment's host of protections for unpopular speakers against governments who sought to punish their expressive activity. While the First Amendment was notoriously ineffective in protecting the rights of socialist, communist, and anti-war activists in the first part of the twentieth century, this amendment became an effective and increasingly robust weapon to protect civil rights activists in the 1950s, 1960s, and 1970s. As Supreme Court Justices were articulating First Amendment doctrines to protect the rights of these activists in the exercise of their civil rights, they were also forging an increasingly strong interrelated set of protections for freedom of expression.

Many of the fundamental First Amendment doctrines that were forged in the classical civil rights era are implicated in the context of modern-day civil rights and social protest movements, like the Black Lives Matter movement and movements critical of police misconduct, as well as educators' efforts to teach students about the effects of systemic racism within our public institutions of learning. These modern-day movements, like those of the classical civil rights era, have been met with opposition, including litigation and legislation.[7] The First Amendment doctrines that were forged in the classical civil rights era continue to be significant in confronting such forms of opposition and in advancing and protecting today's civil rights activists in their exercise of their freedom of speech, assembly, association, expressive conduct, and rights to protest, demonstrate, criticize public officials, and petition the government for redress of grievances.

Part I of this Article analyzes in detail the evolution and advancement of these fundamental First Amendment doctrines during the classical civil rights era of the 1950s, 1960s, and 1970s. Part II examines the continued relevance of these doctrines in the context of today's civil rights and social protest movements. Section II.A focuses on an examination of these doctrines in the context of modern-day protests and efforts to restrict the rights of protestors through litigation and legislation. Section II.B turns to an examination of these doctrines in the context of legislation adopted by a number of states in recent years that restricts teaching of so-called "critical race theory," concepts of systemic racism, and related concepts in our public schools, colleges, and universities. This Article concludes by observing that the First Amendment doctrines that were forged and strengthened during the classical civil rights era can successfully protect modern-day civil rights advocates against efforts to suppress their rights.

PART I: HOW THE CLASSICAL CIVIL RIGHTS ERA CASES FORGED FUNDAMENTAL FIRST AMENDMENT DOCTRINES

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[5] *See infra* Part I.
[6] *See infra* Part I.
[7] *See infra* discussion at Section II.B.

In the classical civil rights era of the 1950s, 1960s, and 1970s, the Supreme Court forged and expanded a number of powerful First Amendment doctrines and articulated constitutional protections for freedom of expression, freedom of association, and freedom to petition the government for redress of grievances. In that era, brave and well-represented civil rights activists helped to define and refine a number of crucial First Amendment doctrines, including the prior restraint doctrine, the vagueness and overbreadth doctrines, the public forum doctrine, the expressive conduct/symbolic speech doctrine, the right to associate, and the right to criticize public officials free of defamation liability. This Part examines these doctrinal evolutions in detail in the context of several classical civil rights era cases.

The Prior Restraint Doctrine

The First Amendment's protection against prior restraints on speech is among the most foundational of the doctrine. Prior restraints are regulations that restrict speech prior to its dissemination, such as prepublication licensing schemes, permitting schemes that require a license, or an official's permission before one may engage in expressive activity (like speaking in a public park or marching in a parade).[8] Systems of prior restraints differ from systems of subsequent punishment, which punish expression after its dissemination and which are generally viewed as less problematic from a free speech perspective than prior restraints.[9] The law's restriction of prior restraints has long been a foundational principle of freedom of expression in the Anglo-American tradition[10] because systems of prior restraint are likely to be much more hostile toward free speech than are systems of subsequent punishment.[11] Because prior restraints censor speech prior to its dissemination, courts have historically viewed prior restraints as more pernicious and dangerous to freedom of expression than methods of subsequent punishment.[12] Prior restraints are constitutionally suspect and indeed are viewed as presumptively unconstitutional.[13] As the Supreme Court explained in *Bantam Books, Inc. v. Sullivan*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[14]

In order for a system of prior restraint to be found constitutional, modern First Amendment doctrine demands that such a system must embody both substantive and procedural safeguards.[15] The powerful substantive safeguards that modern First Amendment doctrine now imposes on any system of prior restraint were forged and strengthened during the classical civil rights era, as the Supreme Court sought to restrict the discretion of government actors who were

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[8] *See* 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:7 (2022).
[9] *See id.* § 15:1; *see also* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648–50 (1955) (distinguishing prior restraint from subsequent punishment and discussing the significance of prior restraint).
[10] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) ("[T]he chief purpose of the [First Amendment is] to prevent previous restraints upon publication.").
[11] Emerson, *supra* note 15, at 660.
[12] *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 589 (1976) (Brennan, J., concurring); Emerson, *supra* note 15, at 660.
[13] SMOLLA, *supra* note 14, § 15:7.
[14] 372 U.S. 58, 70 (1963).
[15] *See* SMOLLA, *supra* note 14, § 15:3.

hostile to civil rights activists.[16] These substantive safeguards now require that any system of prior restraint must not vest broad decision-making discretion in the licensor—lest the licensor use its power to censor speech with which it disagrees.[17]

In *Shuttlesworth v. City of Birmingham*, the Supreme Court articulated the substantive safeguards that are necessary for a system of prior restraint to be constitutional.[18] The *Shuttlesworth* case grew out of a protest against racial discrimination in Birmingham, Alabama.[19] A Birmingham ordinance required anyone seeking to organize or hold a parade or procession on streets or public ways (i.e., on traditional public forums[20]) to secure a permit from the city beforehand.[21] The ordinance expressly granted the parade commission the discretion to deny a parade permit request if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[22] This sweeping discretion empowered those responsible for the permitting process to deny permission to speakers whose messages they disagreed with. Over a week before his organization's planned anti-discrimination protest march, Reverend Fred L. Shuttlesworth sent a representative to apply at City Hall for a parade permit.[23] Commissioner of Public Safety Eugene ("Bull") Connor flatly denied the parade permit request and informed the representative: "[Y]ou will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail."[24] Following that refusal, Shuttlesworth sent a telegram to Commissioner Connor requesting a permit to protest on the city sidewalks "against the injustices of segregation and discrimination."[25] Once again, Connor refused this request and sent a wire back to Shuttlesworth: "I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama."[26] Notwithstanding their lack of a parade permit, on the afternoon of Good Friday, April 12, 1963, fifty-two people (all of whom were Black) walked out of their Birmingham church, led by three Black ministers, including Shuttlesworth, and walked two abreast to protest Birmingham's denial of their civil rights.[27] After marching for four blocks, the protestors were arrested by the city police for violating the parade permit ordinance.[28] Shuttlesworth was sentenced to ninety days' imprisonment at hard labor.[29]

Shuttlesworth challenged his conviction on the relatively novel First Amendment grounds that the Birmingham parade permit embodied an unconstitutional prior restraint because it lacked the requisite safeguards and because it vested unbridled discretion in the licensing authority.[30] The Supreme Court agreed.[31] First, the Court explained that a "law subjecting the exercise of

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[16] *See infra* notes 24–41 and accompanying text.
[17] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988).
[18] *See* 394 U.S. 147, 150–51 (1969).
[19] *See id.* at 148–49.
[20] *See, e.g.*, Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1 (2019) (discussing the public forum doctrine).
[21] *Shuttlesworth*, 394 U.S. at 149.
[22] *Id.* at 149–50 (quoting BIRMINGHAM, ALA., GEN. CODE § 1159 (1963)).
[23] *Id.* at 148, 157.
[24] *Id.* at 157; *id.* at 160 n.1 (Harlan, J., concurring).
[25] *Id.* at 157 (majority opinion).
[26] *Id.* at 157–58.
[27] *Id.* at 148–49.
[28] *Id.* at 149.
[29] *Id.* at 150.
[30] *See* Brief for Petitioner at 23, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (No. 42).

First Amendment freedoms to the prior restraint of a license, *without narrow, objective, and definite standards to guide the licensing authority*, is unconstitutional."[32] The Court held that a law that makes the peaceful enjoyment of constitutionally protected freedoms contingent on the "uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint."[33] The Court explained that permitting authorities may not be granted the unbridled discretion "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."[34] The Court struck down Shuttlesworth's conviction because the parade permitting scheme granted broad and unbridled discretion to the licensing authority—allowing the Commission to deny a request if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused"—and therefore lacked the requisite substantive safeguards necessary to render the prior restraint constitutional.[35]

Further, as the concurrence in *Shuttlesworth* emphasized, the licensing scheme embodied in the parade ordinance also lacked the necessary *procedural* safeguards.[36] As the concurrence explained, systems of prior restraint must also embody procedural safeguards to be constitutional, including by providing for a "speedy administrative or judicial right of review," so that expressive rights "will not be lost in a maze of cumbersome and slow-moving procedures."[37] The parade ordinance was also constitutionally deficient because it did "not establish any procedure at all to govern the consideration of applications," and therefore lacked the requisite procedural safeguards.[38]

Cox v. Louisiana was another case from the classical civil rights era that helped to strengthen the prior restraint doctrine.[39] *Cox* grew out of a large-scale peaceful demonstration organized to protest segregated lunch counters in Baton Rouge, as well as the earlier arrests of students who participated in such protests.[40] In December 1961, twenty-three students from Southern University, a historically Black university, were arrested for picketing and urging the boycotting of stores with segregated lunch counters.[41] On the night of these students' arrests, Reverend B. Elton Cox, an advisor to the Congress of Racial Equality ("CORE"), addressed a meeting in which the students planned to demonstrate the following day in front of the courthouse to protest the arrest and imprisonment of their fellow students and to protest segregation and discrimination in general.[42] The next morning, about 2,000 students left the campus, which was located about five miles from downtown Baton Rouge, and 1,500 of the

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[31] *Shuttlesworth*, 394 U.S. at 150–51, 159.
[32] *Id.* at 150–51 (emphasis added).
[33] *Id.* at 151.
[34] *Id.* at 153.
[35] *See id.* at 149–50, 156 (quoting BIRMINGHAM, ALA., GEN. CODE § 1159 (1963)).
[36] *See id.* at 161 (Harlan, J., concurring).
[37] *Id.* at 162–63.
[38] *See id.* at 163.
[39] 379 U.S. 536 (1965).
[40] *Id.* at 538–40.
[41] *Id.* at 538.
[42] *Id.* at 538–39.

students assembled at the old State Capitol Building, two and one half blocks from the courthouse.[43] "Cox identified himself as the group's leader" and informed law enforcement that the students intended to demonstrate to protest their fellow students' arrest and to protest segregation and discrimination in general.[44] The police requested that Cox disband the group, but Cox refused to do so.[45] The group then walked in an orderly manner toward the courthouse.[46] Cox was arrested and convicted on several counts,[47] including on the grounds of obstructing public passages and of disturbing the peace.[48]

Cox challenged his conviction on First Amendment and other grounds, and the Supreme Court ultimately ruled in his favor.[49] Although, unlike Shuttlesworth, Cox had not applied for or been denied a parade permit, the Court held that since there was evidence that the City had allowed parades and public meetings based on prior "arrangements . . . made with public officials,"[50] the evidence showed that "the authorities in Baton Rouge permit[ted] or prohibit[ed] parades or street meetings" under the statute "in their completely uncontrolled discretion."[51] Accordingly, in reference to the selective enforcement of the obstructing public passages statute, the Court held that "[t]he situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials."[52] This scheme constituted an unconstitutional prior restraint in which the city "require[d] all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d]."[53] The Court held that:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.[54]

In *Shuttlesworth*, *Cox*, and their progeny, the Supreme Court articulated the substantive and procedural safeguards that must be present before any system of prior restraint may be found constitutional. The Court made clear that no government permitting scheme or licensing scheme will be upheld unless it embodies clear, precise, and definite guidelines to constrain the discretion of the decision-maker and unless it provides for swift review of an adverse licensing decision by a judicial body. This prior restraint jurisprudence has proven to be a powerful

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[43] *Id.* at 539.
[44] *Id.* at 540.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 537–38.
[48] *Id.*
[49] *Id.* at 552.
[50] *Id.* at 556 (alteration in original).
[51] *Id.* at 557.
[52] *Id.*
[53] *Id.* at 557–58 (second and third alterations in original) (quoting Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939)).
[54] *Id.*

bulwark of protection against the standardless discretion exercised by government actors against unpopular speakers over the past several decades, and remains an important tool in the modern-day civil rights activist's toolkit.

The Vagueness and Overbreadth Doctrines

Several classical civil rights era cases substantially contributed to the development of two fundamental doctrines for protecting expressive activities—the vagueness doctrine and the overbreadth doctrine. In these cases, notably *Cox*, *Edwards v. South Carolina*, and *Gregory v. City of Chicago*, the Supreme Court struck down vague and/or overbroad laws that had been wielded by government officials to restrict First Amendment freedoms of civil rights activists.[55]

As discussed above, *Cox* centered around a large-scale peaceful demonstration to protest segregated lunch counters in Baton Rouge in December 1961.[56] The demonstrators marched to the west sidewalk across the street from the courthouse, and the students proceeded in an orderly fashion and engaged in cheering, clapping, and singing, prompted by hearing the singing of their fellow students who were imprisoned in the nearby jail.[57] Thereafter, a small crowd of "100 to 300 curious white people . . . gathered on the east sidewalk and courthouse steps, about 100 feet from the demonstrators," and seventy-five to eighty police officers, as well as members of the fire department, were deployed to the street between the demonstrating students and the onlookers.[58] Several of the students displayed picket signs protesting discrimination and segregation.[59] Cox delivered a speech urging people to boycott stores with discriminatory practices.[60] In response to Cox's speech, several onlookers engaged in some "muttering" and "grumbling."[61] After Cox's speech, the sheriff took to the microphone: "Now, you have been allowed to demonstrate. Up until now your demonstration has been more or less peaceful, but what you are doing now is a direct violation of the law, a disturbance of the peace, and it has got to be broken up immediately."[62] Cox and the demonstrators, however, refused to break up their demonstration.[63] The sheriff's deputies then announced "[y]ou have heard what the [s]heriff said, now, do what he said," and began to shove some of the students away from the area.[64] Almost immediately thereafter, one of the police officers "exploded a tear gas shell at the crowd," which "was followed by several other shells," upon which the crowd dispersed.[65] The following day, Cox was arrested and convicted on several counts, including disturbing the peace,[66] and was sentenced to a total of one year and nine months in jail and a cumulative fine of $5,700.[67]

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[55] *See id*.; Edwards v. South Carolina, 372 U.S. 229 (1963); Gregory v. City of Chicago, 394 U.S. 111 (1969).
[56] *See* 379 U.S. at 538–40.
[57] *Id.* at 541–42, 546–49.
[58] *Id.* at 541.
[59] *Id.* at 542.
[60] *Id.* at 542–43.
[61] *Id.*
[62] *Id.* at 543.
[63] *Id.*
[64] *Id.* at 543–44.
[65] *Id.* at 544.
[66] *Id.* at 537–38, 544.
[67] *Id.* at 538.

In support of the charge against Cox for breach of the peace, the State argued that the loud clapping and cheering engaged in by the students "converted the peaceful assembly into a riotous one."[68] The Supreme Court, in reviewing Cox's conviction, held that "the students, though they undoubtedly cheered and clapped, were well-behaved throughout" and were "orderly" and not riotous; therefore, the record did not support the contention that the students' cheering, clapping, and singing constituted a breach of the peace.[69] The Court held further that the criminal breach of the peace statute under which Cox was convicted was unconstitutionally vague.[70] The Louisiana "disturbing the peace" statute at issue provided in part that:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street of public highway, or upon a public sidewalk, or any other public place or building . . . shall be guilty of disturbing the peace.[71]

The Louisiana Supreme Court had provided an authoritative construction of the statutory term "breach of the peace" as limited to the meaning: "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."[72] As the Supreme Court explained, however, even this narrowing construction "would allow persons to be punished merely for peacefully expressing unpopular views."[73] Accordingly, the Court held that the breach of the peace statute under which Cox was convicted was unconstitutionally overbroad and vague:

> [A] "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions, and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . ." Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. . . . "A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment [and is unconstitutional]."[74]

The vagueness of the law at issue in *Edwards v. South Carolina*[75] was even more constitutionally problematic than was present in *Cox*. Like *Cox*, *Edwards* centered on the protests engaged in by a number of Black high school and college students in opposition to

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[68] *Id.* at 546.
[69] *See id.* at 547 ("We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.").
[70] *Id.* at 551.
[71] *Id.* at 548 (quoting LA. REV. STAT. § 14:103.1 (Cum. Supp. 1962)).
[72] *Id.* at 551 (quoting State v. Cox, 156 So.2d 448, 455 (La. 1963)).
[73] *Id.*
[74] *Id.* at 551–52 (first quoting Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949); and then quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
[75] 372 U.S. 229 (1963).

discrimination.[76] In March 1961, Black students convened at the Zion Baptist Church in Columbia, South Carolina, after which they marched in smaller groups to the State House grounds, "an area of two city blocks that was open to the general public" (and which was a traditional public forum under First Amendment law).[77] Their purpose was:

> to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with the present condition of discriminatory actions against [Black people], in general, and to let them know that we were dissatisfied, and that we would like for the laws which prohibited [Black people's] privileges in this State to be removed.[78]

For about thirty to forty-five minutes, the students walked in a peaceful manner through the State House grounds, carrying signs with messages such as "Down with segregation."[79] The protest did not involve any obstruction of traffic on the State House grounds.[80] During the protest, about 200 to 300 onlookers gathered, but no one caused or threatened any trouble.[81] There were also about thirty law enforcement officers present, who had been provided with advance knowledge of the protest.[82] At one point, the police authorities informed the students "that they would be arrested if they did not disperse within [fifteen] minutes,"[83] but the students did not disperse.[84] Instead, one of the students delivered a religious speech, followed by the students singing "The Star Spangled Banner" and other patriotic and religious songs, while stomping their feet and clapping their hands.[85] Fifteen minutes later, the police arrested the students "and marched them off to jail."[86]

The students were charged and convicted of common law breach of the peace and received "sentences ranging from a $10 fine or five days in jail, to a $100 fine or [thirty] days in jail."[87] Unlike the law at issue in the *Cox* case, the breach of the peace law that the students were charged with violating in *Edwards* was part of the common law of the state.[88] In affirming the students' convictions, the state supreme court explained that, under the law of South Carolina,

> the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows:
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> [A] violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . . [including] any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely

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[76] *Id.* at 230.
[77] *Id.* at 229–30.
[78] *Id.* at 230.
[79] *Id.* at 230–31.
[80] *Id.* at 231–32.
[81] *Id.* at 231.
[82] *Id.* at 230.
[83] *Id.* at 233.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 234.
[88] *Compare id.* at 229–30, *with* Cox v. Louisiana, 379 U.S. 536, 538 (1965) (reviewing a conviction for the violation of a statutory breach of the peace law).

> to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. . . . By 'peace' . . . is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members . . . .[89]

The students appealed their convictions, and the Supreme Court ruled in their favor, holding that the state breach of the peace law was unconstitutionally vague.[90] In reversing their convictions for breach of the peace under this common-law crime, the Court emphasized that the expression of unpopular views is fully protected—even if it invites dispute or stirs people to anger—unless such expression creates a clear and present danger of incitement to riot:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. . . . These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. . . . [T]he courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."[91]

The Supreme Court also explained the First Amendment's interrelated protections for free speech, free assembly, and freedom to petition the government for redress of grievances:

> [I]n arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances. . . . The petitioners felt aggrieved by laws of South Carolina . . . . They peaceably assembled at the site of the State Government, and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina." . . . The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form.[92]

In *Gregory v. City of Chicago*, the Supreme Court further developed the First Amendment protections against vague laws.[93] *Gregory* arose out of an incident in which comedian and political activist Dick Gregory, and his fellow protestors, frustrated with the slow pace of desegregation in Chicago public schools eleven years after the 1954 *Brown v. Board of*

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[89] *Edwards*, 372 U.S. at 234 (quoting Edwards v. State, 123 S.E.2d 247, 249 (S.C. 1961)).
[90] *Id.* at 238.
[91] *Id* at 236–38 (quoting Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949)).
[92] *Id.* at 235–36 (footnote omitted).
[93] 394 U.S. 111 (1969).

Education decision,[94] engaged in a protest march to call for the removal of Chicago Superintendent of Schools Benjamin Willis and to press Chicago mayor Richard J. Daley to remove the superintendent from power.[95] On August 2, 1965, Gregory and his fellow protestors conducted a three-and-a-half-hour march from the Chicago's Loop District to the South Side neighborhood where the mayor lived.[96] The protestors were accompanied during the march by 100 police officers and an assistant city attorney.[97] The police officers met Gregory and the protestors at a gathering place in Grant Park, where Gregory delivered a speech critical of the government.[98] The protestors marched to the city hall, and then to the mayor's home about five miles away, arriving there at about 8 PM.[99] When they reached the mayor's neighborhood, they began marching around near the mayor's home.[100] Meanwhile, the crowd of spectators from the neighborhood grew and became increasingly unruly.[101] At around 9:30 PM, when the police apparently became concerned that the crowd of spectators "could no longer be contained, the police asked Gregory and his [fellow protestors] to leave the area."[102] The protestors refused and were arrested and charged with violation of Chicago's disorderly conduct ordinance, which provides:

> All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; . . . shall be deemed guilty of disorderly conduct . . . .[103]

Gregory and his fellow protestors were convicted under this disorderly conduct ordinance, and appealed their convictions, claiming that their First Amendment rights were violated.[104] The Supreme Court unanimously agreed, holding that, in light of the trial judge's charge to the jury, their conviction under this disorderly conduct statute allowed the jury to convict the defendants based on their First Amendment protected activity.[105] In their concurrence, Justices Black and Douglas explained the First Amendment problems with vague laws like the Chicago disorderly conduct ordinance:

> [T]his Court has repeatedly warned States . . . that they cannot regulate conduct connected with [First Amendment] freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms. . . . The disorderly conduct ordinance under which these petitioners were charged and

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[94] 347 U.S. 483 (1954).
[95] *Gregory*, 394 U.S. at 115 (Black, J., concurring).
[96] *Id.* at 115–16.
[97] *Id.* at 116, 127.
[98] *Id.* at 116 ("First we will go over to the snake pit [city hall]. When we leave there, we will go out to the snake's house [the mayor's home]. Then, we will continue to go out to Mayor Daley's home until he fires Ben Willis [Superintendent of Schools]." (alterations in original)).
[99] *Id.*
[100] *Id.*
[101] *Id.* at 128.
[102] *Id.* at 116.
[103] *Id.* at 116–17 (first alteration in original) (quoting CHI., ILL., MUN. CODE § 193-1 (1968)).
[104] *Id.* at 112 (majority opinion).
[105] *Id.* at 113.

> convicted is not . . . a narrowly drawn law . . . . To the contrary, it might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment. The average person charged with its violation is necessarily left uncertain as to what conduct and attitudes of mind would be enough to convict under it. . . . Moreover, the ordinance goes on to state that it shall be a crime for persons to "collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons . . . ." Such language could authorize conviction simply because the form of the protest displeased some of the onlookers, and of course a conviction on that ground would encroach on First Amendment rights. . . . And it must be remembered that only the tiniest bit of petitioners' conduct could possibly be thought illegal here—that is, what they did after the policeman's order to leave the area. The right "peaceably to assemble, and to petition the Government for a redress of grievances" is specifically protected by the First Amendment. . . . There are ample ways to protect the domestic tranquility without subjecting First Amendment freedoms to such a clumsy and unwieldy weapon.[106]

Cox, *Edwards*, and *Gregory* make clear that statutes that are vaguely worded or overly broad in their coverage cannot form the basis for conviction of those engaged in First Amendment protected activities.

The Right to Engage in Expressive Conduct

Cases involving sit-ins—in which protestors engaged in acts of nonviolent sit-ins at lunch counters, libraries, and other segregated public places—while clearly advancing the causes of racial equality, also served to define and strengthen the First Amendment doctrine of expressive conduct—i.e., conduct within the scope of the Amendment's protections. *Garner v. Louisiana*[107] and *Brown v. Louisiana*[108] are among the most important cases to recognize the protections for expressive conduct. Prior to *Garner* and *Brown*, the Supreme Court's protections for expressive conduct were not well-developed. In the 1931 case of *Stromberg v. California*, the Court had extended the First Amendment's protections to the flying of a red flag and invalidated a statute that prohibited any person from displaying "a red flag . . . in any public place . . . as a . . . symbol . . . of opposition to organized government."[109] The Court observed that the red flag law could be construed as prohibiting peaceful opposition to organized government and thus limiting free political discussion.[110] Then, in the 1968 case of *United States v. O'Brien* (burning draft cards to protest the Vietnam War era draft) and the 1969 case of *Tinker v. Des Moines* (wearing black armbands to protest the Vietnam War), the Supreme Court extensively defined the contours of the expressive conduct doctrine.[111] But in between the timeframe of the *Stromberg* case in the

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[106] *Id.* at 117–19, 121 (Black, J., concurring) (quoting CHI., ILL., MUN. CODE § 193-1 (1968)).
[107] 368 U.S. 157 (1961).
[108] 383 U.S. 131 (1966).
[109] 283 U.S. 359, 361, 369–70 (1931) (quoting CAL. PEN. CODE. § 403(a) (repealed 1933)).
[110] *Id.* at 369.
[111] United States v. O'Brien, 391 U.S. 367, 369–70, 375, 386 (1968); Tinker v. Des Moines, 393 U.S. 503, 504, 509–10 (1969).

1930s and the *O'Brien* and *Tinker* cases in the late 1960s, the mid-1960s' civil rights era cases of *Garner* and *Brown*—both involving nonviolent sit-ins to protest Louisiana's discriminatory segregation practices—substantially advanced the Court's expressive conduct jurisprudence and provided meaningful First Amendment protection for nonviolent protest and other expressive acts of civil disobedience.

Garner involved several sit-ins to protest racial discrimination and segregation at department store lunch counters in Baton Rouge, Louisiana.[112] While the department stores permitted Black patrons to purchase their goods without discrimination, "the store[] [did] not provide integrated service at their lunch counters."[113] In one of several consolidated cases at issue in *Garner*, Jannette Hoston, a student at Southern University, along with six of her colleagues, took seats at the "white lunch counter" at the Kress Department Store.[114] As the students took their seats at the counter, the manager instructed the waitress to tell the group "that they could be served [only] at the counter across the aisle."[115] After being told this, the students "made no response and remained quietly in their seats."[116] The manager telephoned the police, who arrived and directed the students to leave.[117] The students refused to leave.[118] One student calmly requested a glass of iced tea.[119] The police placed the students under arrest and charged them with violating the Louisiana breach of the peace statute.[120] The students were convicted and sentenced to four months' imprisonment.[121]

The students challenged their convictions on the grounds that their convictions were based on no evidence of guilt and therefore deprived them of due process; that the breach of the peace statute was so vague as to offend the Due Process Clause; and that their convictions violated their First Amendment right to freedom of expression.[122]

The Court found it unnecessary to reach the broader constitutional questions raised by the students because it held that the students' convictions in these cases were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause."[123] The Court explained that the statutory language, as earlier interpreted by the Louisiana Supreme Court, was not intended to embrace peaceful and orderly conduct.[124] Because the students' conduct was peaceful and orderly, the Court held that it could not support a conviction for breach of the peace.[125]

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[112] *See Garner*, 368 U.S. at 158–60.
[113] *See id.* at 159–60, 160 n.3 (explaining that "[t]he terminal itself caters to both races, but separate facilities are maintained for the service of food").
[114] *See id.* at 159–60, 170.
[115] *See id.* at 160.
[116] *Id.*
[117] *See id.*
[118] *Id.*
[119] *See id.*
[120] *Id.*
[121] *See id.* at 161.
[122] *See id.* at 162–63.
[123] *Id.* at 163.
[124] *Id.* at 167.
[125] *See id.* at 173–74.

Justice Harlan in his concurrence agreed that the students' convictions were unconstitutional on the grounds that the breach of the peace statute was unconstitutionally vague and that there was no clear and present danger to the public peace and order as to support the convictions under the breach of the peace statute.[126] Harlan also concluded that the students' sit-in demonstration constituted expressive conduct and was therefore within the First Amendment's protections for freedom of expression:

> We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country. Such a demonstration . . . is as much a part of the "free trade in ideas," as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak . . . to mere verbal expression. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech[,] . . . the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections.[127]

Thus, in *Garner*, Justice Harlan first began to articulate an expansive concept of First Amendment protected expressive conduct for protest activity like sit-ins.

Five years after *Garner*, the Court took up *Brown v. Louisiana*, also involving a sit-in, this time to protest racial discrimination and segregation practiced by public libraries in Louisiana.[128] This sit-in was planned by the CORE, representatives of which had notified the sheriff of the organization's intention to engage in the sit-in.[129] The local branches of Audubon Regional Library in Clinton, Louisiana, had a practice of refusing service to Black people and only allowing Black people to borrow books from the *blue* bookmobile, whereas white people were allowed to patronize the local branches and were allowed to borrow books from the *red* bookmobile.[130] In March 1964, five young Black men went into the reading room of the Clinton Branch of the Library.[131] When the branch assistant asked if she could assist the men, one of the men, Henry Brown, requested a book entitled *The Story of the Negro* by Arna Bontempts.[132] The assistant informed Brown that the branch did not have the book but that she would request it from the State Library and that Brown could pick up the book from the blue bookmobile when it was available or that the book could be sent to him.[133] Although the assistant testified that she expected the men would then leave the premises, they did not, and instead Brown proceeded to

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[126] *See id.* at 185–86, 201 (Harlan, J., concurring).
[127] *Id.* at 201–02 (citations omitted) (first quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and then quoting Whitney v. California, 274 U.S. 357, 375 (1957) (Brandeis, J., concurring)).
[128] *See* 383 U.S. 131, 135–36 (1966).
[129] *See id.* at 137.
[130] *See id.* at 136.
[131] *See id.*
[132] *See id.*
[133] *Id.*

sit down in a chair in the reading room, while the four other men stood near him silently.[134] The branch assistant summoned the regional librarian, who asked the men to leave, but they declined to do so.[135] Shortly thereafter, the sheriff arrived and asked the men to leave.[136] The men said that they would not.[137] The sheriff then arrested the men "for not leaving a public building when asked to do so by an officer."[138] All five men were subsequently convicted of breach of the peace.[139] Brown was sentenced to pay a fine of "$150 and costs, and in default thereof to spend 90 days in the parish jail," while his four other companions received lesser fines and terms.[140]

Brown and the others appealed their convictions.[141] In reversing their convictions for breach of the peace, the Supreme Court first explained, as it had done in earlier cases, that the men could not constitutionally be convicted merely because they did not comply with the order to leave the library:

> [P]etitioners' presence in the library was unquestionably lawful. . . . They were neither loud, boisterous, obstreperous, indecorous nor impolite. There is no claim that, apart from the continuation—for ten or fifteen minutes—of their presence itself, their conduct provided a basis for the order to leave, or for a charge of breach of the peace. . . . They sat and stood in the room, quietly, as monuments of protest against the segregation of the library. . . . [T]here is not the slightest evidence which would or could sustain the application of the [breach of the peace] statute to petitioners.[142]

The Court then made clear that the First Amendment's protections extended to expressive conduct such as that engaged in by the men in their sit-in demonstration, explaining that the First Amendment's protections "are not confined to verbal expression[,] . . . [but instead] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."[143]

In subsequent cases, the Court recognized that activities like demonstrating and marching also fell within the ambit of First Amendment expressive conduct. By the time it decided *Gregory* in 1969, the Court held, without need of elaboration, that the First Amendment protects acts of marching and demonstrating as expressive conduct.[144] In sum, the Court established that the First Amendment protects not only verbal expression but also conduct engaged in for expressive purposes—like acts of sit-ins, demonstrating, and marching.

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[134] *See id.*
[135] *Id.* at 137.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 138.
[140] *See id.* at 137–38.
[141] *Id.* at 138.
[142] *Id.* at 137–39.
[143] *Id.* at 141–42.
[144] Gregory v. City of Chicago, 394 U.S. 111, 113 (1969).

The Right to Criticize Public Officials

The right to criticize public officials free of liability for defamation is an integral component of our modern conception of the First Amendment. But until the civil rights era case *New York Times v. Sullivan* in 1964, this fundamental First Amendment protection was unrecognized by the Court. In *Sullivan*, the Court first subjected the state common law of libel to scrutiny under the First Amendment.[145] Indeed, the Supreme Court characterized this case as an opportunity to articulate the "central meaning of the First Amendment"[146]—i.e., that the people have a right to criticize the public officials who govern them, free of liability for libel.

Sullivan involved the racially discriminatory tactics of law enforcement officials in Montgomery, Alabama, and the efforts of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South to publicize such tactics and to elicit public support for their efforts to condemn such tactics.[147] The Committee placed an advertisement in *The New York Times* to appeal for funds to support Dr. King's defense and to support students who were protesting discrimination in the South.[148] The advertisement that the Committee placed in the newspaper, entitled *Heed Their Rising Voices*, described discriminatory tactics of the law enforcement officials in Montgomery, Alabama:

> As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .
>
> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .
>
> Small wonder that the Southern violators of the Constitution . . . are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. . . .
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they

[145] N.Y. Times v. Sullivan, 376 U.S. 254, 264 (1964).
[146] *Id.* at 273.
[147] *See id.* at 256.
[148] *See id.* at 256–57.

> have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South.[149]

The advertisement ended with an appeal for funds.[150] The advertisement's description of civil rights protests and ensuing arrests contained minor inaccuracies regarding the police tactics toward the student protestors and toward Dr. King—as the Supreme Court explained:

> The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a pre-registration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps. . . . Dr. King had not been arrested seven times, but only four . . . .[151]

In response to these minor inaccurate statements, which he claimed were imputable to him as supervisor of the police, L. B. Sullivan—the Commissioner of Montgomery, Alabama, who was responsible for supervising the police department—sued the Committee and *The New York Times* for libel and recovered a $500,000 judgment in the Alabama state courts.[152]

On appeal, the Supreme Court subjected the state common law of defamation to searching scrutiny under the First Amendment.[153] The Court explained that the First Amendment required breathing space for criticisms of public officials' conduct and that such breathing space was inherent in the central meaning of the First Amendment, which our nation had inherently adopted by rejecting the cause of action of seditious libel in the short-lived and infamous Sedition Act of 1798:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. . . . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct

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[149] *Heed Their Rising Voices*, N.Y. TIMES, March 19, 1960.
[150] *Id.*
[151] *See Sullivan*, 376 U.S. at 259.
[152] *See* N.Y. Times v. Sullivan, 144 So.2d 25, 29 (Ala. 1962).
[153] *Sullivan*, 376 U.S. at 279.

> unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not.[154]

The Court then applied its newly articulated test to conclude that the facts of the case were constitutionally insufficient to meet the knowledge or recklessness standard and that *The New York Times* and other defendants could therefore not be held liable for defamation.[155] The Court went on to hold that the evidence was constitutionally defective in that it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" Sullivan.[156] The Court warned that Sullivan's argument on this point ran the risk of converting criticism of government action into criticism of government officials responsible for the action for purposes of defamation liability, which would have dangerous consequences for the ability to criticize the government that lies at the core of our First Amendment freedoms.[157]

By ending the use of defamation law by government officials to insulate themselves from criticism of their actions by civil rights activists and other critics, the Supreme Court in *Sullivan* provided important breathing room for "uninhibited, robust, and wide-open"[158] debate on public issues and discussions and criticisms of public officials—protections that lie at the very heart of our First Amendment freedoms and our system of democratic self-government.[159]

Associational Rights and Limitations on Liability for Illegal Acts of Others

In *NAACP v. Claiborne Hardware*, the Supreme Court strengthened protections for the right of association for protestors by protecting protest leaders under the First Amendment from liability for the tortious actions of others.[160] In that case, Black citizens of Port Gibson, Mississippi, had organized a long-term boycott of white-owned businesses beginning in 1966 to attempt secure compliance by civic and business leaders with a host of demands for racial justice and equality—including demands related to desegregation, "public improvements in [B]lack residential areas, . . . and [an] end to verbal abuse [of Black people] by law enforcement officers."[161] The boycott was intended to be nonviolent, but threats of violence and some acts of violence did occur—in one instance, for example, after the police killed a young Black man in 1969, "sporadic acts of violence ensued."[162] In addition, leaders of this boycott identified and ostracized members of the community who patronized white businesses in contravention of the boycott.[163]

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[154] *Id.* at 279–80.
[155] *See id.* at 285–86.
[156] *Id.* at 288.
[157] *See id.* at 291.
[158] *See id.* at 270.
[159] The strong protections that *Sullivan* and its progeny provide to civil rights activists and other critics of public officials are currently in some danger of being scaled back. *See, e.g.*, Andrew Chung, *U.S. Justices Thomas, Gorsuch Question Libel Protections for Media*, REUTERS (July 2, 2021, 1:04 PM), https://www.reuters.com/article/us-usa-court-libel-idCAKCN2E822L.
[160] 458 U.S. 886, 907–08 (1982).
[161] *See id.* at 889.
[162] *See id.* at 900–01.
[163] *See id.* at 903–04.

In response, Port Gibson merchants sued the National Association for the Advancement of Colored People ("NAACP"), including the national organization and local organizers.[164] The merchants asked the court to enjoin defendants' acts of standing in front of businesses and advocating that other consumers not patronize those businesses and requested damages for the value of lost earnings related to the boycott over a seven-year period from 1966 through 1972.[165] The lower court imposed a broad permanent injunction, which prevented the boycott from continuing, granted the merchants' request for damages based on three separate conspiracy theories, and held that the NAACP and the individual defendants who organized the boycott or participated in it were jointly and severally liable for all economic damages resulting from the eight-year boycott, which amounted to $1.25 million plus interest.[166] The Mississippi Supreme Court, on appeal, overturned two of the theories of liability, but rejected the NAACP's First Amendment defenses and upheld liability on the third, concluding that the boycott was unlawful because force, violence, or threats were present.[167]

On appeal, the U.S. Supreme Court unanimously reversed, affirming the rights of boycotters as protected by both the First and Fourteenth Amendments, and sharply curtailing the rights of states to impose liability based on association.[168] The Court held that the purpose of the boycott, the actions undertaken as part of it, and the interpersonal encouragement were all protected forms of speech and conduct.[169] The Court explained:

> The [B]lack citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. . . . "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[170]

Based on its review of the activities in this case, the Court held that:

> [T]he boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.[171]

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[164] *Id.* at 889–90.
[165] *See id.* at 889–90, 892–93.
[166] *Id.* at 891–95.
[167] NAACP v. Claiborne Hardware, 393 So.2d 1290, 1301 (Miss. 1980).
[168] *Claiborne Hardware*, 458 U.S. at 907–08.
[169] *Id.*
[170] *Id.* (quoting Citizens Against Rent Control Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 294 (1981)).

Regarding the balance between protecting First Amendment activity that led to violence and the governmental interest in redressing harms caused by illegal activity, the Court stated:

> The fact that [petitioners'] activity is constitutionally protected . . . imposes a special obligation on this Court to examine critically the basis on which liability was imposed. . . . Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. *When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*[172]

The Court also reversed the Mississippi Supreme Court's holding regarding the liability of the NAACP. The Court held that, in order to hold the NAACP liable, the state would be required to show:

> "[C]lear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" . . . [T]his intent must be judged "according to the strictest law," for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."[173]

The Court further explained:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[174]

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[171] *Id.* at 911–12 (citation omitted) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
[172] *Id.* at 915–17 (emphasis added) (citations omitted) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
[173] *Id.* at 919 (footnote omitted) (quoting Scales v. United States, 367 U.S. 203, 229–300 (1961)).
[174] *Id*. at 920.

In particular, regarding the liability of NAACP Field Secretary Charles Evers, the Court held that, even though Evers was "specially connected with the boycott," he could not be held liable because (1) he did not authorize, direct, or ratify specific tortious activity; (2) his speeches did not violate the *Brandenburg* test for incitement; and (3) the speeches were not evidence that he gave specific instructions to carry out violent acts or threats.[175] The Court explained:

> If there were other evidence of [Evers'] authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that *there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence*. The [lower court's] findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred. The findings are constitutionally inadequate to support the damages judgment against him.[176]

The Supreme Court decision in *Claiborne Hardware* thus provides strong protection for associational rights and stands for the proposition that individuals cannot be held liable for the actions of third parties with whom they associate for First Amendment-protected purposes merely through that association. Rather, for liability to be imposed, the state must show clear proof that the group itself possessed unlawful goals and that the individual defendant had a specific intent to further those illegal aims—and such specific intent must be judged according to the strictest law.

First Amendment Protections for Controversial Subjects in Public Education

During the classical civil rights era, the Supreme Court also strengthened the First Amendment's protections for unpopular and disfavored ideas in the context of the public education system. The *Board of Educucation, Island Trees Union Free School District No. 26 v. Pico* case arose in 1975 in New York, when a Long Island area Board of Education sought to restrict books in its public school curriculum and library that were by and about people of color, including books by and about James Baldwin, Langston Hughes, Richard Wright, Alice Childress, and Eldridge Cleaver, as well as those involving Native Americans.[177] The controversy began when several members of a Long Island, New York area Board of Education traveled to upstate New York to attend a conference sponsored by the Parents of New York United, a politically conservative organization that was gaining national momentum in the 1970s.[178] At the conference, the Parents of New York United provided the Board of Education members with a

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[175] *Id*. at 926–29. Under *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969), speakers may be held liable for advocacy of violence only when they intend to incite imminent lawless action and only if such acts are likely to occur.

[176] *Id.* at 929 (emphasis added) (footnotes omitted).

[177] 457 U.S. 853 (1982); *see infra* notes 187–92 and accompanying text.

[178] *Pico*, 457 U.S. at 856; *Inside the SCOTUS Case on School Library Censorship*, WNYC STUDIOS (Feb. 4, 2022), https://www.wnycstudios.org/podcasts/otm/segments/first-supreme-court-case-banned-school-books-on-the-media.

list of books considered "objectionable" and "'improper fare for school students" by the conference organizers.[179] Upon returning to their district, the school board members learned that nine of the books on the "objectionable" list were on the shelves at the district high school library, one book was available at the junior high school library, and yet another book was included in the curriculum of a twelfth-grade literature course.[180] The objectionable books included several that were written by Pulitzer Prize winning and acclaimed Black and Latino writers and that explored the experiences of Black, Latino, and Native American characters, including *Down These Mean Streets*, by Piri Thomas;[181] *Best Short Stories by Negro Writers* (which included short stories by James Baldwin, and which was edited by Langston Hughes);[182] *Laughing Boy*, by Oliver LaFarge;[183] *Black Boy*, by Richard Wright;[184] *A Hero Ain't Nothin' But A Sandwich*, by Alice Childress;[185] and *Soul on Ice*, by Eldridge Cleaver.[186]

At a meeting with the superintendent of schools and the principals of the high school and junior high school, the Board of Education directed that the books on the "objectionable" list be "removed from the library shelves and delivered to the Board's offices, so that Board members could read them."[187] The Board also issued a press release regarding its actions, characterizing the listed books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,"[188] and concluding that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[189] The Board then appointed a "Book Review Committee," consisting of four parents and four members of the school staff, to review these books and "to recommend whether the books should be retained, taking into account the books' 'educational suitability,' 'good taste,' 'relevance,' 'and appropriateness to age and grade level.'"[190] The Committee made a report to the Board, recommending that some of the books be retained, some be removed, and others "be made available . . . only with parental

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[179] *Pico*, 457 U.S. at 885 n.1 (Burger, J., dissenting).
[180] *Id.* at 856 & n.3.
[181] *Down These Mean Streets*, by Piri Thomas, is a coming-of-age story that "chronicled [the author's] tough childhood in Spanish Harlem and the outlaw years that followed and became a classic portrait of ghetto life." Joseph Berger, *Piri Thomas, Spanish Harlem Author, Dies at 83*, N.Y. TIMES (Oct. 19, 2011), https://www.nytimes.com/2011/10/20/books/piri-thomas-author-of-down-these-mean-streets-dies.html.
[182] *Best Short Stories by Negro Writers*, edited by Langston Hughes, includes forty-seven short stories by Black authors published between 1899 and 1967. *See* BEST SHORT STORIES BY NEGRO WRITERS: AN ANTHOLOGY FROM 1899 TO THE PRESENT, Table of Contents (Langston Hughes ed. 1967).
[183] *Laughing Boy: A Navajo Love Story*, by Oliver LaFarge, won the Pulitzer Prize in 1930. *See Laughing Boy: A Navajo Love Story, by Oliver La Farge (Houghton)*, PULITZER PRIZES, https://www.pulitzer.org/winners/oliver-la-farge (last visited Feb. 7, 2023).
[184] *Black Boy*, by Richard Wright, is a memoir about the author's youth growing up in the South and moving to Chicago. *See* Edward P. Jones, *Foreword to* RICHARD WRIGHT, BLACK BOY (2005).
[185] *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress, is a novel about an adolescent boy who struggles growing up in the ghetto and becomes addicted to drugs in the 1970s. *See A Hero Ain't Nothin' But A Sandwich*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/arts/encyclopedias-almanacs-transcripts-and-maps/hero-aint-nothin-sandwich (last visited Feb. 7, 2023).
[186] *Soul on Ice*, by Eldridge Cleaver, is Cleaver's memoir and collection of essays "that shocked, outraged, and ultimately changed the way America looked at the civil rights movement and the [B]lack experience." *See Soul on Ice*, BOOKSHOP.ORG, https://bookshop.org/books/soul-on-ice/9780385333795 (last visited Feb. 7, 2023).
[187] Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 857 (1982) (plurality opinion).
[188] *Id.* (alteration in original) (quoting Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).
[189] *Id.* (alteration in original) (quoting *Pico*, 474 F. Supp. at 390).
[190] *Id.*

approval."[191] The Board, however, "substantially rejected" the Committee's recommendations, "deciding that only one book"—*Laughing Boy*—"should be returned to the High School library without restriction, that another"—*Black Boy*—"should be made available subject to parental approval," and "that the remaining nine books should be removed from elementary and secondary libraries and [from] use in the curriculum."[192] The Board apparently justified its decision based on a consideration of isolated passages from the identified books.[193] In one case, for example, the book *A Hero Ain't Nothin' But A Sandwich* was identified for removal because of a passage in the book in which a teacher in Harlem tells his students that George Washington was a slaveholder (apparently based on the Board's belief that this passage was un-American).[194]

Several junior and high school students, led by high school senior and student council president Steven Pico, challenged the Board's removal decisions as a violation of their First Amendment rights. They argued that the removal of the books from the school libraries and the prohibition of their use in the curriculum were ordered on the grounds that "particular passages in the books offended [the Board members'] social, political and moral tastes."[195] Pico—who had already read many of the books identified for removal—later characterized the school board's removal of works by James Baldwin, Alice Childress, Langston Hughes, and Richard Wright as motivated by the fact that these were works involving Black authors espousing "minority ideas in a suburban white community."[196] The challengers sought a declaration that the Board's actions were unconstitutional and petitioned the court for injunctive relief to order the "Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the schools' curricula."[197] The Board countered that, because it was the democratically-elected body authorized to make decisions about the school curriculum and the library offerings, the Court should substantially defer to the Board's decisions.[198]

The Supreme Court ruled in favor of the students.[199] In a plurality decision by Justice Brennan, the Court explained that the removal of the books was unconstitutional if the removal was on the grounds that the Board did not like the ideas in the books.[200] The plurality explained that the Constitution imposes limits on the power of the State to control the curriculum, the classroom, and the sources of knowledge available to students in their school libraries.[201] While recognizing that local school boards enjoy considerable discretion in the management of school affairs, the Court observed that, "[a]t the same time, . . . we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[202] The Court

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[191] *Id.* at 857–58.
[192] *Id.* at 858. One book was ordered to be made available subject to parental approval. *Id.*
[193] *Id.* at 858–59. The school board's method of evaluation in this case thus stands in contrast to the constitutionally mandated method of determining whether a book is outside the protection of the First Amendment on the grounds of obscenity, for which there must be a consideration of the work "taken as a whole." *See* Miller v. California, 413 U.S. 15, 24 (1973).
[194] *Inside the SCOTUS Case on School Library Censorship*, WNYC STUDIOS (Feb. 4, 2022), https://www.wnycstudios.org/podcasts/otm/segments/first-supreme-court-case-banned-school-books-on-the-media.
[195] *Pico*, 457 U.S. at 858–59.
[196] WNYC STUDIOS, *supra* note 200.
[197] *Pico*, 457 U.S. at 859.
[198] *See id.* at 894 (Powell, J., dissenting) (explaining the importance of local, democratic control of school boards).
[199] *Id.* at 859–60, 875.
[200] *Id.* at 871 (plurality opinion).
[201] *Id.* at 854, 861, 865, 872.

noted that, in its decision in *Epperson v. Arkansas*, it had invalidated the State's anti-evolution statute as violative of the First Amendment's Establishment Clause, and reaffirmed the duty of courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry."[203] Recognizing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the *Pico* Court wrote that "local school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment."[204]

The plurality went on to explain:

> Of course, courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems" unless "basic constitutional values" are "directly and sharply implicate[d]" in those conflicts. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." . . . "[T]he State may not . . . contract the spectrum of available knowledge." . . . "[T]he Constitution protects the right to receive information and ideas." . . . [T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. . . . "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[205]

The Court then turned to the specific question of whether the First Amendment places limitations upon the discretion of the Board of Education to remove books from the high school and junior high school libraries.[206] It observed that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[207] While recognizing that the school board possessed significant discretion to determine the content of their school libraries, the Court stated that the school board's discretion "may not be exercised in a narrowly partisan or political manner."[208] In short, in the *Pico* case, the Court imposed limits on the discretion of the democratically-elected school board to "contract the spectrum of available knowledge" by suppressing certain ideas and removing books from school libraries if such removal was based on the board's disagreement with the ideas in those books.[209]

In summary, during the classical era of the Civil Rights Movement, the Supreme Court issued a host of important decisions that, while combatting racial segregation and discrimination, were also pivotal in defining and strengthening protections for now well-settled First

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[202] *Id.* at 864.
[203] *Id.* at 865 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
[204] *Id.* (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969)).
[205] *Id.* at 866–68 (first alteration in original) (citations omitted) (first quoting *Epperson*, 393 U.S. at 104; then quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965); then quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969); and then quoting *Tinker*, 393 U.S. at 511).
[206] *Id.* at 869.
[207] *Id.* at 870 (alteration in original) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
[208] *Id.* at 870–71.
[209] *Id.* at 866 (quoting *Griswold*, 381 U.S. at 482).

Amendment doctrines, including the prior restraint doctrine; the vagueness and overbreadth doctrines; the public forum doctrine; the expressive conduct doctrine; the right to associate free of liability for protest-related harms; the right to criticize public officials; and the right to learn free of ideological discrimination in our system of public education.

PART II. FIRST AMENDMENT DOCTRINE AND THE ADVANCEMENT OF CIVIL RIGHTS TODAY

The First Amendment doctrines that were forged and expanded in the classical civil rights era constitute a critical part of the arsenal that is available for today's civil rights activists. Some of these doctrines—like the expressive conduct doctrine, the prior restraint doctrine, the public forum doctrine, and the right to criticize public officials—are now firmly established as part of the uncontested background of the civil rights landscape, and have been successfully invoked by today's civil rights activists to swiftly defeat unconstitutional restrictions on their First Amendment freedoms, as this Article explores in Section II.A below. Others, like the vagueness doctrine, are currently being wielded by today's civil rights activists to challenge widespread legislative efforts to restrict the teaching of concepts involving systemic racism in our institutions of higher education, as this Article examines in Section II.B below. Yet, the right to protest on the streets and to associate for purposes of protest without incurring liability for protest-related harms—as protected by the public forum doctrine and in *Claiborne Hardware* and similar cases from the classical civil rights era—are under sharp attack today. In Section II.C, this Article surveys a host of recent state anti-protest legislation and vagueness and other challenges to the constitutionality of such legislation, and then turns to the ongoing speech-restrictive case of *Mckesson v. Doe*, and the implications of such developments for modern civil rights activists' rights.

A. How the First Amendment Expressive Conduct, Prior Restraint, and Public Forum Doctrines and the Rights to Criticize Public Officials and to Associate Anonymously Protect Today's Civil Rights Activists

Many of the First Amendment doctrines forged and strengthened during the classical era of the Civil Rights Movement are now firmly established as part of the uncontested background of the civil rights landscape and have been successfully invoked by today's civil rights activists to swiftly defeat unconstitutional restrictions on their First Amendment freedoms. First, the expressive conduct doctrine—which was strengthened during the civil rights era to protect actions like sit-ins and marches—has formed the background of protection for today's activists like Black Lives Matter ("BLM") protestors who have sought to draw attention to issues like police misconduct by staging "die-ins" (among other approaches). For example, as part of the protests against Michael Brown and Eric Garner's deaths at the hands of police officers and President Obama's muted response to issues affecting Black communities like police misconduct, racial profiling, and militarization of the police, fifty BLM activists and clergy members staged a large scale "die-in" at the Capitol Hill Longworth Building, during which they lay motionless on the floor.[210] Since the pivotal decisions of *Garner v. Louisiana* and *Brown v.*

[210] *See* Oliver Laughland, *Black Lives Matter Protesters Interrupt Lunch with 'Die-In' on Capitol Hill*, GUARDIAN (Jan. 21, 2015), https://www.theguardian.com/us-news/2015/jan/21/black-lives-matter-protesters-die-in-capitol-hill-longworth-office-building; Wesley Lowery, *'Black Lives Matter' Protestors Stage 'Die-In' in Capitol Hill*

Louisiana in the classical civil rights era,[211] such expressive conduct has been widely recognized as protected by the First Amendment,[212] and today's civil rights activities have enjoyed the benefit of being able to engage in such conduct, secure in the First Amendment's protections for such activities. Similarly, in cases like *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*,[213] courts have recognized that conduct such as the distribution of food in a public park to protest government inaction on the plight of people experiencing homelessness is First Amendment-protected expressive conduct.[214]

In addition, the now firmly established right to criticize public officials,[215] including police officers, free of defamation liability has been an important component of protestors' rights in the context of recent widescale protests of police misconduct and of the use of excessive force by police, such as in the context of the protests over the death of George Floyd at the hands of police officers in the summer of 2020. In cases like *Black Lives Matter Seattle-King County v. Seattle Police Department*,[216] *Abay v. City of Denver*,[217] and *Don't Shoot Portland v. City of Portland*,[218] courts have reaffirmed that members of the public have an absolute right to criticize and protest the actions of public officials, including police officers and the right to direct verbal criticisms against police officers. Courts have also held that the "police may not interfere with orderly, nonviolent protests merely because they disagree with the content" or the message of activists protesting against the police, and that protestors have a right to be free from police retaliation against them based on their First Amendment-protected political speech and protest activities.[219]

The well-established public forum doctrine—which protects the rights of members of the public to access traditional public forums like streets, sidewalks, and parks—has also been an important component of protestors' rights today. For example, in cases like *Index Newspapers LLC v. United States Marshals Service*, the court held that members of the public—and especially the journalists bringing suit in such cases—enjoy a "deeply entrenched . . . right to access city streets and sidewalks," which may not be abridged by the government.[220] Similarly, in cases like *Seattle Police Department*, the court recognized that BLM protestors had a right to protest on public grounds.[221]

Cafeteria, WASH. POST (Jan. 21, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/01/21/black-lives-matter-protesters-stage-die-in-in-capitol-hill-cafeteria/.

[211] *See supra* text accompanying notes 113–49.

[212] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 399, 419–20 (1989) (referencing the staging of "die-ins" to protest the threat of nuclear war, and holding that flag-burning and associated protest-related conduct was expressive conduct protected by the First Amendment).

[213] 901 F.3d 1235, 1245 (11th Cir. 2018).

[214] *Id*. The *Food Not Bombs* court also recognized that the prior restraint doctrine prohibits government officials from denying activists permits to engage in such expressive conduct in public parks under a permitting scheme governing the use of parks that vested standardless discretion in the city's permitting officials. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266, 1276, 1295 (11th Cir. 2021).

[215] But see concerns about recent efforts to limit the broad protections against liability for defamation of public officials under *Sullivan* discussed *supra* note 165.

[216] 466 F. Supp. 3d 1206, 1212–13 (W.D. Wash. 2020).

[217] 445 F. Supp. 3d 1286, 1292 (D. Colo. 2020).

[218] 465 F. Supp. 3d 1150, 1155 (D. Or. 2020).

[219] *See Abay*, 445 F. Supp. 3d at 1292 (quoting Jones v. Parmley, 465 F.3d 46, 56 (2d Cir. 2006)).

[220] 977 F.3d 817, 831 (9th Cir. 2020).

[221] 466 F. Supp. 3d at 1213.

In sum, in modern-day cases like those discussed above, courts swiftly reaffirmed the importance of crucial First Amendment doctrines forged during the classical civil rights era—like the expressive conduct doctrine, the right to criticize public officials, the prior restraint doctrine, and the right to associate anonymously—all of which are now essential components of the First Amendment rights of civil rights activists and protestors.

B. How the Void for Vagueness First Amendment Doctrine Can Be Wielded to Invalidate Legislation Restricting the Teaching of Concepts Involving Systemic Racism in Public Education

One highly controversial aspect of today's ongoing civil rights struggle centers around what can be taught and discussed in our public schools, colleges, and universities.[222] In the past two years, fifteen states have enacted educational gag orders—laws that limit instruction on certain books, ideas, and concepts in schools—most notably (1) prohibitions on teaching or incorporating certain ill-defined concepts involving race and racism—including a prohibition on the teaching of the concept that the United States or any state is "fundamentally racist"; (2) prohibitions on the ill-defined concept of "critical race theory"; and (3) in some cases, prohibitions on teaching materials from the book *The 1619 Project*.[223] The educational concepts and materials subject to these prohibitions involve reconceptualizing, critiquing, and understanding our nation's four-hundred-year-old legacy of enslavement of Black people, our history of racism and of discrimination against Black people, and the lingering effects of these practices on our country today.[224] The legislative efforts to restrict the teaching of such concepts largely suffer from constitutionally fatal vagueness problems.[225] These efforts, which derive from a Trump-era executive order reacting to *The 1619 Project*, proceed by defining a series of "divisive" or "prohibited" concepts—such as the concept that the United States is a fundamentally racist nation—that cannot be taught in the public education system.[226] But these concepts are unconstitutionally vague under the controlling First Amendment precedent that was first forged during the classical civil rights era and are also constitutionally suspect on a number of other grounds, as this Article examines below.[227]

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[222] *See* Cade Spencer, *Classroom Gag Orders: Protecting Tender Feelings or Denying Realities?*, FREE SPEECH PROJECT, https://freespeechproject.georgetown.edu/classroom-gag-orders-protecting-tender-feelings-or-denying-realities/ (last visited Mar. 17, 2023).

[223] *See* Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. EXPERTS (Aug. 17, 2022), https://pen.org/report/americas-censored-classrooms/#:~:text=This%20law%20prohibits%20public%20colleges,%2C%20ethnicity%2C%20or%20national%20origin. Most of these laws target teaching about race and racism, while a growing number also target teaching about sex and sexism and LGBTQ+ identities, such as Florida's infamous "Don't Say Gay" legislation. *See id*. Because the focus of this Article is primarily race discrimination and the First Amendment, this Article concentrates its analysis largely on the race and racism aspects of these laws.

[224] *See* Leah Asmelash, *The New York Times Magazine's 1619 Project Takes a Hard Look at the American Paradox of Freedom and Slavery*, CNN, https://www.cnn.com/2019/08/19/media/1619-project-new-york-times-trnd/index.html (Aug. 19, 2019, 4:40 PM).

[225] *See infra* notes 294–319 and accompanying text.

[226] Young & Friedman, *supra* note 229.

[227] *See infra* notes 321–29 and accompanying text.

Because opposition to *The 1619 Project* features prominently in recent legislative efforts to restrict books, materials, and discussions involving systemic racism, a brief exploration of this book—and of the right-wing conservative reaction to the book—is warranted. *The 1619 Project*—whose title comes from the year in which the first ship carrying enslaved people landed in the English colony of Virginia—is a collection of essays, poems, and short fiction about the legacy and implications of the institution of slavery that reconceptualizes the origin of our nation as centered on the preservation of the institution of slavery.[228] The book was co-edited by Professor Nikole Hannah-Jones, a professor at Howard University and an award-winning writer for The New York Times Magazine.[229] Hannah-Jones developed the project and wrote the preface and the first and last essays in the book, for which she received the 2020 Pulitzer Prize for Commentary.[230] She conceptualized the work as a meaningful way to "mark the four-hundredth anniversary [of 1619] by exploring the unparalleled impact of African slavery on the development of our country and its continuing impact on our society."[231] The project "aims to reframe the country's history by placing the consequences of slavery and the contributions of [B]lack Americans at the very center of our national narrative" and to demonstrate how the enslavement of Africans in the eighteenth and nineteenth centuries has the effect of continuing to disadvantage Black Americans today.[232]

Since its publication, *The 1619 Project* has drawn high praise—but also substantial controversy from a number of quarters, particularly from right-wing conservatives. For example, after learning that the California Department of Education was reportedly including the project in its state curriculum in late 2020, then-President Trump announced that federal funding would be withheld from the state's schools in response.[233] In November 2020, Trump issued an executive order establishing the "1776 Commission," whose mission was to develop a "patriotic" curriculum as a counter to *The 1619 Project*.[234] In the final months of his term, Trump also issued an "Executive Order on Combating Race and Sex Stereotyping," to counter and suppress the "pernicious and false belief that America is an irredeemably racist and sexist country."[235] The

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[228] *See* Adam Hochschild, *A Landmark Reckoning with America's Racial Past and Present*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/11/15/books/review/the-1619-project-nikole-hannah-jones-caitlin-roper-ilena-silverman-jake-silverstein.html.

[229] Nikole Hannah-Jones was formerly a professor at the University of North Carolina, but was denied tenure in connection with opposition to *The 1619 Project*. Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (May 19, 2021), https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html.

[230] Hochschild, *supra* note 234.

[231] NIKOLE HANNAH-JONES & THE N.Y. TIMES MAG., THE 1619 PROJECT: A NEW ORIGIN STORY, at xxii (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman eds., 2021).

[232] *The 1619 Project*, N.Y. TIMES MAG. (Sept. 4, 2019), https://www.nytimes.com/interactive/2019/08/04/magazine/1619-america-slavery.html.

[233] *See* Evan Gerstmann, *Trump Says He Will Punish Schools that Teach the New York Times' '1619' Project by Withholding Federal Funds*, FORBES (Sept. 6, 2020), https://www.forbes.com/sites/evangerstmann/2020/09/06/trump-says-he-will-punish-schools-that-teach-the-new-york-times-1619-project-by-withholding-federal-funds/.

[234] *See* Exec. Order No. 13,958, 85 Fed. Reg. 70951 (Nov. 2, 2022). The 1776 Commission was terminated by President Biden in his first day in office. *See* Caroline Kelly, *Biden Rescinds 1776 Commission Via Executive Order*, CNN, https://www.edition.cnn.com/2021/01/20/politics/biden-rescind-1776-commission-executive-order.html (Jan. 21, 2021, 12:10 AM).

[235] *See* Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

Executive Order articulated several "[d]ivisive concepts" that the Administration sought to eradicate from the public sphere in various ways (including, for example, the concept that "the United States is fundamentally racist or sexist"; the concept that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously"; and the concept that "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex").[236] This Executive Order prohibited the incorporation or expression of these concepts in any federal employee training, in any U.S. military training, and in any training that any institution that contracted with the federal government could provide to its employees.[237]

The hostility toward the ideas embodied in *The 1619 Project* and the desire to restrict the teaching of the Divisive Concepts discussed above served to motivate a number of state legislators to attempt to ban inclusion and discussion of such books, materials, and concepts in public education at the state level as well. In recent months, fifteen states have taken steps to restrict the teaching of certain books (including *The 1619 Project*), ideas, and concepts involving race and racism (as well as sex and sexism) in public schools.[238] Florida and Texas have expressly prohibited the book *The 1619 Project*—or any part thereof—from being used as part of the educational curriculum.[239] Georgia prohibits public K-12 schools from offering any classroom instruction that promotes ideas from a set of "[d]ivisive concepts" regarding race, subjects school districts in violation to state control, and threatens suspension of school superintendents for violating such laws.[240] Increasingly, these educational gag orders extend to public colleges and universities as well.[241] Several of these laws are now subject to constitutional challenges, as this Article discusses below.

Oklahoma and Florida provide important test cases for evaluating the impact of such state legislation on students, teachers, and administrators. Oklahoma's Divisive Concepts legislation, which became effective in July 2021, has been construed by officials to limit the course offerings available in the state's public colleges to drastically effect the core curriculum made available in its public schools and to limit students' exposure to teachings concerning racism, and has generally contributed to censorship of and self-censorship among the state's educators.[242] In early 2021, Oklahoma legislators began considering a bill to restrict the teaching or inclusion of certain concepts involving race, racism, sex, and sexism in the classroom—including in higher education.[243] House Bill 1775 was introduced in the Oklahoma House of Representatives in

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[236] *Id.* at 60685.
[237] *See id.* at 60684.
[238] *See* Young & Friedman, *supra* note 229 and accompanying text.
[239] Adam Sabes, *1619 Project Book Can Still Be in School Libraries, Despite States' Critical Race Theory Bans: Expert*, FOX NEWS (Nov. 20, 2021, 3:07 PM), https://www.foxnews.com/us/1619-project-book-school-libraries-critical-race-theory-bans ("The Texas law, House Bill 3979 which was passed and went into effect Sept. 1, bans public schools from including content from The New York Times' 1619 Project in curriculum . . . .").
[240] H.R. 1084, Reg. Sess. (Ga. 2022).
[241] *See* Young & Friedman, *supra* note 229 ("This law prohibits public colleges and universities in South Dakota from compelling students to adopt or affirm certain ideas from a list of 'divisive concepts' related to race, color, religion, sex, ethnicity, or national origin.").
[242] OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

February 2021.[244] In discussing and debating the Act, several Oklahoma legislators expressed their intention that the Act would limit or suppress discussion of "police brutality," "intersectionality" in schools,[245] and "the theory of implicit bias,"[246] and eliminate school programs that discussed concepts like "institutionalized racism."[247] House Bill 1775 became effective on July 1, 2021.[248] This legislation applies to "institution[s] of higher education,"[249] including twenty-five colleges and universities. The law, inter alia, prohibits any teacher, administrator, or school district employee from incorporating any of the Eight Prohibited Concepts (which borrow from the Trump Executive Order) within any part of a course.[250] It also requires that the State Board of Education release rules to guide the enforcement and implementation of the Act.[251] These rules promulgated by the State Board of Education provide for sanctions for individuals and entities that violate the Act—including the loss of accreditation and teaching licenses[252]—and provide that any private citizen may file a complaint to initiate an investigation into possible violation of the rules.[253]

In the year since it became law, Oklahoma school districts have responded to the Act by restricting curricula and programming. One school district, for example, directed its teachers to "avoid[] the terms 'diversity' and 'white privilege' in class," and removed books from the list of anchor texts (i.e., those around which the larger curriculum is built) used by educators.[254] While the anchor tests formerly included Lorraine Hansberry's *A Raisin in the Sun*, Zora Neale Hurston's *Their Eyes Were Watching God*, Maya Angelou's *I Know Why the Caged Bird Sings*, Harper Lee's *To Kill a Mockingbird*, and the autobiographical *Narrative of the Life of Frederick Douglass, an American Slave*, now the anchor texts only include books written by white male authors.[255] In addition, rather than risk violating the law, some professors and administrators are censoring themselves, their classes, and their class discussions and are refraining from mentioning racism or sexism altogether.[256]

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[243] *See* Brent Skarky, *An Oklahoma Bill Seeks to Ban Teaching 'Divisive Concepts,' But Not Everyone Agrees on what That Means; Some Think the Bill Is More Harmful*, OKLA. NEWS 4 (Feb. 23, 2021), https://kfor.com/news/local/an-oklahoma-bill-seeks-to-ban-teaching-divisive-concepts-but-not-everyone-agrees-on-what-that-means-some-think-the-bill-is-more-harmful/.

[244] *OK HB1775*, LEGISCAN, https://legiscan.com/OK/bill/HB1775/2021 (last visited Jan. 21, 2023).

[245] Amended Complaint at 54–55, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022-G (W.D. Okla. Nov. 9, 2021) [hereinafter Amended Complaint].

[246] Press Release, Okla. House of Reps., Bill Prohibiting "Critical Race Theory" Curriculum Passes House (Apr. 29, 2021), https://www.okhouse.gov/members/PrintStory.aspx?NewsID=8125.

[247] Amended Complaint, *supra* note 252, at 54; Press Release, Oklahoma Senate, Sen. Standridge Issues Statement Thanking Fellow Members for Supporting HB 1775 (Apr. 22, 2021), https://oksenate.gov/press-releases/sen-standridge-issues-statement-thanking-fellow-members-supporting-hb-1775.

[248] OKLA. STAT. ANN. tit. 70, § 24-157 (West 2021).

[249] *Id.* § 24-157(A)(1).

[250] *Id.* § 24-157(B)(1); *see also supra* notes 241–43 and accompanying text.

[251] *Id.* § 24-157(B)(2).

[252] OKLA. ADMIN. CODE § 210:10-1-23(h)(1), (j) (2021).

[253] *Id.* § 210:10-1-23(g)(1).

[254] Amended Complaint, *supra* note 252, at 2.

[255] *Id.* "Only F. Scott Fitzgerald's *The Great Gatsby* and Arthur Miller's *The Crucible* remain." Motion for Preliminary Injunction at 10, n.22, Black Emergency Response Team v. O'Connor, No. 5:21-cv-01022-G (W.D. Okla. Oct. 29, 2021).

The Oklahoma law has had chilling effects on the pedagogical choices and decisions of teachers and administrators and has restricted the ability of students to receive and discuss ideas and materials that involve race and racism. Many teachers and administrators in that state are unclear about what it means to teach one of the "Prohibited Concepts"—including the concept of feeling "discomfort . . . 'on account of [one's] race or sex,'" especially upon pain of losing one's accreditation or teaching license if one violates the terms of the law.[257] In one instance, after the Oklahoma law took effect, in May 2021, Oklahoma City Community College administrators informed adjunct professor Melissa Smith that her fully subscribed class "Race and Ethnicity in the United States" would be canceled as a result of the law.[258] The college's actions were apparently prompted by complaints from a parent who threatened legal action.[259] The college administrators determined that the "Race and Ethnicity in the United States" course—a general education class which was to focus on an examination of "sociological theories of contact between minority and majority groups in a multicultural society, including topics such as prejudice, discrimination, acculturation, and pluralism"—was of questionable legality in light of the law.[260] A spokesperson for the college explained: "[After] learning more about HB/SB 1775 and how it essentially revokes any ability to teach critical race theory, including discussions of white privilege, from required courses in Oklahoma . . . we recognized that HB/SB 1775 would require substantial changes to the curriculum for this class particularly."[261] The college ultimately determined that this course could be made available, but only as an elective, and could not be offered as "a general education requirement in social sciences."[262] As a result of first being canceled and then changed to an elective, the course went from being fully subscribed to having only one enrolled student.[263] Other teachers and professors in Oklahoma have also reported changing their curriculum and censoring themselves, their students, and their class discussions out of fear of violating the law.[264]

Florida, led by Governor Ron DeSantis, has also enacted legislation that substantially restricts the books, topics, and concepts that are allowed to be taught in the state public education system. Florida's efforts to limit what can be taught and discussed in public classrooms at every level of education (i.e., K-20, or kindergarten through graduate school) gained traction in June 2021, when DeSantis attended a Florida "State Board of Education meeting to 'discuss the importance of maintaining the integrity of Florida's academic standards by keeping Critical Race Theory' out of the classroom."[265] Later that month, pursuant to the governor's directive, the

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[256] *See* Amended Complaint, *supra* note 252, at 2.
[257] *Id.* at 1, 6, 25 (quoting OKLA. STAT. tit. 70, § 24-157(1)(B)(1)(g) (2022)).
[258] *See* Graham Piro, *Chilling Effect Remains as Oklahoma's 'Divisive Concepts' Law Becomes Effective*, FIRE (July 2, 2021), https://www.thefire.org/news/chilling-effect-remains-as-oklahomas-divisive-concepts-law-becomes-effective/.
[259] *Id.*
[260] *Id.*
[261] Hannah Knowles, *Critical Race Theory Ban Leads Oklahoma College to Cancel Class that Taught 'White Privilege'*, WASH. POST (May 29, 2021) (alterations in original), https://www.washingtonpost.com/education/2021/05/29/oklahoma-critical-race-theory-ban/.
[262] Piro, *supra* note 265.
[263] *Id.*
[264] *See id.*

Florida Department of Education banned the instruction of ideas that "suppress or distort significant" historical events—including the teaching of any materials from the book *The 1619 Project*[266] and "the teaching of Critical Race Theory."[267] The Florida State Department of Education's Amended Regulation, which was amended to achieve these goals, provides in relevant part:

> Instruction on the required topics . . . may not suppress or distort significant historical events . . . . *Examples of theories that distort historical events and are inconsistent with State Board approved standards include . . . the teaching of Critical Race Theory, meaning the theory that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons. Instruction may not utilize material from The 1619 Project . . . .*[268]

In December 2021, DeSantis held a press conference to announce a broad legislative proposal called The Stop the Wrongs to Our Kids and Employees Act, or Stop WOKE Act.[269] His press release described the initiative as one that would give Floridians "tools to fight back against woke indoctrination" and promised that the legislation would "take on both corporate wokeness and Critical Race Theory."[270] Near the end of its 2022 legislative session, the Florida Legislature passed Committee Substitute for House Bill 7 (CS/HB 7), which amended the Florida Civil Rights Act ("FCRA"), the Florida Educational Equity Act ("FEEA"), public K-12 educational instruction and materials standards, and educator professional development standards.[271] This legislation, entitled the "Individual Freedom Act" ("IFA"), was signed by DeSantis on April 22, 2022.[272]

The IFA effects a number of changes to Florida's laws. First, the Act amends the FCRA by expanding what constitutes discrimination based on race, color, sex or national origin, and prohibits "[s]ubjecting any individual, as a condition of employment, membership, certification, licensing, credentialing, or passing an examination, to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe" certain concepts, including, for example, the concept that:

> [a]n individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the race, color, sex, or national origin.[273]

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[265] *See* Verified Complaint at 6, Falls v. DeSantis, 2022 WL 2303949 (N.D. Fla. June 27, 2022) (No. 4:22-CV-166-MW-MJF) [hereinafter Verified Complaint]; FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022).
[266] *See* Verified Complaint, *supra* note 272, at 6.
[267] *See id.*
[268] FLA. ADMIN. CODE ANN. r. 6A-1.094124 (emphasis added).
[269] Verified Complaint, *supra* note 272, at 8.
[270] *See id.*
[271] *Id.* at 9–10, 13.
[272] *Id.* at 9.

The amended statute contains a carve out for discussion of the concepts "as part of a course of training or instruction, provided such training or instruction is given in an *objective* manner without endorsement of the concepts."[274] The IFA also amends the FEEA to define as illegal discrimination on the basis of race, color, national origin, or sex any training or instruction in public K-20 education that "espouses, promotes, advances, inculcates, or compels" a student or employee to believe in the prohibited concepts, including, for example, the concept that

> [a] person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.[275]

It exempts in the education context the discussion of the concepts "as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts."[276] Finally, the IFA amends K-12 educational instruction and materials standards, by requiring that all K-12 instruction and instructional materials comply with six principles of individual freedom, which are inverses of the prohibited concepts discussed above, including, for example, that "[a] person should not be instructed that he or she must feel guilt, anguish, or other forms of psychological distress for actions, in which he or she played no part, committed in the past by other members of the same race or sex."[277]

Florida's law has already led to substantial censorship and self-censorship in education. The example of a University of Central Florida professor is illustrative. The professor "explained that he no longer felt free . . . to discuss . . . Michelle Alexander's 2010 book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, which argues that the American justice system perpetuates a racial caste system," out of fear of violating the provisions of the law.[278] Similar instances of self-censorship and actual censorship by the Florida Board of Education abound.[279]

State legislation such as that discussed above that restricts the books, concepts, and ideas that can be taught in public schools, colleges, and universities, are vulnerable on a number of First Amendment grounds. First, these prohibitions are vulnerable to constitutional attack on the grounds that they are unconstitutionally vague and do not provide clear guidance as to what is illegal and what is not.[280] This is particularly problematic regarding educational regulations like those adopted in Florida that prohibit instruction that "distort[s] significant historical events, such as . . . slavery" and that expressly prohibit "Critical Race Theory," defined as "the theory

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[273] FLA. STAT. ANN. § 760.10(8)(a)(7) (West 2022).
[274] *Id.* § (8)(b) (emphasis added).
[275] *Id.* § 1000.05(4)(a)(7).
[276] *Id.* § 1000.05(4)(b).
[277] *Id.* §§ 1003.42(3), 1006.31(2)(d).
[278] Young & Friedman, *supra* note 229 (describing a lawsuit challenging Florida's educational gag order, which includes the professor's story).
[279] *See, e.g.*, Carissa Allen, *Florida Higher Education Union Decries New 'Anti-Woke' Law*, WUFT NEWS (June 20, 2022), https://www.wuft.org/news/2022/06/20/florida-higher-education-union-decries-new-anti-woke-law/.
[280] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 551 (1965); Edwards v. South Carolina, 372 U.S. 229, 238 (1963).

that racism is not merely the product of prejudice, but that racism is embedded in American society and its legal systems in order to uphold the supremacy of white persons."[281]

As the Supreme Court has made clear in its classical civil rights era cases like *Cox*[282] and *Edwards*,[283] a law regulating expression is unconstitutionally vague and violates the First Amendment if "[p]eople of common intelligence must necessarily guess at [the law's] meaning and differ as to its application,"[284] as the Constitution requires that all who are subject to such regulation "be informed as to what the State commands or forbids."[285] Laws that embody vague terms and concepts necessarily lead to the chilling of speech and to self-censorship, because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'"[286]

Indeed, the Trump-era Executive Order that embodied the Prohibited Concepts involving race and racism has been successfully subject to legal challenge on grounds of vagueness. In *Santa Cruz Lesbian and Gay Community Center v. Trump*, the plaintiffs—a number of community organizations and consultants serving the LGBTQ+ community who provide advocacy and training to government agencies about systemic bias and racism—brought suit to challenge the constitutionality of the Trump Executive Order.[287] This Executive Order prohibited the U.S. Uniformed Services, federal agencies, and federal contractors from promoting any of the list of "divisive concepts" in workplace training.[288] The plaintiffs alleged that "the Executive Order require[d] them to censor or cease the training[] that [was] fundamental to their missions" or risk losing federal funding, in violation of the Free Speech Clause of the First Amendment,[289] and claimed that the Order was unconstitutionally vague because it did not provide sufficiently clear notice of what speech was legal and what speech was illegal.[290]

In ruling on the plaintiffs' constitutional challenge to the Order, the District Court for the Northern District of California first held that plaintiffs had met their burden of showing a likelihood of success on their First Amendment claims.[291] It held that requiring federal grantees like plaintiffs to certify that they would not use grant funds to promote any of the divisive concepts imposes unconstitutional conditions on the plaintiffs' receipt of federal funding, in violation of the First Amendment.[292] The court found that the plaintiffs had met their burden of showing a likelihood of success on their vagueness challenge to the Order, because the terms of the Order were so vague that it was impossible for plaintiffs to determine what expression or conduct was prohibited and what expression or conduct was allowed:

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[281] FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022).
[282] *Cox*, 379 U.S. at 536, 551.
[283] *Edwards*, 372 U.S. at 238.
[284] Citizens United v. FEC, 558 U.S. 310, 324 (2010) (alteration in original) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).
[285] *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 574 (1974) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).
[286] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).
[287] 508 F. Supp. 3d 521, 527–28 (N.D. Cal. 2020).
[288] Exec. Order No. 13,950, 85 Fed. Reg. 60683, 60687 (Sept. 22, 2020).
[289] *See Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 528.
[290] *Id.*
[291] *Id.* at 542.
[292] *Id.* at 543.

> Section 4 [of the Executive Order] requires a contractor to agree not to "inculcate in its employees" certain concepts, including the concept that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously." Section 5 [of the Executive Order uses language indicating that the grant recipient] will not use federal funds to "promote" certain concepts, among them the same concept identified above that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."[293]

The court held that the lines drawn in the Executive Order are "so murky [that] enforcement of the ordinance poses a danger of arbitrary and discriminatory application" and that "[t]his lack of clarity may operate to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being . . . punished."[294] Accordingly, the court concluded that the plaintiffs had met their burden of demonstrating a likelihood of success on their claim challenging the Executive Order as void for vagueness.[295]

In a similar vagueness challenge to the Florida IFA statute, which included prohibited concepts that were also patterned after the Trump Executive Order, the District Court for the Northern District of Florida recently held that the statute was unconstitutional on vagueness and other First Amendment grounds.[296] In *Honeyfund v. DeSantis*, several plaintiffs (including employers who wish to mandate trainings and diversity and inclusion consultants) challenged the IFA's amendments to the Florida Civil Rights Act, which expand the definition of unlawful employment practices to include the act of requiring employees to attend training or any other required activity that promotes any of eight forbidden concepts.[297] Concepts forbidden under the IFA include those such as that: "[m]embers of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin" (Concept 1);[298] "[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin" (Concept 4);[299] and Concept 7:

> An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.[300]

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[293] *Id.* at 543 (citation omitted) (quoting Exec. Order No. 13,950, 85 Fed. Reg. at 60685–86).
[294] *Id.* at 544 (final alteration in original) (quoting Hunt v. City of Los Angeles, 638 F.3d 703, 712–13 (9th Cir. 2011)).
[295] *Id.* at 545.
[296] *See* Honeyfund.com, Inc. v. DeSantis, No. 4:22cv227-MW/MAF, 2022 WL 3486962, at *1–2, *11, *14 (N.D. Fla. Aug. 18, 2022).
[297] *See id.* at *1–2.
[298] *Id.* at *1.
[299] *Id.*
[300] *Id.* at *2.

Plaintiffs sought a preliminary injunction to enjoin government officials from enforcing the portions of the IFA that prohibit employers from endorsing any of the eight concepts during any mandatory employment activity, claiming that the statute was unconstitutionally vague and embodied a viewpoint-based restriction on employer speech, among other grounds.[301] The district court agreed.[302] First, the court explained that a vague law "raises special First Amendment concerns because of its obvious chilling effect on free speech,"[303] as those covered by the statute "are bound to limit their behavior to that which is unquestionably safe."[304] In analyzing Concept 1, the court held that it was "mired in obscurity," observing that "[i]t is not clear what is prohibited beyond literally espousing that, for example, '[w]hite people are superior to Black people.'"[305] Turning to Concept 4, the court found that it was "even worse, bordering on unintelligible."[306] It explained that, pursuant to the statute, under Concept 4, employers cannot endorse the view that "[m]embers of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin," which "features a rarely seen triple negative, resulting in a cacophony of confusion."[307] The court held that Concept 4 was "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[308] Nor did the statute's exception allowing for "objective" discussions of the prohibited concepts save it from being unconstitutionally vague, as the court held that "few terms are as loaded and contested as 'objective,'" especially "when discussing concepts rooted in historical phenomena, like systemic racism, critical race theory, white privilege, and male privilege."[309] Accordingly, the court held that the statute was unconstitutionally vague and granted a preliminary injunction against its enforcement.[310]

For the same reasons that the courts in *Santa Cruz Lesbian and Gay Community Center v. Trump* and *Honeyfund v. DeSantis* held that these federal and state provisions incorporating the prohibited concepts were unconstitutionally vague, courts should conclude that other similar state laws are also unconstitutionally vague. Currently, this includes the pending constitutional challenge brought by teachers in New Hampshire alleging that their state statute is void for vagueness and impermissibly restricts the teachers' curricular discretion to discuss various

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[301] *Id.* at *2–6.

[302] *Id.* at *14. The court summarily rejected the overbreadth challenge—which required it to determine if the statute was substantially overbroad in relation to its clearly legitimate sweep—concluding that there was no clearly legitimate sweep to the law. *Id.* ("Plaintiffs contend that the IFA has 'zero "plainly legitimate sweep,"' and this Court agrees." (citation omitted)).

[303] *Id.* at *11 (quoting Reno v. ACLU, 521 U.S. 844, 871–72 (1997)).

[304] *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 609 (1967)).

[305] *Id.* at *12.

[306] *Id.* at *13.

[307] *Id.* (alteration in original) (emphasis omitted) (quoting FLA. STAT. § 760.10(8)(a)(4) (2022)).

[308] *Id.* (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

[309] *Id.*

[310] *Id.* at *14, *16. There has also been a recent successful challenge to the Stop WOKE Act brought by professors and students in *Pernell v. Florida Board of Governors of the State University System*. No. 4:22cv304, 2022 WL 16985720, at *52 (N.D. Fla. Nov. 17, 2022) (granting preliminary injunction in part). In this case, the court rejected Florida's argument that it had the power to restrict professors' classroom speech under the government speech doctrine. *See id.* at *1. The court held that the Act embodied an unconstitutional viewpoint-based regulation of speech, which "cast a leaden pall of orthodoxy over Florida's state universities," and which violated principles of academic freedom embodied in the First Amendment. *See id.* at *41, *52.

concepts,[311] as well as similar lawsuits challenging the constitutionality of Oklahoma's gag order.[312]

In addition, laws restricting the books, concepts, and ideas that can be taught in public schools, colleges, and universities are inconsistent with the Supreme Court's decision in *Island Trees v. Pico*, discussed above, in which the Court considered a First Amendment challenge brought by students against a school district based on its removal of several books from its school libraries (as well as one book from the curriculum).[313] In that case, the school board argued that, because it was the democratically elected body authorized to make decisions about the school curriculum and the library offerings, the Court should substantially defer to the board's decisions.[314] The Supreme Court rejected this argument and ruled in favor of the students.[315] Holding that the removal of the books from the library was unconstitutional if it was on the grounds that the Board was opposed to the ideas in the books, the Supreme Court explained that the Constitution imposes limits on the power of the State to control the curriculum, the classroom, and the sources of knowledge available to students.[316] While recognizing that local school boards enjoy considerable discretion in the management of school affairs, the Court observed that, "[a]t the same time, . . . we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[317] The Court explained that, in its decision in *Epperson v. Arkansas*, it had invalidated a State's anti-evolution statute as violative of the First Amendment's Establishment Clause, and reaffirmed the duty of courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry."[318] The Court observed that "local school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment":[319]

> Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. And we have recognized that the "State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." . . . "[T]he Constitution protects the right to receive information and ideas." This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution . . . . [T]he right to receive ideas is a necessary

[311] *See* Complaint at 2, 13, 17, Local 8027, AFT-New Hampshire v. Edelblut, 2022 WL 9409739 (D.N.H. Mar. 8, 2022) (No. 1:21-CV-01077); Local 8027, AFT-New Hampshire v. Edelblut, No. 21-cv-1077-PB, 2023 WL 171392 (D.N.H. Jan. 12, 2023) (order dismissing the First Amendment claims relating to K-12 teachers, but denying dismissal of the First Amendment claims relating to college/university professors and the vagueness claims).
[312] *See* Okla. State Conf. of the NAACP v. O'Connor, 569 F. Supp. 3d 1145, 1148, 1155 (W.D. Okla. 2021) (granting preliminary injunction).
[313] *See supra* notes 184–86 and accompanying text.
[314] *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863–64 (1982) (plurality opinion); *id.* at 894 (Powell, J., dissenting).
[315] *Id.* at 870–72 (plurality opinion).
[316] *See id.* at 864, 870–71.
[317] *Id.* at 864.
[318] *Id.* at 865 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
[319] *Id.* (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1969)).

> predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. . . . "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [S]chool officials cannot suppress expressions of feeling with which they do not wish to contend." In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.[320]

While recognizing that the school board possessed significant discretion, the Court explained:

> [The school board's] discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas.* Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. 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. . . . [S]chool boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[321]

The *Pico* decision stands for the proposition that state legislation prohibiting textbooks or teaching involving concepts or ideas that are disfavored by the state legislature violates the First Amendment. The motivating force behind such state legislation is the disagreement with the concepts and ideas expressed in these books and embodied in these educational resources, *viz.*, that racism is not merely a product of individual prejudice but is deeply entrenched in our history as a nation and has a systemic or institutional character. In enacting this legislation prohibiting teachers from exercising their professional discretion to teach materials from *The 1619 Project* or other texts that embody these concepts and that offer race-based critiques of U.S. history and society, the Oklahoma, Florida, and other state legislatures are doing so "because they dislike the ideas contained in those books" and are seeking to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[322] This is what the Constitution prohibits—and has long prohibited—state legislators from doing.

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[320] *Id.* at 866–68 (citations omitted) (first quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); then quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965); then quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969); and then quoting *Tinker*, 393 U.S. at 511).

[321] *Id.* at 870–72 (footnote omitted) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[322] *Id.* at 872 (quoting *Barnette*, 319 U.S. at 642).

C. Anti-Protest State Legislation and Case Law

Since 2017, at least thirty-nine states have enacted some form of legislation restricting protests or protest-related activities (and indeed all but five of the fifty states have considered enacting such legislation).[323] While these recently enacted laws expanding liability for protests and protest-related activities vary widely, common themes among these statutes include expanded definitions of "riot" and increased severity of the punishments for crimes such as rioting, disrupting traffic, trespassing on public property and defacing public monuments. Arkansas,[324] Iowa,[325] Oklahoma,[326] South Dakota,[327] and Tennessee[328] have enacted laws increasing the maximum penalty to one year in jail for people who protest on and obstruct sidewalks and streets—which constitute traditional public forums for expression. Such legislation also expands liability for protesting by (1) expanding the definition of "riot" to encompass some peaceful protest activity; (2) creating a cause of action for harming "monuments"; and (3) imposing highly questionable prior restraints and other restrictions and hurdles to the organization and execution of protests.

In addition, the right to protest has been under attack by the expansion of the common law of tort liability. One of the most significant and controversial cases involving the First Amendment rights of modern-day protesters is *Mckesson v. Doe*.[329] In this case, Doe—a police officer who was injured during a 2016 BLM demonstration—sought to hold BLM leader DeRay Mckesson liable for the officer's injuries, which were caused by an unidentified individual at the demonstration.[330] Mckesson, in turn, asserted First Amendment defenses in connection with his right to protest and his First Amendment right not to be held liable for harms resulting from other protestors' actions, under *Claiborne Hardware* and related precedents.[331] The case is currently making its way through the courts.[332]

The *Mckesson v. Doe* case stems from a 2016 BLM demonstration in Baton Rouge, Louisiana, that was organized to protest the police killing of a thirty-seven-year-old Black man named Alton Sterling. On July 5, 2016, Sterling was selling CDs outside of a convenience store in Baton Rouge when a "homeless man approached him and asked him for money."[333] Sterling refused and flashed his gun at the homeless man, who then dialed 911 to report Sterling.[334] After an encounter with two police officers at the scene, Sterling was shot and killed by the officers.[335]

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[323] *See* US Protest Law Tracker, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/ (last visited Aug. 17, 2022).
[324] ARK. CODE ANN. § 5-71-214(c) (West 2021).
[325] IOWA CODE ANN. § 723.4(4) (West 2021).
[326] H.R. 1674, 58th Leg., 1st Reg. Sess. (Okla. 2021).
[327] H.R. 1117, 95th Leg. Sess. (S.D. 2020).
[328] S.B. 5, 111th Gen. Assemb. 2d Extraord. Sess. (Tenn. 2020).
[329] 141 S. Ct. 48 (2020) (per curiam).
[330] *Id.* at 49.
[331] *Id.* at 50.
[332] The Supreme Court opined on this decision in November of 2020. *Mckesson*, 141 S. Ct. 48.
[333] Joshua Berlinger, Nick Valencia & Steve Almasy, *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN, https://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/ (July 8, 2016, 7:24 AM).
[334] *Id.*

Sterling's killing, which was recorded by a cell phone video camera and widely shared on social media, led to various memorials, demonstrations, and protests around the country.[336]

One such demonstration was organized and led by DeRay Mckesson, a BLM leader and protest organizer.[337] Part of the protest involved blocking a public highway in front of the Baton Rouge Police Department headquarters and gathering in front of the headquarters.[338] In response to the demonstration, Doe and other police officers were dispatched to monitor and control the protests.[339] The officers were equipped with riot gear and began to mass arrest the protestors in order to disperse the blockade around the police headquarters.[340] The protests ensued over the course of an entire day, during which some protestors threw water bottles at officers.[341] In the evening, after the protests intensified, an unidentified participant in the protests threw either a rock or piece of concrete toward the officers, striking Doe and resulting in serious injuries—including "loss of teeth, a jaw injury, a brain injury, [and] a head injury."[342] Although Mckesson organized the blockade of the public highway, he did not participate in the violence that ensued that injured Doe.[343]

Seeking to recover for his injuries and lost wages, Doe sued Mckesson and BLM for negligence and vicarious liability, as well as other claims.[344] Doe claimed that Mckesson and BLM "knew or should have known that the physical contact[,] riot[,] and demonstration that they staged would become violent," that Mckesson "'was in charge of the protests' and 'was seen and heard giving orders throughout the day and night of the protests,'" and "did nothing to calm the crowd" but instead "incited the violence on behalf of . . . Black Lives Matter."[345] Doe claims further that the unidentified person who threw the object at him was a member of BLM and was "'under the control and custody' of Mckesson."[346]

The district court dismissed Doe's negligence and vicarious liability claims against Mckesson, largely in reliance on the Supreme Court's holding in the classical civil rights era case of *Claiborne Hardware*, discussed above.[347] The court first explained that "[t]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[348] Quoting *Claiborne Hardware*, the court explained that

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[335] *Id.*
[336] *Id.*
[337] *Mckesson*, 141 S. Ct. at 49.
[338] *Id.*
[339] *See id.*
[340] *See* Doe v. Mckesson, 945 F.3d 818, 822–23 (5th Cir. 2019), *vacated*, 141 S. Ct. 48 (2020).
[341] *Id.* at 823.
[342] *See id.*
[343] *See id.*
[344] Doe v. Mckesson, 272 F. Supp. 3d 841, 845 (M.D. La. 2017), *aff'd in part, rev'd in part, remanded*, 945 F.3d 818 (5th Cir. 2019).
[345] *Id.* (alterations in original).
[346] *Id.*
[347] *See id.* at 846–48.
[348] *Id.* at 844 (quoting Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981)).

"'[t]he right to associate does not lose all constitutional protection merely because some members of [a] group may have participated in conduct,' such as violence, 'that itself is not protected.'"[349] Accordingly, when a tort is committed in the context of a First Amendment protected activity like the demonstration at issue in this case, "courts must use 'precision' in determining who may be held liable for the tortious conduct so that the guarantees of the First Amendment are not undermined."[350] Echoing the Supreme Court's speech-protective language in *Claiborne Hardware*, the court held that, while the First Amendment does not protect violence, "[t]he presence of activity protected by the First Amendment . . . imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[351] In particular, while an individual may be held liable "for the consequences of [his] [own] violent conduct" and for losses proximately caused by his own violent or unlawful conduct, he cannot be held liable "for the consequences of nonviolent, protected activity."[352] The court explained:

> The First Amendment similarly restricts the ability of a tort plaintiff to recover damages from an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. To impose tort liability on an individual for the torts of others with whom he associated, a plaintiff must prove that (1) the individual authorized, directed, or ratified specific tortious activity; (2) his public speech was likely to incite lawless action and the tort followed within a reasonable period; or (3) his public speech was of such a character that it could serve as evidence that [he] gave other specific instructions to carry out violent acts or threats.
>
> [Doe's] allegations . . . do not give rise to a plausible claim for relief against Mckesson. In order to state a claim against Mckesson to hold him liable for the tortious act of another with whom he was associating during the demonstration, Plaintiff would have to allege facts that tend to demonstrate that Mckesson authorized, directed, or ratified specific tortious activity. Plaintiff, however, merely states—in a conclusory fashion—that Mckesson incited the violence and g[ave] orders . . . . Further, Plaintiff has not pleaded sufficient factual allegations regarding Mckesson's public speech to state a cause of action against Mckesson based on that speech. . . . Nor can Plaintiff premise Mckesson's liability on the theory that he allegedly did nothing to calm the crowd. As the United States

[349] *Id.* (allterations in original) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982)).
[350] *Id.* (quoting *Claiborne Hardware Co.*, 458 U.S. at 916).
[351] *Id.* at 846 (quoting *Claiborne Hardware Co.*, 458 U.S. at 916–17).
[352] *Id.* (first alteration in original) (quoting *Claiborne Hardware Co.*, 458 U.S. at 918).

> Supreme Court stated in *NAACP v. Claiborne Hardware Co.*, [c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.[353]

The district court thereby granted Mckesson's motion to dismiss and Doe appealed.[354]

On appeal, a divided panel of the Fifth Circuit reversed the district court's grant of Mckesson's motion to dismiss.[355] While the Fifth Circuit affirmed the dismissal of Doe's suit against BLM and two of Doe's claims of liability against Mckesson, it held that Doe's negligence theory should have survived and that Doe could sue based on a type of "negligent protest" theory, i.e., on the theory that "Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration."[356] Specifically, the Fifth Circuit held that Doe plausibly alleged that Mckesson breached his duty of reasonable care in organizing and leading the demonstration because Mckesson planned to block a public highway and that action was likely to provoke a confrontation between police and demonstrators.[357] Although Louisiana does not recognize a duty to protect others from the criminal activities of third parties, the Fifth Circuit held that Louisiana does "recognize a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence."[358] Because of this duty, the Fifth Circuit held, "a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest."[359] Thus, the Fifth Circuit held that, because Mckesson led the protest to a public highway and because a confrontation with police was foreseeable, Doe had plausibly alleged that Mckesson's negligence was the but-for cause of Doe's injuries.[360]

The Fifth Circuit also reversed the lower court's First Amendment ruling based on *Claiborne Hardware*. While the district court interpreted *Claiborne Hardware* as holding that Doe was required to create an inference that Mckesson directed, authorized, or ratified the conduct that injured Doe, the Fifth Circuit read *Claiborne Hardware* to hold that "Doe simply needed to plausibly allege that his injuries were one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of

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[353] *Id.* at 847–48 (quotation marks omitted) (citations omitted) (quoting *Claiborne Hardware Co.*, 458 U.S. at 918–20, 927). Mckesson's expression and conduct in the context of this protest were markedly different from those of Donald Trump on January 6, 2021, where the president engaged in expression that arguably constituted incitement to riot under the *Brandenburg* test. *See, e.g.*, Catherine J. Ross, *What the First Amendment Really Says About Whether Trump Incited the Capitol Riot*, SLATE (Jan. 19, 2021, 3:26 PM), https://slate.com/technology/2021/01/trump-incitement-violence-brandenburg-first-amendment.html.

[354] *Mckesson*, 272 F. Supp. 3d at 854.

[355] Doe v. Mckesson, 945 F.3d 818, 822 (5th Cir. 2019), *vacated*, 141 S. Ct. 48 (2020).

[356] *Id.* at 827.

[357] *See id.* at 822–23.

[358] *Id.* at 827.

[359] *Id.*

[360] *See id.* at 828.

care."[361] Because Mckesson had directed the demonstrators to break the law by blocking the highway, Doe's injuries were a foreseeable result of that illegal conduct, and thus Mckesson could be held liable based on his own tortious activity, according to the Fifth Circuit.[362] Essentially, the Fifth Circuit held that Mckesson could be held liable for injuries "caused by a combination of his own negligent conduct and the violent actions of another that were foreseeable as a result of that negligent conduct."[363]

Under the Fifth Circuit's reading of *Claiborne Hardware* and its interpretation of Louisiana tort law, a protest leader may be held liable for another's illegal conduct, regardless of whether the illegal conduct occurred in the context of a larger nonviolent protest that was protected by the First Amendment. The Fifth Circuit held that it was Mckesson's direction to protestors to violate the public highway obstruction ordinance that provided the avenue for liability.[364] The court explained, "*Claiborne Hardware* does not insulate the petitioner from liability for his own negligent conduct simply because he, and those he associated with, also intended to communicate a message."[365]

Following the Fifth Circuit's reversal, Mckesson moved for rehearing en banc, but the judges denied the motion in an 8-8 split.[366] The Supreme Court, in a per curiam opinion, declined to rule on the constitutional issues, holding that "the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented."[367] Accordingly, the Supreme Court concluded that the constitutional issue would only be implicated if Louisiana law permitted recovery under these circumstances.[368] Thus, the Supreme Court certified two questions to the Louisiana Supreme Court: (1) "whether Mckesson could have breached a duty of care in organizing and leading the protest"; and (2) whether Doe "alleged a particular risk within the scope of protection afforded by the duty," if that duty exists.[369]

On remand, the Fifth Circuit certified the two questions from the Supreme Court, but also solicited guidance on the separate, related matter of whether the Professional Rescuer's doctrine applies.[370] Under this doctrine, a "professional rescuer"—such as a firefighter or police officer—who is injured in the performance of his or her duties is not entitled to damages because of the assumption of risk.[371]

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[361] *Id.* at 829 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982)).
[362] *See id.*
[363] *Id.*
[364] *See id.* at 832.
[365] *Id.* (emphasis omitted).
[366] *See* Doe v. Mckesson, 947 F.3d 874, 875 (5th Cir. 2020).
[367] Mckesson v. Doe, 141 S. Ct. 48, 50 (2020).
[368] *Id.* at 51.
[369] *Id.*
[370] *See* Doe v. Mckesson, 2 F.4th 502, 503–04 (5th Cir. 2021) (per curiam).

On March 25, 2022, the Louisiana Supreme Court handed down its decree regarding the certified questions and held that:

> By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration. This is not . . . a "duty to protect others from the criminal activities of third persons." Louisiana does not recognize such a duty. It does, however, recognize a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence.[372]

Based on the allegations in Doe's amended complaint, the Louisiana Supreme Court held that the Fifth Circuit accurately summarized the relevant Louisiana law on this issue and that Mckesson could be held liable for Doe's injuries because Mckesson provoked

> a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway, thereby posing a hazard to public safety), . . . directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM in other parts of the country resulted in violence and injury not only to citizens but to police . . . .[373]

Regarding the application of the Professional Rescuer's doctrine, the Louisiana Supreme Court concluded that the doctrine had "been abrogated in Louisiana both legislatively and jurisprudentially."[374] Following the decision of the Louisiana Supreme Court, the Fifth Circuit is set to issue a reconsideration.

As it currently stands, the *Mckesson v. Doe* case poses substantially chilling effects on First Amendment protected activities by abandoning the protections accorded to protestors by the Supreme Court in *Claiborne Hardware* and imposing crushing financial liability on protest organizations. This decision, coupled with widespread recent legislative efforts to restrict the rights of protestors, poses grave challenges for the future of certain First Amendment rights.

CONCLUSION

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[371] *See* Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, *§ 9:24. Rescue Doctrine and Situations*, https://1.next.westlaw.com/Document/Ia943c66bb17511e696c7d5cbd6c0f720/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default) (Dec. 2022).
[372] Doe v. Mckesson, 339 So.3d 524, 531–32 (La. 2022) (citation omitted) (quoting Posecai v. Wal-Mart Stores, 742 So.2d. 762, 766 (La. 1999)).
[373] *Id.* at 533.
[374] *Id.* at 536.

The successes of the classical era of the Civil Rights Movement were not limited to addressing racial discrimination and segregation: they also brought about powerful changes in First Amendment doctrines and ushered in the development of powerful doctrinal tools that can now be wielded by modern day civil rights activists to defeat modern day efforts to silence their messages of antiracism. In the classical era of the Civil Rights Movement in the 1950s, 1960s, and 1970s, civil rights activists successfully advanced a host of novel First Amendment arguments to protect themselves in the exercise of their freedom of speech, assembly, association, rights to protest, demonstrate, criticize public officials, and petition the government for redress of grievances. These classical era cases strengthened and developed the First Amendment's host of protections for unpopular speakers against governments who sought to punish their expressive activity. As Supreme Court Justices were articulating First Amendment doctrines to protect the rights of these activists in the exercise of their civil rights, they were also forging an increasingly strong interrelated set of protections for freedom of expression. Many of the fundamental First Amendment doctrines that were forged in the classical civil rights era are implicated in the context of modern-day civil rights and social protest movements like the BLM movement and movements critical of police misconduct, as well as educators' efforts to teach students about the effects of systemic racism within our public institutions of learning. These modern day movements, like those of the classical civil rights era, have been met with opposition, including litigation and legislation. The First Amendment doctrines that were forged in the classical civil rights era continue to be significant in confronting such forms of opposition and in advancing and protecting today's civil rights activists in their exercise of their freedom of speech, assembly, association, expressive conduct, and rights to protest, demonstrate, criticize public officials, and petition the government for redress of grievances. Today, the shield of hard-won First Amendment jurisprudence can continue to protect protestors in the streets and access to ideas, even—especially—unpopular ones.