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## State Imposed Narratives: The Unconstitutionality (and Futility) of Rigging the Past to Control the Present

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NOTE FROM A PANELIST OF THE 2022 CRITICAL RACE THEORY  
SYMPOSIUM

STATE IMPOSED NARRATIVES:  
THE UNCONSTITUTIONALITY (AND FUTILITY) OF RIGGING THE PAST  
TO CONTROL THE PRESENT

*Burt Neuborne*<sup>1</sup>

Narratives define, enrich, and, occasionally, embitter our lives. Some narratives are intensely personal, helping us to forge an individual identity. Many are collective; spinning multiple, overlapping stories of shared ethnic; racial; religious; gendered; economic; geographical; and/or national bonds. Human beings need both personal and collective narratives to make sense of a world that often borders on chaos.

As a teen-ager in the mid-1950's, I stumbled onto a narrative of "legal crusader," fed by the evening news (I was 13 when the Supreme Court decided *Brown v. Board of Education*), and a steady diet of library books with stories (maybe they were fables) about Clarence Darrow and Thurgood Marshall. As a young ACLU lawyer in the late-1960's, I quickly realized that enormous roadblocks exist to effecting real change through law. I asked myself whether such a fraught and fragile narrative was worth adopting as a roadmap for a professional life. With much trepidation, I opted for the essentially existential effort to use law to roll rocks of injustice up Sisyphean hills. I've never regretted the choice; although I confess that, today, the rocks seem bigger, and the hill seems steeper, than a half-century ago.

My embrace of collective narratives was similarly beset by difficult choices. Choosing a narrative about my American identity led me to complicate the standard story of American exceptionalism - a comforting, rose-tinted tale of belonging to a uniquely-favored free people striving to build legal, political, and economic institutions designed to advance liberty, equality, and shared prosperity - with a more complex, less comforting national history, replete with shining examples of heroism and struggles for liberty and equality; but also deeply marred by pervasive racial bigotry, misogyny, greed, and economic exploitation.

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My chosen narratives are not easy to inhabit. Each requires complex personal trade-offs that balance profound inconsistencies. Right or wrong, though, my choices to construct, embrace and live inside each of my narratives were - and are - my own. No authoritarian figure – not a political dictator, nor a tyrannical teacher, a committed clergy, a well-meaning but stifling parent, a rigid community, or a populist legislature - rigged the outcome by denying me free access to the facts and opinions I needed to assess the power of each narrative. And that has made all the difference. I write this brief essay, not to defend the rightness or wrongness of my chosen stories; but to stress how important it has been to have been free to explore and choose my narratives. More often than we care to admit (or even realize), narratives are imposed on us by external forces that artificially limit the horizons of our knowledge and imaginations – parental and peer pressures; educational inadequacy and conformity; economic blinders; religious, social, and cultural walls - especially when the imposed narratives are backed by legal sanctions. In the quiet of the night, though, each of us knows whether we have made our narrative choices freely. Our ability to see ourselves as free-standing, autonomous persons vested with human dignity is, I believe, ultimately dependent on a sense that our narrative choices have been - and are - our own. Indeed, I believe that the most important hallmark of a society genuinely committed to individual liberty is the freedom to discover your own preferred narratives; to probe freely into the historical, social, psychological, and economic facts at their core; and to choose whether to inhabit them.

It is no coincidence, therefore, that the brilliantly organized Bill of Rights<sup>2</sup> begins with a First Amendment that itself begins with a promise in the Establishment Clause that the State will neither impose a religious (or deeply conscientious) narrative on you, nor force you to support one against your will.<sup>3</sup> In the end, the freedom to choose our own narratives is the foundation stone on which respect for individual dignity rests. When Justice Brandeis wrote in *Whitney v. California*<sup>4</sup> about our First Amendment commitment to human dignity, he was, I believe, describing the individual's freedom to confront the facts at the core of a chosen narrative. This Symposium is a timely and courageous effort to shine a light on the current, deeply misguided effort to impose a rose-tinted narrative of our nation's 400-year interaction with white racism beginning in 1619 by using law to block the teaching and free discussion of the extent to which American whites have

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<sup>2</sup> I discuss Madison's brilliant organization of the Bill of Rights in Burt Neuborne, "*The House Was Quiet and the World Was Calm: Reading the Bill of Rights as a Poem*," 57 Vand. L. Rev. 2005 (2009).

<sup>3</sup> I discuss the careful horizontal structure of the First Amendment in Burt Neuborne, *MADISON'S MUSIC* (The New Press 2015).

<sup>4</sup> 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ, rejecting majority's reasoning but concurring in result on other grounds).

benefited – and continue to benefit - from our nation’s ugly history of bias against people of color, long after the formal legal foundations of white racism have finally been dismantled.

I do not argue in this brief essay that the rose-tinted vision of our racial history is right or wrong; any more than I insist that stories of embedded, surviving white privilege, viewed as a form of unjust enrichment linked to past racism, are right or wrong. My point is that fidelity to First Amendment principles requires that we be left free to decide the questions of rightness or wrongness for ourselves, free from paternalistic (or racist) efforts by the state to impose a “comfortable” racial narrative upon us. Tyrants know that the key to maintaining authoritarian control is not simply force. As Vladimir Putin will soon learn, even the bloodiest of tyrants doesn’t have enough bullets to cow a restive population for long. Tyrants have learned that the key to sustained autocratic power is controlling the processes by which ordinary people construct their personal and collective narratives. Whether we look at major league tyrants, like Stalin, Mao, Hitler, Pol Pot, or Putin; or minor league would-be tyrants like Donald Trump, or the Trump wannabes of today, the common threads that unite their domestic agendas are: (1) rejection or denigration of the idea of objective truth – tyrants are always at war with the idea of objective facts, whether in science or history; and (2) efforts to control the processes by which their subjects decide which narratives – personal and collective - to embrace.

And they always start by attacking the mainstream press, gagging teachers, and banning books.<sup>5</sup>

In the early 1930’s, Adolf Hitler waged a war against science, objective facts and free inquiry, railing against “Jewish” science, and castigating the mainstream press as the “lying press (*lugenpresse*).” By 1937, Hitler had purged German schools of books and teachers that offered students access to facts and opinions that enabled them to make their own decisions about which historical or ethnic or racial narrative to embrace. The rest is pure tragedy.

In 1935, Josef Stalin began compiling an official history of the Soviet Union, sometimes called “The Short Course.” Published in 1938, the Short Course quickly became required reading in every Soviet school, imposing a single historical narrative on generations of Russian students. We continue to pay the price, today, for such an indoctrinated Russian population.

Mao Tse Tung followed the same path. His “Little Red Book” became the sole permissible source of information about history and economics. Teachers and intellectuals were ruthlessly purged to prevent them from assisting others in deciding what narratives to embrace. Pol Pot also ruthlessly silenced the voices of teachers and intellectuals who might provide students with facts, not state-imposed

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<sup>5</sup> I discuss the process of denying facts and imposing narratives in Burt Neuborne, “WHEN AT TIMES THE MOB IS SWAYED:” A CITIZEN’S GUIDE TO PROTECTING THE REPUBLIC (The New Press 2019).

stories. Donald Trump rails against facts, refusing to acknowledge the lack of factual support for his fantasies about massive fraud in the 2020 Presidential election, calls the mainstream press a “lying” press, and urges his followers to use law to gag teachers.

It is true, of course that we vest control of our public schools in local, democratically elected school boards and in state legislatures. It is also true that parents and other interested persons should have substantial and respected input into the content of public education.<sup>6</sup> It would, however, be a national tragedy if adults who passionately embrace one view of our national history are successful in using law to impose that view on schoolchildren by denying them access to the facts and opinions needed to permit them to make their own choices about the American narrative. That’s what tyrants like Vladimir Putin do.

That is also why efforts to use law to ban the discussion of our troubled racial past and present from the public schools violate the First Amendment. This is not the first time that zealots have sought to use democratic control of the public schools as a device to impose forced narratives on American schoolchildren. Tennessee, Nebraska and Oregon were the early battlegrounds. In the celebrated *Scopes* trial,<sup>7</sup> the Tennessee legislature sought to ban the teaching of a hated doctrine – Darwinian evolution - from the public schools. Clarence Darrow defended the schoolteacher, arguing that free inquiry cannot take place when the state bars unpopular subjects from the schools. Scopes was convicted and paid a small fine (later vacated on technical grounds by an appeals court), but history has judged that attempt at mind control with the harshness it deserves.

Law, as well as history, condemned Nebraska’s and Oregon’s unfortunate efforts at using schools for mind control. In *Myer v. Nebraska*,<sup>8</sup> the Supreme Court opened the modern First Amendment era by invalidating Nebraska’s effort to ban the teaching of German in the schools. The Nebraska legislature, infected by the anti-German bias of the WWI era, feared that teaching German in the schools would reinforce the culture of thousands of German immigrants residing in Nebraska,

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<sup>6</sup> The Supreme Court has recognized that non-parents are constitutionally entitled to vote in school board elections because they are deeply affected by the quality of public education. *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

<sup>7</sup> In 1925, John Scopes, a Dayton public school teacher, defended by Clarence Darrow, was found guilty of teaching Darwinian evolution in violation of Tennessee’s recently enacted Butler Act and fined \$50. The conviction was affirmed by the Tennessee Supreme Court in *Scopes v. State* (1927) (not officially reported; opinion widely available on Internet). The appeals court vacated the judge-imposed \$50 fine because the Butler Act required the fine to be set by the jury at a minimum of \$100; but recommended that the proceedings be *nolle prosequere* because Scopes was no longer employed by the state. The trial proceedings were fictionalized in the play and movie, “*Inherit the Wind*.” The United States Supreme Court repudiated the Scopes conviction in *Epperson v. Arkansas*, 393 U.S. 97 (1968)

<sup>8</sup> 262 U.S. 390 (1923).

many of whom had opposed going to war with Germany. The Supreme Court firmly rejected the Nebraska's effort to impose a more conventionally patriotic narrative on schoolchildren. While the Court relied on the substantive due process clause because the First Amendment had not yet been applied to the states, *Myer*, decided in 1923, is viewed today as recognizing First Amendment protection of freedom of inquiry in the public schools.

In *Pierce v. Society of Sisters*,<sup>9</sup> the Supreme Court reiterated its support for principles of free inquiry by striking down Oregon's effort to force schoolchildren to attend public schools, cutting off the possibility that private schools might provide children with alternative narratives. In the years since *Scopes*, *Pierce*, and *Meyers*, the Supreme Court has remained true to the vision of public schools as a place to open minds; not to close them.

In the depths of our most trying national ordeal – the war for national survival with Adolf Hitler's Germany – the Court, after an initial wobble, dramatically protected students against forced narratives. During WW II, legislatures and school boards sought to impose a compulsory pledge of allegiance to the flag on students to reinforce a narrative of patriotism. In *West Virginia Board of Education v. Barnette*,<sup>10</sup> the Court rebuffed efforts to impose a stifling orthodoxy on American schoolchildren. Justice Jackson's stirring words asserting the freedom of individuals to choose their own narratives free from the coercive arm of the state stands as a powerful rebuff to efforts to ban discussion of controversial topics from American public schools.

In the modern era, the Court has refused to permit zealots to purge school libraries of controversial books,<sup>11</sup> prevented the firing of teachers for political reasons,<sup>12</sup> blocked efforts to smuggle religious indoctrination into the schools,<sup>13</sup> and protected the right of students and teachers to discuss and practice religion in freely-chosen settings that did not risk imposing the religious narrative on others.<sup>14</sup>

Tennessee's efforts to use law to ban the discussion of controversial racial issues, including the facts of our national history of racial bias, cannot be squared with such a First Amendment heritage of constitutionally protected educational openness and free inquiry. The enjoyment of such robust First Amendment freedom comes, however, with at least three significant responsibilities. First a commitment to respecting the legal rights of others to choose their own narratives, even when we find them ugly. Under the First Amendment, the way to oppose and defeat ugly narratives is to refute them; not use law to silence them. Indeed, if progressives

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<sup>9</sup> 268 U.S. 510 (1925).

<sup>10</sup> 319 U.S. 624 (1943).

<sup>11</sup> *Island Trees School Dist. V. Pico*, 457 U.S. 853 (1982).

<sup>12</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>13</sup> *Epperson v. Arkansas*, *supra.*; *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>14</sup> *Good News Club v. Milford School Board*, 533 U.S. 98 (2001).

assert the right to use law to silence an ugly narrative, they concede the power of others to use law to silence their preferred narratives.

Second, the self-discipline not to use positions of power, especially positions of educational power, to impose our chosen narratives on others. The freedom of inquiry that public school teachers enjoy carries with it a duty to present material in a balanced manner that aids students in making up their own minds. And, finally, an ongoing inward-looking, personal duty to subject our chosen narratives to searching factual and moral scrutiny. No narrative is perfect.

I am confident that if we remain true to our First Amendment tradition of respect for free inquiry in our schools, we, as a nation, will continue to grow towards the light as the result of millions of freely made private choices to embrace narratives of justice and shared human dignity. If, however, we abandon our heritage of intellectual openness and free inquiry by using law to impose the narratives of those in power on our children; narratives that either ignore the facts and current consequences of our troubled racial past; or ignore often heroic past and current efforts to live up to our ideals, we will sow the seeds for future strife and instability.

It's a funny thing about state-imposed narratives – they just don't last.