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John Greabe: 'Divisive Concepts' law and the big chill

Aug 18, 2021



John Greabe

MUCH CRITICAL commentary concerning the so-called “divisive concepts” provisions in this year’s budget legislation has focused on their restrictions on speech. These restrictions, among other things, forbid public K-12 teachers from instructing that some persons are “inherently superior or inferior to [others]”, “inherently racist or sexist,” “should be discriminated against,” or “should not attempt to treat others equally” because of their “age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.”

Criticism of these speech restrictions is deserved. They fly in the face of, as the Supreme Court has described it, our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.” (NY Times v. Sullivan, 1964). For example, the question whether affirmative action should be constitutional is likely to return to the Supreme Court next term in Students for Fair Admissions v. Harvard College. The case involves whether Harvard is unlawfully discriminating against Asian-American applicants in its admissions processes. What a wonderful issue to explore and debate in a high school civics class, right?

Sadly, if I were asked to counsel a teacher who wished to avoid trouble under the new law, I would advise against discussing affirmative action. For if, say, a teacher asked a student to articulate an argument in favor of affirmative action, that teacher would run the risk of being charged with violating a provision of the new statute stating that “no pupil in any public school shall be instructed to express support for [the idea] that an individual should be discriminated against partly because of his or her race.”

Now, to be clear, I don’t believe that it would be a statutory violation for a teacher to ask a student to present such an argument. But my view on how the statute should be construed would not affect my advice. For the statute could be read to bar such an assignment.

In 1st Amendment parlance, vague statutes that might cause speakers to refrain from lawful speech are said to have “chilling effects.” But the chilling effects likely to be caused by the vagueness of the new law’s speech restrictions, as just described, pale in comparison to those that likely will be caused by its remedial provisions.

The new law's remedial provisions are sweeping. They invite "[a]ny person aggrieved" by a perceived violation of the statute to sue the violator's school or school district. They also ominously raise the prospect of ending an offending teacher's career by stating that "[v]iolation of [the divisive concepts law] by an educator shall be considered a violation of the educator code of conduct that justifies disciplinary sanction by the state board of education."

The law ordinarily seeks to shield from lawsuits and liability public servants who are called upon to exercise discretion and judgment unless they act in a patently unreasonable manner. Police officers, for example, cannot be sued or held liable for merely violating the Constitution; they can be sued and held liable only if they have acted in such disregard of clearly established constitutional law that they are either plainly incompetent or knowing law-violators. The law confers this qualified immunity to avoid chilling police officers from performing their challenging duties.

The divisive concepts law flouts this tradition. It puts targets on the backs of teachers and declares open season. The clear message to teachers is "discuss discrimination in its various forms at your professional peril."

Consider the following scenario.

A civics teacher observes, correctly, that the death penalty is imposed in this country in a racially discriminatory manner. A student in the class misunderstands the teacher to have said that White jurors in capital cases tend to vote in ways that disadvantage African Americans because they are inherently racist. A parent of this student subsequently asks whether her teacher has ever suggested that White persons are inherently racist. The student answers yes and recounts her misunderstanding of what the teacher said. The aggrieved parent then sues and files a complaint with the State Board of Education.

Serious harm would be caused by actions such as this, regardless of outcome. The school and school district would be forced to expend scarce resources defending against the claims. And the teacher would bear the additional psychic and practical burdens of being charged with unethical conduct.

The divisive concepts law's remedial provisions will likely chill risk-averse school districts, schools, and teachers from exploring crucial topics such as the legacy of slavery, contemporary racism, sexism, religious bigotry, and other forms of discrimination, notwithstanding assurances that the discussion of such topics remains permissible.

New Hampshire's divisive concepts law should be repealed.

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