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COMMENTARY

Commentary: Divisive concepts and regulation by threat of baseless lawsuit

| JOHN GREABE

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📷 Protesters hold up signs outside the Texas state capitol on May 29, 2021, in Austin, Texas. Thousands came out in response to a new bill outlawing abortions after a fetal heartbeat is detected, which was signed by Texas Gov. Greg Abbot. (Sergio Flores | Getty Images)

At the State House, attention has returned to New Hampshire's so-called "divisive concepts" law. The law, enacted in 2021, bars public K-12 teachers from engaging in certain forms of instruction on issues of race, gender, and other forms of discrimination. The Legislature is presently considering bills both to repeal the law and to extend it to the higher education context.

Those who support repeal tend to emphasize the vital need for classroom conversations on topics near the periphery of the restraints on speech imposed by the law. And rightly so. The law's purpose and effect are to deter teachers and schools from engaging in such conversations. Bans on speech targeting controversial topics are rooted in weakness and fear, not strength. Over time, Americans have always come to see them as misguided.

But there is another feature of this law that deserves separate condemnation. The law encourages the initiation of legal processes by uninjured, ideologically driven complainants that will inevitably deter teachers and schools from engaging in important conversations that are *not* prohibited by the law. The law thus stands as a yet another example of an emerging but disturbing national phenomenon: state legislatures exploiting the chilling effect of the threat of a baseless lawsuit to deter conduct that they cannot or will not regulate openly and honestly.

Consider, for example, recent developments in Texas and California.

If you follow the news, you probably are aware that the Texas Legislature has enacted a law that invites anyone in the nation to file a lawsuit against persons or entities involved in assisting someone in obtaining an abortion after the sixth week of pregnancy.

And you might also have read that California Gov. Gavin Newsom is trying to get the California Legislature to enact a similar law targeting anyone assisting in the manufacture, distribution, or sale of what he calls "assault weapons."

Now, at present, many abortions and firearms-related activities targeted by these laws are constitutionally protected. Therefore, state legislatures cannot lawfully regulate them. But the purpose of these laws is not to authorize lawsuits that plaintiffs could *win*. Rather, the purpose is to make it too risky and expensive for the potential targets of such laws to exercise their *lawful* rights. For being sued or made the subject of some other punitive legal process can be catastrophic even if the subject ultimately prevails.

Thus, even though abortion is still a constitutionally protected right, and even though the lawsuits authorized by the Texas law are doomed to fail (at least until the United States Supreme Court withdraws federal constitutional protections for abortion rights), there have been virtually no abortions in Texas since its anti-abortion law went into effect last fall. And Gov. Newsom has made it clear that his goal is to achieve a similar outcome in California. That is, he wants to make it too risky and expensive to engage in certain firearms-related activity, even though a federal judge has found the activity to be constitutionally protected.

Certainly, many in the New Hampshire Legislature oppose the constitutional protection presently afforded to certain abortions. And many others oppose the constitutional protection that federal court judges are extending to certain firearms-related activity. No doubt, many in the New Hampshire Legislature would like to see the Supreme Court reinterpret the Constitution so that states may regulate these activities. But unless and until such an interpretive change takes place, no one should support legislation designed to do an end-run around the law and to deter lawful activity through ideological lawsuits.

Sham laws of this sort undermine political accountability, increase civil conflict, and invite cynicism about the integrity of the legislative process. They are flatly inconsistent with the rule of law. Government action seeking to deter and punish lawful conduct is tyrannical.

New Hampshire's law is also a sham. By its terms, the law prohibits discriminatory speech that no competent professional would engage in. But its remedial provisions, which invite *any* aggrieved person to sue schools and to report teachers to the State Board of Education, seek to accomplish far more. These provisions seek to deter educators from engaging in important and entirely lawful classroom conversations about racism, slavery, sexism, religious bigotry, and other forms of discrimination. The law's legislative history makes this clear.

If the New Hampshire Legislature wishes to suppress conversations about these vital topics, it should enact a law that does so explicitly. It should not hide behind a subterfuge. It is disingenuous for the Legislature to pretend that teachers and schools need not worry if they merely steer clear of supremacist advocacy. For teachers and schools surely know that all that it takes is one ideologue, acting entirely on hearsay, to set into motion punitive legal processes that, regardless of outcome, can have ruinous consequences for those involved.

We are a state that places a high value on freedom. A law that stealthily seeks to suppress lawful activity – especially core First Amendment activity – is antithetical to freedom.

The New Hampshire Legislature should repeal its “divisive concepts” law.

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