10-10-2023

Florida's Stop Woke Act and its Function as a Content-Based Restriction

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October 10, 2023 No Comments

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Senate Bill 266 and Critical Race Theory

May 2023, Florida Governor Ron Desantis signed into law Florida Senate Bill 266 (SB 266) concerning changes to funding requirements for Florida State University System institutions.. Under SB 266, university undergraduate courses may not "distort significant historical events or include a curriculum that teaches identity politics…or is based on theories that systemic racism, sexism, oppression, and privilege are inherent in the institutions of the United States and were created to maintain social, political, and economic inequities".

The bill is popularly known as the "Stop Woke Act" (hereafter "the Act")—an attempt to curtail the apparent horrors of Critical Race Theory (CRT) discussion. Desantis has been outspoken in his disdain for tenets of CRT. Consistent with Desantis's mischaracterization, the Florida legislature believes CRT materially distorts history, victimizes Caucasian Americans, and silences what it would call "Western values". Accordingly, the Florida legislature began a campaign to ban or remove CRT as an approach to education in state-funded universities. Under the Act, Department heads and professors must present their curricula to the institution's Board of Trustees annually to ensure compliance; professors may lose their positions and schools may lose their funding if classes integrate CRT teaching.

In reality, CRT was developed in the 1980s by Kimberle Crenshaw and other legal scholars. CRT examines social structures in historical context to the challenge systemic imbalance of legal and social power between White Americans and Brown and Black Americans. Crenshaw intended CRT be a Socratic practice, thus encouraging frank

communication and social analysis. CRT is therefore not an alternative recounting of historical events, rather another mode of historical discussion emphasizing previously disregarded and silenced voices in American history.

Photo By Ernie A. Stephens

Threshold Issues

A party bringing a constitutional claim must show that a (1) state action upon (2) speech has an (3) infringing effect. Usually, Constitutional protections are only enforceable against the government. Here, the State of Florida has imposed the 'Stop Woke Act', thus satisfying the State Action Doctrine.

The First Amendment states: "Congress shall make no law…abridging the freedom of speech or of the press." The Framers contemplated protecting a wide variety of expression (including unpopular, profane, obscene, and even racist speech). Expression can also be nonverbal (such as an image, symbol, political funding, or conduct that communicates). Freedom of expression extends to public school officials in classrooms. In *Tinker v. Des Moines Independent Community School District*, Justice Fortas stated "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". Therefore, even in the public-school context, teachers and students' expressions are classified as "speech" and thus protected via the First Amendment. Here, teachers and students have a protectable right to engage in CRT-related discussion.

Infringement may take many forms. A law is considered infringing if it creates a chilling effect upon speech, places civil liabilities upon speech, denies compensation for speech, compels speech, or places unconstitutional conditions upon speech. A chilling effect is one which dissuades speech. Being that speech in the classroom is covered under the First Amendment, a law creating a chilling effect upon speech in the classroom infringes upon rights of expression. Where a law intends to infringe upon speech, the Court will further analyze whether the infringement is justified by a compelling purpose. Again in *Tinker*, Justice Fortas stated, "[infringing statutes] unconstitutionally interfere with the liberty of teacher, student, and parent."

The Act's harsh penalties are likely to dissuade teachers and students from engaging in protected speech–CRT discussion. Thus, the Act infringes upon students and teachers' First Amendment rights.

Classifying the Restriction

After the challenger has established that First Amendment protections apply, the government has the burden to show that the law is no more infringing than necessary in furtherance of a compelling government interest (known as Strict Scrutiny—the most stringent standard of judicial review the court will apply. A compelling interest is difficult to define. For instance, in *U.S. v. Hardman*, the 10th Circuit Court of Appeals defined a compelling interest as an interest of the "highest order". Still, this language does not operate as an effective standard. In *Republican Party of Minnesota v. White*, the court approached the question differently. The *White* court treated the questions of interest and fit, as one:

"If an interest is *compelling* enough to justify abridging core constitutional rights, a state will enact regulations that substantially protect that interest from similarly significant threats…A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon…speech, when it leaves appreciable damage to that supposedly vital interest unprohibited"

–*Republican Party of Minnesota v. White*, 416 F.3d 738, 750 (2005).

By using the *White* analysis and evaluating fit *first*: does this infringement upon a fundamental right pass strict scrutiny? Strict Scrutiny review ensures that speech is broadly protected while balancing certain public interests. Whether the restriction is content-based or content-neutral informs the propriety of that fit.

Generally, the government may not impose a law restricting speech by content. Content-neutral restrictions reasonably define the time, manner, and place of expression. Where a law imposes a time, manner, or place restriction, the law need only leave open ample alternative avenues of communication to be deemed valid. Content-based restrictions take two forms. A subject matter restriction precludes speech on a topic; a viewpoint-based restriction precludes speech from a certain perspective. In some cases, a law restricts subject matter and viewpoint. Both types of content restrictions are disfavored, however a Court is more likely to uphold a subject matter restriction than a viewpoint-based restriction.

This Stop Woke Act's language infringes both subject matter and viewpoint. Although the language of the Act is ambiguous and it does not explicitly mention CRT, it expressly attacks central tenets of CRT. Infringing upon the composite topics of CRT naturally precludes CRT subject matter. Kimberle Crenshaw's definition of CRT follows:

"Although CRT scholarship differs in object, argument, accent, and emphasis, it is nevertheless unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and in

particular to examine the relationship between that social structure and ideals such as ‘rule of law’ and ‘equal protection’.”

-Kimberle Crenshaw, Neil Gotanda, et. al., *Critical Race Theory: The Key Writings that Formed the Movement* New York Press, xiii (1995).

The Act restricts discussion of the effects of inherent racism, sexism, oppression, and privilege upon social structures. First, placing restrictions upon the *effects* of racism, sexism, oppression, and privilege limits discussing the topics themselves. Second, limiting discussion of these topics necessarily limits discussing CRT as an academic school of thought. In *Epperson v. State of Arkansas*, the Court found that an act restricting discussion of Darwinian evolution naturally inhibited a teacher from mentioning the theory in a neutral way. Similarly, restricting the component parts of CRT also restricts neutral discussion of CRT as an existing academic alternative to traditional modes of historical analysis. The Act restricts expression upon subject matter for teachers and students.

The language of the Act vehemently restricts based on viewpoint. First, CRT is a lens through which academics can evaluate history, in the belief that American schools traditionally ignore racialized and gendered facts about American history and life. Therefore, any restriction upon the subject matter of CRT is also a restriction upon the expression of the speaker’s political viewpoint (that oppression is inherent in American history and its social structure). Second, the Act prohibits ‘distortions’ of significant historical events. Proponents of CRT believe that history cannot be taught in a politically neutral and decontextualized way. By prohibiting ‘distortions’ (repugnant though the language may be), the legislature makes a value judgment that viewpoints espoused in CRT do in fact distort historical events. While the Florida legislature may argue history is apolitical, it certainly may not infringe upon the rights of others to argue otherwise on that basis. Third, is CRT is taught through critical discussion. Naturally, participants in CRT classes voice opposing viewpoints about systemic oppression; educators may join in conversation to facilitate critical thinking. Prohibiting students and educators from engaging in CRT-related conversations in the intended Socratic format handicaps certain arguments. And, logically, handicapping expression of one viewpoint in a debate, selects for expression of opposing opinions.

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Social Harm

The effect of the Act upon the discussion method functions like a microcosm of a larger evil. CRT encourages multi-faceted, intersectional conversation, but it is founded upon *duality*. Crenshaw and others began with the premise that education has amplified the White American experience and ignored systemic oppression. This foundation presents a dichotomous tension. CRT proponents believe American history, civics, and social science education presuppose some elements of identity, oppression, racism, sexism, etc. Whereas opponents like the Florida legislature, believe these topics can be and have always been taught as a decontextualized accounting of facts. These arguments are mutually exclusive. In a bipolar debate, prohibiting expression of one viewpoint necessarily promotes the other. In this case, the opponents of CRT win by default.

This debate is not a strictly philosophical conversation about learning. Rather, this debate is imbued with current political significance. CRT asks participants to question a status quo in the hope of deconstructing injustice and decolonizing American social life. Many professors and students believe the Stop Woke Act, and the various acts it has inspired in neighboring states, put American civil life at risk. Dr. Brooke Sadler of the University of South Florida offered her thoughts on the implications of the Act for Social Science curricula. From her October 2022 Guest Column for the Orlando Sentinel… "[the Act] places the ultimate power and sole

discretion to fire tenured faculty in the hands of one person, the chief academic officer, who may override the judgment of experts in the field".

In her open letter to Florida educators representing the Florida Philosophical Association, Dr. Sadler spoke on the possible detriment to Florida university students should the Act go unchallenged: "[W]e teach our students to think critically about common wisdom, to question authority, and to welcome fresh perspectives". Dr. Sadler strongly believes such values and practices are integral to "our understanding of the value of a functioning democracy." Without academic freedom to experiment in classrooms, students will lose an essential element of civic engagement: the ability to hold their government responsible for fairly representing all citizens regardless of identity.

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