



## **Academic Pursuits at ETSU: A Safe Space for Professors and a Safe Space for Critical Race Theory**

On April 11, 2022, Governor Lee signed into law SB2290/HB2670 (the “Divisive Concepts Act” or the “Act”), commonly called the “CRT law” in reference to its presumptive target: Critical Race Theory. As with any new law, our faculty, staff, and students have many questions about the application of this Act to their jobs with the university. I hope to answer as many of those questions as possible in this article.

With any law, it is important to understand the context in which the legislature enacted it. The controversy that inspired the Divisive Concepts Act began just a few years ago. In 2018 and 2019, Critical Race Theory, a previously obscure academic construct dating to the late 1960s entered the mainstream with the publication of the books *White Fragility* by Robin DiAngelo and *How to be an Antiracist* by Ibram X. Kendi and the presentation of anti-bias and anti-racist training seminars in workplaces across America. The controversy began in July 2020 when journalist Christopher Rufo received information about Seattle’s anti-racist training. He researched the seminars, published articles on the Manhattan Institute’s *City Journal* website, accepted anonymous reports of additional seminars, and eventually landed an interview on Tucker Carlson’s television program. The next morning, Rufo received a call from the Trump Administration. President Trump asked Rufo to help draft an executive order to prohibit critical-race-theory-based training seminars from the federal government. Within a year, critical race theory consumed network and cable news, newspapers, magazines, and websites. And the controversy soon entered statehouses across the country, including Tennessee, where our General Assembly, in 2021, enacted the state’s first divisive concepts statute. That law prohibited local school systems from teaching certain elements of critical-race-theory and anti-racism, dubbed “divisive concepts,” to elementary, middle school, junior high, and high school students. This



year, the Tennessee General Assembly turned its attention to critical-race-theory and anti-racism training in higher education and enacted the Divisive Concepts Act.

### **1. The Divisive Concepts Act protects and preserves Academic Freedom.**

For our purposes, the General Assembly saved the most important provision for the end of the Act. Section 7 of the Act expressly provides that we should not interpret it to infringe on the freedom of speech protected by the state and federal constitutions, to prohibit training our employees on state and federal non-discrimination laws, to infringe on the First Amendment right to freedom of speech, to infringe on our faculty's right of academic freedom, or to require action contrary to any state or federal law or any requirement of our academic accreditation. The United States Supreme Court has ruled that academic freedom is "a special concern of the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>ii</sup> The Court explained:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned . . . . The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.<sup>ii</sup>

As if that were not enough to bring emphasis to the scope of protection provided by the First Amendment, the Supreme Court continued:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>iii</sup>



Moreover, the Act does not alter or amend any provision of the Campus Free Speech Protection Act. The Tennessee Campus Free Speech Protection Act<sup>iv</sup> includes the following provisions that are pertinent to the teaching of the “divisive concepts” identified in the CRT law:

- Public institutions of higher education embrace a commitment to the freedom of speech and expression for all students and all faculty.
- Public institutions of higher education, including their faculty, shall not require students or other faculty to adopt or to indicate their adherence to beliefs or orthodoxies on any particular political, philosophical, religious, social, or other such subject, although institutions may require students and faculty to conform their conduct to the requirements of law and policy.
- An institution shall be committed to maintaining a campus as a marketplace of ideas for all students and all faculty in which the free exchange of ideas is not to be suppressed because the ideas put forth are thought by some or even by most members of the institution's community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.
- Faculty are free in the classroom to discuss subjects within areas of their competence.

Finally, and most notably, the Campus Free Speech Protection Act mandates that “[n]o faculty will face adverse employment action for classroom speech, unless it is not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction.”

The guiding principle for statutory interpretation is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.<sup>v</sup> With this in mind and given the express protection of Section 7, the protections afforded by the Campus Free Speech Protection Act, and the protections provided by the First Amendment, we should interpret the Divisive Concepts Act in accordance with the General Assembly’s goal of preserving First Amendment rights and protecting academic freedom. The General Assembly did not intend for the Act to cause significant changes to our existing academic curricula or courses or any subsequent courses that we may develop in the future. Our faculty can rest assured that the various fora in which



we pursue academic endeavors—classrooms, labs, lecture halls, and performance venues—are safe spaces for the teaching of Critical Race Theory and Anti-Racism

## **2. Our Faculty and Staff are Protected from Personal Liability under the Act.**

Although the Act permits students and employees, who believe the university violated the Act, to file a lawsuit against the university, the Act does not authorize a lawsuit against an individual employee, whether a member of our faculty or staff. To be sure, the General Assembly has provided that “state officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer’s or employee’s office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain.”<sup>vi</sup> A state employee who has absolute immunity from liability is free from suit and free from liability for damages. The Tennessee Supreme Court has explained that “the legislative purpose and intent of [Claims Commission statute] is to protect state employees from individual liability for acts or omissions that occur in the scope of their employment.”<sup>vii</sup> Thus, a student or employee who files a lawsuit under the Act must file it against the university and the university will be liable for any damages. Moreover, if a student or employee files a lawsuit against the university, the Tennessee Attorney General and Reporter will represent the university and any officers or employees who are interested in the lawsuit, whether named or not.<sup>viii</sup> Moreover, the claim would most likely be litigated before the Tennessee Claims Commission, which has “exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees.”<sup>ix</sup> Finally, the state would pay any judgment through the Risk Management Fund.<sup>x</sup> The state of Tennessee protects its employees from personal liability. This protection extends to any faculty or staff who are interested in a lawsuit filed because of an alleged violation of the Divisive Concepts Act.



In conclusion, I hope this article instills confidence in the faculty and staff to continue working for the university without concern for their First Amendment rights on campus, including academic freedom, and without concern for any personal liability for a lawsuit challenging the performance of your duties. The university's administration supports you. The law protects you.

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<sup>i</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>ii</sup> *Id.*

<sup>iii</sup> *Id.*

<sup>iv</sup> Tenn. Code Ann. § 49-7-2401

<sup>v</sup> *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020).

<sup>vi</sup> Tenn. Code Ann. § 9-8-307(h).

<sup>vii</sup> *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 343 (Tenn. 2002)

<sup>viii</sup> Tenn. Code Ann. § 8-6-109.

<sup>ix</sup> Tenn. Code Ann. § 9-8-307.

<sup>x</sup> Tenn. Code Ann. § 9-8-109.