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LEGISLATIVE BRIEFER

Campus Speech Bills and the Right to Protest

Universities in the United States have long been associated with campus protest. Student demonstrators played a significant, and sometimes leading role, during the civil rights movement, the Vietnam War, and the campaign for divestment from Apartheid South Africa, among other political moments. In recent years, this tradition has been revitalized: Many campuses are seeing a surge in student demonstrations, whether related to Black Lives Matter, immigration policies, environmental campaigns, or other issues. Amidst a charged national political environment, some of the most publicized protests have been against speakers on campus viewed as politically polarizing. These demonstrations have sometimes led to confrontations between protesters and speakers, university administrators, or counter-protestors.

In this context, legislation has been proposed in statehouses across the country purportedly aiming to ensure "free speech" on state university campuses. These bills generally address a range of issues related to speech activities. Some provisions have garnered broad support from free speech advocates, such as those increasing areas on campus where students can hold demonstrations. Other provisions, however, are likely not to expand free speech rights, but instead limit or chill the right to peacefully assemble and protest on state university campuses. Among other problems, these provisions have vague and overly broad standards for impermissible protest activity; impose potentially disproportionate penalties for protesters found in violation of those standards; incentivize the over-policing of demonstrations; and curtail the ability of universities to inform policy debates.

This briefer focuses on provisions of bills with some of the most negative implications for protest rights. It divides these provisions into those banning protests that infringe on the expressive rights of others, mandatory sanctions, litigation, and university neutrality.

Banning Protests that Infringe on the Expressive Rights of Others

A number of proposed bills in different states direct state universities to adopt policies on expressive activity on campus. One of the most concerning policy provisions that universities would have to adopt would prohibit students from "infringing" on the expressive rights of others. For example, legislation introduced in Wisconsin states: "Any protest or demonstration that infringes on the rights of others to engage in or listen to expressive activity is prohibited."[1]

Provisions such as this one do not accurately reflect the U.S. Constitution's First Amendment protection of free speech. The First Amendment provides that the state, including a state actor like a public university, will not interfere in an individual's protected speech. It does not, however, create a right to listen to or engage in expressive activity free from interference by a non-state actor, such as a protestor. As such, the Wisconsin bill's provision appears either to misstate the First Amendment right or create a new right for which there is no standard.[2]

Importantly, prohibiting protests that "infringe" on the expressive rights of others might lead a university to ban peaceful protests protected under the First Amendment. Take the example of a speaker in an unreserved public forum on campus, such as an outdoor space: If individuals gather to peacefully protest and heckle the speaker, that heckling is protected speech even though it may disrupt the speaker's remarks.[3] In a public forum, both the speaker and the demonstrators have a right not to have their protected speech interfered with by a state university.[4] Similarly, take the example of students peacefully picketing a speaker in a public forum on campus as the speaker

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[1] Wisconsin AB 440 (2017). See also, Illinois HB 2939 (2017).

[2] In *Grayned v. City of Rockford* 408 U.S. 104 (1972), the U.S Supreme Court held that a law is unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Under the proposed Wisconsin statute it is unclear what activities are prohibited under the statute and which are not.

[3] See, e.g., *Feiner v. New York* 340 U.S. 315 (1951)

[4] The standard is different in a private reserved space on campus. Under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the U.S. Supreme Court found that an elementary, junior high, or high school could prohibit speech that would "materially and substantially" interfere with the work and discipline of the school. However, there are many protests in public areas in a school that may interfere with a speaker in that public space, but not "materially and substantially" interfere with the functioning of the school. Notably, the Supreme Court did not say that a student had to be or should be punished by the school if their protest "materially and substantially" interfered with the functioning of the school, but merely that the student could be. Further, in *Tinker*, the students in question were all in primary or secondary school, not university. The federal courts have indicated elsewhere that universities must, at least in some cases, meet a higher threshold in restricting the speech activities of university students given their greater maturity and the different pedagogical goals of each institution, among other factors. (See, *McCauley v. university of the Virgin Islands*, 618 F.3d 232 (2010) noting differences between high schools and universities when striking down a speech code maintained by the University of the Virgin Islands.)

walks to a speaking event: If the speaker stops in the public space to address the students and is shouted down, the students' speech is protected speech even if it disrupts the speaker addressing them. Universities could, however, interpret provisions such as those in the Wisconsin bill in a way that leads them to prohibit constitutionally-protected protests like these.

In the end, unclear language that requires universities to ban protests that "infringe" on others' expressive rights forces universities to make difficult decisions about interpretation and could compel them to act in a way that chills the right to protest. It could even lead a university to unconstitutionally prohibit demonstrations protected under the First Amendment.[5]

Mandatory Expulsion or Suspension

Several draft bills that have been introduced would compel universities to suspend or expel students who participate in protests that infringe on the expressive rights of others.[6] For example, a bill introduced in Illinois reads, "[A]ny student who has twice been found responsible for infringing on the expressive rights of others will be suspended for a minimum of one year or expelled."[7]

Such provisions couple the unclear standard of banning demonstrations or other activities that "infringe" on the expressive rights of others, with mandatory penalties against students. As such, they provide for the enforcement of a vague standard with sanctions that may be disproportionate to a specific context.

Suspension or expulsion can create significant financial and emotional costs for a student and are the harshest penalties a university may impose. Yet, provisions like those in the Illinois bill require these penalties be administered even if a university determined that another action was better fitted to the context or there were mitigating circumstances. For example, a university might decide that it would be best to engage in dialogue with a student about the importance of including a diversity of viewpoints on campus, or issue a warning about future repercussions. In other cases, a formal reprimand or requisite community service might be the most appropriate sanction.

Depending on the process involved in determining whether a student violated the rule, suspending or expelling a student as required by the Illinois bill and others may also leave universities open to legal challenge, on grounds that they violated the student's due process rights.

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[5] As the Supreme Court made clear in *Cohen v. California* 403 U.S. 15 (1971) and *Snyder v. Phelps* 562 U.S. _ (2011) prohibiting speech only because it is offensive or disrespectful violates the First Amendment.

[6] See also, Wisconsin AB 299 (2017).

[7] Illinois HB 2939 (2017), See also, Michigan SB 350 (2017) and Missouri HB 2423 (2017).

Imposing mandatory sanctions on participants in a campus protest can also chill protest activity protected under the First Amendment. Given the vague language and rigid punishments in these provisions, many students may decide to simply not participate in any protests to avoid the possibility of receiving these harsh penalties.[8]

Litigation

A number of draft bills have provisions that create a cause of action under state law against a state university when an individual's expressive rights are infringed.[9] These provisions have varied constructions and some may actually expand protest rights. For example, some bills only create a cause of action against a university if the student is denied access by a university to a student forum for expressive purposes.[10]

Others, however, take a much broader and more concerning approach. For example, in a bill introduced in Illinois, either the Attorney General or any person whose expressive rights are violated per the provisions of the bill can sue a state university.[11] The Illinois bill includes a provision that requires universities to prohibit "protests and demonstrations that infringe upon the rights of other to engage in or listen to expressive activity" and requires that the university suspend or expel any student who has twice violated this policy.[12] Presumably, someone who was aggrieved under the Act could sue the university under this broadly-worded provision if they believed their expressive rights were infringed on campus. Notably, this creates liability for a university not just for their acts of commission (i.e. a university interfering with the expressive activity of a student), but also acts of omission (i.e. not stopping other students from interfering with another's speech).

Creating a cause of action on such broad grounds encourages litigation against state universities over student protests, potentially creating a flood of cases against universities over controversial protests that then must be defended at taxpayer expense. Fear of such litigation may also incentivize universities to over-regulate and over-penalize demonstrations, chilling protest rights on campus.

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[8] A number of proposed bills require a mandatory range of unspecified disciplinary sanctions on those who interfere with or infringe on the expressive rights of others. See, e.g., Wisconsin AB 440, *CA AB2081*. For example, Georgia Senate Bill 339 (2018) reads: "That a range of disciplinary sanctions shall be established for anyone under the jurisdiction of the institution who materially and substantially interferes with the free expression of others." While less egregious than mandatory expulsion or suspension, this language creates a vague requirement of mandatory sanctioning that can place pressure on universities to discipline protesters when either no discipline is warranted or to discipline them disproportionately to the infraction.

[9] If a state university violates the First Amendment of the Constitution there is already a cause of action in federal law.

[10] Colorado Senate Bill 062 (2017)

[11] Illinois House Bill 2939 (2017)

[12] See, *e.g.*, Illinois HB 2939 (2017), Iowa SF 2344 (2018), Florida SB 1234 (2018), South Carolina HB 4440 (2018), Missouri HB 2423 (2017), Oklahoma HB 3586 (2018), West Virginia SB 111 (2018), Wyoming HB 0137 (2018).

University Neutrality

Several states have proposed laws that would require universities to attempt to take a neutral stance on policy issues.[13] For example, a bill introduced in West Virginia requires that state universities: "Shall strive to remain neutral, as an institution, on the public policy controversies of the day."[14]

Such a requirement directly blocks universities' ability to speak out on or protest injustices. For example, such language likely would have stopped many universities from taking part in the South Africa apartheid divestment movement.

The neutrality requirement also limits universities' ability to inform policymakers or the public about topics on which they have expertise and strong interests. They could be held back, for example, from providing expert feedback on issues such as academic freedom, how university endowments might be affected by tax reform, or how immigration rules can be reformed to attract top tier talent to American universities. Universities could even be limited from expressing an opinion about the impact of campus free speech bills themselves.

Finally, part of the difficulty of the requirement that universities strive to remain "neutral" is the very vagueness of the term. For example, when many universities were divesting from Apartheid South Africa in the 1980s, *not* divesting would itself be taking a position on a public policy issue of the day. Universities will be forced into the impossible position of determining which actions or inactions constitute "neutrality" in an endless number of policy debates.

Conclusion

While lawmakers justify the campus speech bills being considered today on the grounds that they will protect free speech, many of the bills have provisions that could limit or chill the right to peacefully assemble and protest. Legislators, the media, and the public should carefully examine provisions in these bills to appreciate their legal and policy implications and how they might undermine individuals' protest rights.

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[13] *See, e.g.,* Illinois HB 2939 (2017), Missouri HB 2423 (2017), West Virginia SB 111 (2018), and California AB 2081 (2018).

[14] West Virginia SB 111 (2018)