

centerforconstitutionalrights
on the front lines for social justice

March 4, 2014

Higher Education Committee Members
Illinois State Senate
Capitol Building
Springfield, IL 62706

RE: Senate Bill 3017 – “Anti-Boycott Bill”

Dear Higher Education Committee Member:

We at the Center for Constitutional Rights, an organization dedicated to upholding the rights of individuals to express their political views without repression, are writing to convey our serious concerns with Senate Bill 3017, which would prohibit public universities from using any funds to support academic boycotts of certain countries, including Israel.

This bills threaten core First Amendment principles, is mobilizing strong opposition from a spectrum of academic and civil society groups,¹ and will no doubt trigger constitutional challenges in the courts. Accordingly, we urge you to oppose this bill.

A. SB 3017 Targets Core Political Speech in Violation of Fundamental First Amendment Principles

The Supreme Court has held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”² Boycotts “to bring about political, social and economic change” involve speech, association and petition activities unquestionably protected under the First Amendment.³ This is no accident. The

¹ The New York State legislature recently proposed two bills, S.6438 and A.8392, on which SB 3017 is modeled, aimed at denying state funds to universities that fund organizations that support the academic boycott of Israel and three other countries. Overwhelming opposition there caused the Assembly bill to be delayed. The New York Times reported, “the turnabout has been described by some as a political earthquake in Albany.” See http://takingnote.blogs.nytimes.com/2014/02/07/boycotting-israel-and-the-first-amendment/?_php=true&_type=blogs&_r=0; See also Editorial, *A Chill on Speech*, N.Y. TIMES, Feb. 3, 2014, at <http://www.nytimes.com/2014/02/04/opinion/a-chill-on-speech.html> (“NY Times Editorial”); Center for Constitutional Rights and National Lawyers Guild – New York City Chapter letter to Assembly members, <http://ccrjustice.org/files/1%2030%2014%20%20CCR%20NLG%20NYC%20Letter%20to%20NY%20Assembly%20Members%20FINAL.pdf>; New York Civil Liberties Union letter to Assembly Members, <http://coreyrobin.files.wordpress.com/2014/02/academic-boycott-bill-a8392-s6438-nyclu-statement-final.pdf>; American Association of University Professors’ statement, <http://aaup.org/sites/default/files/files/AAUPstatementboycottlegislation.pdf>; Columbia University faculty statement, <http://coreyrobin.files.wordpress.com/2014/02/columbia-faculty-boycott-letter-with-signatures-11.pdf>; City University of New York faculty and staff union statement, <http://pscabc.blogspot.com/2014/02/new-york-state-boycott-bill-attacks.html>. A similar mobilization of groups intent on protecting free speech and academic freedom are also organizing in opposition to these bills in Maryland and now in Illinois as well.

² *Connic v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations and citations removed).

³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

United States itself is a product of a colonial boycott against British, Irish, and West Indian goods, issued by the First Continental Congress on October 20, 1774, in an effort to avoid war, persuade British lawmakers, and influence British public opinion.⁴ Since then, our country has had a long tradition of boycotts, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr. to the boycott of apartheid South Africa.

The American Studies Association's (ASA) resolution to boycott Israeli academic institutions – at which this bill is directed⁵ – was passed in response to the absence of “substantive academic freedom for Palestinian students and scholars under conditions of Israeli occupation,” and because “Israeli institutions of higher learning are a party to Israeli state policies that violate human rights and negatively impact the working conditions of Palestinian scholars and students.”⁶

Resolutions such as the ASA's are core political speech and thus deserve the “special protection” afforded by the First Amendment. Indeed, the ASA's boycott resolution takes inspiration from the boycott campaign against the apartheid regime in South Africa.⁷ Had a bill such as this been passed during that era, public universities across Illinois would have had to choose between allowing academic organizations to express opposition to the South African apartheid regime and keeping their full state funding. It would have been an unacceptable outcome then, and it is an unacceptable outcome now – regardless of the current unpopularity of the ASA's position among legislators.

B. Denial of Funding to Institutions of Higher Learning for the Purpose of Suppressing Expressed Political Viewpoints of Scholars and Academic Groups Violates the First Amendment

The proposed legislation also strikes at the heart of the First Amendment in its attempt to silence those on one side of a contentious debate through the reduction of state funds to public universities and colleges. The bill punishes a range of academic activities if an organization even merely advocates for an academic boycott against countries that are members of the Organisation for Economic Co-Operation and Development (OECD). But the bills clearly target a particular viewpoint being expressed in boycotts of Israeli academic institutions, as the bill's author has made clear.⁸ The government is never permitted to legislate in a manner that gives preference to certain political viewpoints over others,⁹ as such viewpoint discrimination “raises

⁴ Cong. Journal, 1st Cont'l Cong., 1st Sess. (Oct. 20, 1774), reprinted in 1 Journals of the Cont'l Congress 75-81 (Worthington C. Ford et al. eds., 1903); *see also* David Ammerman, In the Common Cause: American Response to the Coercive Acts of 1774 (1974).

⁵ See State Senator Ira Silverstein's announcement of the bill, which admits that the bill specifically targets those that “promote political boycotts of Israel and other foreign nations,” and refers directly to the ASA's resolution endorsing an academic boycott of Israeli academic institutions, *available at* <http://www.senatorsilverstein.com/>.

⁶ American Studies Association Resolution on the Academic Boycott of Israel, *available at* http://www.theasa.net/american_studies_association_resolution_on_academic_boycott_of_israel.

⁷ ASA Academic Boycott Resolution: Frequently Asked Questions, *available at* http://www.theasa.net/images/uploads/ASA_Boycott_FAQs.pdf.

⁸ See *supra* note 5.

⁹ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”¹⁰

Supporters of this and similar bills in other states and in the U.S. Congress have claimed that they are constitutional because the legislature can choose what they want to fund, and because the funding prohibitions do not prevent individuals from paying their own expenses for membership and participation in organizations, even if they can’t use university funds. **This is an inaccurate reading of the law.** Direct or indirect restrictions in public funding aimed at suppressing particular political perspectives are unconstitutional. The Supreme Court has held that the government may not deny a benefit or impose restrictions on entities to suppress certain political perspectives.¹¹ This bill would amount to “a penalty on disfavored viewpoints,” which violates the First Amendment.¹² It would also “impose penalties or withhold benefits based on membership in a disfavored group,” which the Supreme Court said would violate First Amendment principles.¹³

By depriving a public university of all state aid during the same year that the university allows any direct state funds to be used to support membership and activities in organizations that advocate for academic boycotts, this bill represents exactly the type of government interference in free speech that the First Amendment was designed to protect against.

C. Cutting State Aid Can Have a Chilling Effect on Protected Speech Activities

SB 3017 also infringes on academic freedom by penalizing universities and faculty for taking public positions based on their political and moral principles. The American Association of University Professors (AAUP), which disagrees with the academic boycott of Israel, nevertheless strongly condemned similar legislation in New York and Maryland. In a statement, the AAUP said that the “legislation undermines constitutionally protected academic speech and debate in order to promote a particular viewpoint,” and that “academic freedom is meaningless if it does not protect those who support unpopular positions, including the advocacy of academic boycotts.”¹⁴

These bills inappropriately give legislators the power to censor academic exchange, and they cast exactly the “pall of orthodoxy” on academics and their institutions on matters of public concern that the Supreme Court has warned against.¹⁵ As the New York Times Editorial Board recently explained in condemning the similar New York bill:

¹⁰ *R.A.V.*, 505 U.S. at 387 (internal quotations and citations removed); *See also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

¹¹ *Healy v. James*, 408 U.S. 169, 183 (1972).

¹² *NEA v. Finley*, 524 U.S. 569, 587 (1998).

¹³ *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006) (citing *Healy*, 408 U.S. at 180-184).

¹⁴ American Association of University Professors, Statement on Academic Boycott Legislation, Feb. 4, 2014, at <http://aaup.org/sites/default/files/files/AAUPstatementboycottlegislation.pdf>.

¹⁵ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *see also Adler v. Board of Education*, 342 U.S. 485 (1952); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, (1961); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977).

[This] bill is an ill-considered response to the American Studies Association Resolution and would trample on academic freedoms and chill free speech and dissent. Academics are rightly concerned that it will impose a political test on faculty members seeking university support for research meetings and travel.¹⁶

Even if the bill does not “limit the attendance by any employee of the University at an event of an academic entity that boycotts” an OECD country (meaning that scholars can continue to participate by using personal funds to belong to or participate in such academic entities), the message is clear that such activities are disfavored by the government. Courts have long recognized that speech may still be chilled even when a party continues to exercise its First Amendment rights.¹⁷ The chilling effect is felt in many ways, including by other entities contemplating similar boycott resolutions and individual academics who support such resolutions.

D. The Exceptions in the Bill Do Not Cure It of Its Constitutional Problems

The exceptions that the bill makes for boycotts that would not trigger a withholding of state aid, including if the country boycotted is a state sponsor of terrorism, if it is connected with a labor dispute, or if it is protesting unlawful discriminatory practices under Illinois law, do not make the bill any more constitutionally acceptable. Such exceptions create unconstitutional preferences for certain subject areas and viewpoints; the First Amendment’s strongest condemnation is of government action that condemns only those messages and viewpoints it disfavors. Moreover, the bill would still prohibit constitutionally protected boycott activities not covered by these exceptions, such as boycotts protesting economic inequalities.

It is certainly the case that the ASA’s and other boycotts against Israeli academic institutions are aimed at protesting Israel’s discriminatory treatment of Palestinians. It is therefore arguable that this boycott would fall under the third exception in the bill,¹⁸ even if Senator Silverstein would deny the political impetus behind the boycott. Even so, to determine that a boycott falls under this exception would inevitably require litigation, which any university would want to avoid. This vague and overbroad prohibition of boycotts would thus likely cause public universities to deny funding to all organizations that engage in politically motivated boycotts, thereby further chilling the speech and associational activities of academics on campus.

E. Academic Boycott Resolutions Such as the ASA’s Are Neither Discriminatory Nor Anti-Semitic

Some detractors of the academic boycott allege that singling out Israeli academic institutions amounts to anti-Semitism and constitutes discrimination against Jewish and Israeli individuals because of their religion or national origin. This allegation aims to deflect from the academic boycott’s attempt to end Israeli discriminatory practices towards Palestinians by mislabeling the boycott’s supporters as the offending parties.

¹⁶ NY Times Editorial, at <http://www.nytimes.com/2014/02/04/opinion/a-chill-on-speech.html>.

¹⁷ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

¹⁸ See supra note 6, 7.

The ASA boycott resolution – to which this bill is responding – is politically motivated; it targets institutions, not individuals, in order to change the policies of politically accountable government actors in Israel and the U.S. The individuals who could be affected by the ASA resolution, for example, are only those who directly represent Israeli state institutions in an official capacity.¹⁹ To equate criticism of the Israeli state or a boycott of Israeli academic institutions with anti-Semitism is as misguided as calling criticism of or sanctions against the Iranian government anti-Muslim or anti-Persian, and as illogical as classifying criticism of the Chinese occupation of Tibet as hateful against people of Chinese ethnicity. Common sense makes clear the distinction between anti-Jewish bias (based on the race, ethnicity or religious identity of Jewish people as individuals or as a group) and criticism of Israeli institutions. The law also recognizes the distinction.²⁰

Attempts to paint academic groups that support boycotts as anti-Semitic and discriminatory against Jews and Israelis are not only legally bankrupt; they also trivialize important struggles against anti-Semitism and all other forms of racism.

F. Conclusion

We are committed to upholding the First Amendment rights of those challenging orthodox views. Senate Bill 3017 punishes public universities that may fund participation in an academic group that has used an honored American tactic to effect social, political and economic change, solely because public officials disagree with the message that these groups are expressing. These bills are constitutionally infirm, and their passage would necessitate a legal challenge in order to protect the right of any individual or organization to engage in such protected speech activities.

Sincerely,



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Legal Director
Center for Constitutional Rights

¹⁹ASA Boycott Resolution, *What does the boycott mean for the ASA?*, available at http://www.theasa.net/what_does_the_academic_boycott_mean_for_the_asa/.

²⁰ See, e.g., recent letters by the U.S. Department of Education Office for Civil Rights dismissing several claims under Title VI of the Civil Rights Act alleging that campus activity critical of Israel created an anti-Semitic hostile environment. The letters explain that the allegations were not actionable because the activities complained of constitutionally protected First Amendment expression, and were based on political viewpoint, not race, ethnicity or national origin. For more information and to view the letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech%2C-department-of-education-dismisses-complaint>.