POLITICAL SPEECH ON CAMPUS: A PRACTICAL LOOK AT UNIVERSITY POLICIES AND REGULATIONS

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I. The First Amendment and Its Application on Campus

In just forty-five words, the First Amendment to the United States Constitution is a "blueprint for personal freedom and the hallmark of an open society."[1] It reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition to the Government for a redress of grievances."[2]

Critically, the First Amendment protects citizens from governmental interference with these foundational rights and prevents state actors—such as public colleges and universities—from hindering the exercise of these rights.[3] An essential purpose of the First Amendment is to protect political speech in particular. The Supreme Court of the United States has reiterated this principle numerous times, reaffirming that the protection of the First Amendment is "at its zenith" for "core political speech,"[4] and that the First Amendment was enacted "to protect the free discussion of governmental affairs."[5]

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[1] *7 Things You Need to Know About the First Amendment*, FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/page/things-you-need (last visited Apr. 17, 2020) (describing the importance of the First Amendment).

[2] U.S. CONST. amend. I.

[3] State action is an established legal principle holding that constitutional amendments are applicable to state and local governments. *See generally Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010), *available at* https://harvardlawreview.org/wp-content/uploads/pdfs/DEVO_10.pdf; Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561 (2008), *available at* https://scholarship.law.missouri.edu/mlr/vol73/iss2/8.

[4] Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 186–87 (1999) (quoting Meyer v. Grant, 486 U.S. 414 (1988)) (petitioning related to political causes is "core political speech" at the very heart of the First Amendment, where its protection is "at its zenith").

[5] Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *see also* Virginia v. Black, 538 U.S. 343, 365 (2003) ("[L]awful political speech [is] at the core of what the First Amendment is designed to protect.").

It has long been settled law that the First Amendment is fully binding on public colleges and universities.[6] Relatedly, the First Amendment limits the restrictions that public universities may place on student organizations. When a public university burdens the ability of a student organization to engage in expressive activity—such as speech, protest, or association—that burden must withstand First Amendment scrutiny.[7]

In contrast, the First Amendment does not generally apply to students at private colleges.[8] Acceptance of federal funding does confer some legal obligations on private institutions, such as compliance with federal anti-discrimination laws, but compliance with the First Amendment is not one of these obligations.[9] However, the vast majority of private institutions

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[6] Widmar v. Vincent, 454 U.S. 263, 268–69 (1981) ("[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); Healy v. James, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (internal citations omitted).

[7] *Healy*, 408 U.S. at 181.

[8] *See generally First Amendment on Private Campuses*, Harv. C.R.-C.L. L. Rev. (Dec. 1, 2015), https://harvardcrcl.org/first-amendment-on-private-campuses/. Section 94367 of the California Education Code, known as the "Leonard Law," serves as an exception to this general rule, providing that "[n]o private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." CAL. EDUC. CODE § 94367. However, the code further provides that the law "does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization." *Id.*

[9] *See generally First Amendment on Private Campuses*, HARV. C.R.-C.L. L. REV. (Dec. 1, 2015), https://harvardcrcl.org/first-amendment-on-private-campuses/. Although they are not obligated to uphold the First Amendment, private institutions that receive federal funding may be obligated to uphold institutional free speech promises in the future: On March 21, 2019, President Donald Trump issued an executive order directing federal agencies to "take appropriate steps" to "promote free inquiry" at institutions that receive federal research and education grants. Exec. Order No. 13864, 84 Fed. Reg. 11401 (Mar. 21, 2019). In response, the Department of Education proposed regulations that would require private institutions to comply with stated institutional promises regarding free speech. Under the proposed regulations, the department would determine a private college has not complied "only if there is a final, non-default judgment by a State or Federal court to the effect that the private institution . . . violated its stated institutional policy regarding freedom of speech or academic freedom." Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs,

explicitly commit to protecting students' free speech rights in official materials.[10] When a college or university makes a promise to a student in official materials, such as the student handbook, that school is morally bound, and possibly contractually bound, to fulfill that promise by maintaining written policies that comply with First Amendment standards.[11]

II. The Internal Revenue Code and Universities' Tax-Exempt Status

We now turn to a discussion of how colleges and universities commonly run afoul of the First Amendment's dictates when it comes to political expression on campus. Institutional censorship of student political expression may stem from a misunderstanding of the Internal Revenue Code's (IRC's) requirements. However, a proper understanding of the IRC reveals that it does not—and in fact cannot—conflict with the First

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Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3210 (proposed Jan. 17, 2020).

[10] For example, the University of Chicago makes explicit in written policy its "commitment to a completely free and open discussion of ideas." *Report of the Committee on Freedom of Expression*, U. OF CHI., https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf (last visited May 14, 2020). Similarly, Emory University states that it is committed "to the widest possible scope for the free circulation of ideas." *Policy 1.3 Equal Opportunity and Discriminatory Harassment Policy*, EMORY U., http://conduct.emory.edu/_includes/documents/policy1-3.pdf (last updated Aug. 27, 2018).

[11] Courts have held that private institutions must meet commitments made in official materials as a matter of contract. *See, e.g.*, Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34 (1st Cir. 2007) ("The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook . . . . We interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them."); Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) ("It is held generally in the United States that the 'basic legal relation between a student and private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'"); Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984) ("The relationship between a university and a student is contractual in nature."). In some cases, however, courts have held that such materials are not contractually binding. *See* Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234, 241 (D. Mass. 1999) (ruling that the provisions of the student handbook were not contractually binding on the university in part because the university could unilaterally modify them without notice); Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D.N.C. 1991), *aff'd*, 959 F.2d 231 (4th Cir. 1992) (holding that Duke University's academic bulletin was not a binding contract); Romeo v. Seton Hall Univ., 875 A.2d 1043, 1050 (N.J. Super. Ct. App. Div. 2005) ("A contractual relationship cannot be based on isolated provisions in a student manual . . . . [A] private religious university's values and mission must be left to the discretion of the university.").

Amendment, given the constitutional principle of the Supremacy Clause.[12] Simply put, state and federal laws (including state constitutions) cannot conflict with the United States Constitution—the federal Constitution is the "supreme law of the land."[13]

The overwhelming majority of America's colleges and universities—both public and private—are tax-exempt entities as defined by the Internal Revenue Service (IRS) in Section 501(c)(3) of the IRC.[14] The educational purpose of these institutions is the basis for the 501(c)(3) exemption, and these institutions enjoy tax benefits in accordance with this designation as charitable entities.[15] Such benefits, however, come with restrictions. These institutions must abide by the regulations laid out in the IRC and related governing laws.

One restriction is the prohibition of 501(c)(3) organizations from "participat[ing] in, or interven[ing in] . . . any political campaign on behalf of (or in opposition to) any candidate for public office."[16] Colleges and universities regularly invoke this IRC restriction on the political activity of 501(c)(3) organizations as a justification for the censorship of political expression of students.[17] However, the IRC and IRS training materials do not support such a justification, as we will explain in the following section.

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[12] It is well-established that legislation (state or federal) cannot violate the Constitution (and, by extension, the Bill of Rights). *See* U.S. CONST. art. VI, § 2. *See also* Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review).

[13] *See* McCulloch v. Maryland, 17 U.S. 316 (1819) (finding states may not interfere with federal constitutional power); *see also* Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31 (last visited May 14, 2020).

[14] *See* I.R.C. §§ 115, 501(c)(3). Public universities are most often exempt under both IRC Section 115 and 501(c)(3). *Id.* Private universities are exempt under 501(c)(3). *Id.* For a more detailed discussion of public universities' tax exemptions, *see Organizations Closely Affiliated with State or Indian Tribal Governments Reference Guide*, IRS.GOV, *available at* https://www.irs.gov/pub/irs-tege/cpe2004h__ref_guide_organizations.pdf.

[15] I.R.C. § 501(c)(3). The IRC provides tax exemptions for organizations that meet certain qualifications under the Code, such as being organized for an exempt purpose such as charitable, religious, or educational purposes. For additional information on what qualifies an organization to receive an exemption under § 501 (c)(3) of the Internal Revenue Code, *see generally Exemption Requirements*, IRS.GOV (Mar. 17, 2020), https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations. Benefits include an exemption from federal income tax, deductible contributions, and other exemptions depending on state law.

[16] I.R.C. § 501(c)(3).

[17] FIRE's case archives are replete with examples of such instances. *See infra* Part V.

Violations of the IRC are punishable by excise taxes and potential revocation of status as a tax-exempt organization, so it is unsurprising that institutions take this prohibition seriously.[18] While these penalties are stern, violations only occur when the college or university *as an institution* participates in prohibited political advocacy. IRS training materials make this point very clear in regard to colleges and universities: "In order to constitute participation or intervention in a political campaign, however, the political activity must be that of the college or university and not the individual activity of its faculty, staff, or students."[19]

i. Internal Revenue Service Guidance on Political Activities

There is no "bright line" test to evaluate whether an entity has participated or intervened in a political campaign in a way that would be considered disqualifying activity for a 501(c)(3) organization. In determining if there is a violation, the IRS considers all relevant facts of the situation to evaluate the totality of circumstances.[20] The prohibition on "participation or intervention" in political campaigns at its most general interpretation means 501(c)(3) entities may not endorse candidates for public office (written or orally), solicit campaign funds, or distribute campaign literature.[21]

For colleges and universities seeking to avoid the ire of the IRS during the upcoming election season, there are several IRS "Revenue Rulings"[22] that shed light on more specific political activities that are permissible (and impermissible).[23] It is critical to reiterate that the IRC's prohibition on

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[18] Judith E. Kindell & John. F. Reilly, *Election Year Issues*, IRS.GOV, 335, 353–54 (2002), https://www.irs.gov/pub/irs-tege/eotopici02.pdf.

[19] *Id.* at 376–77. Note that the IRS materials reference "individual activity of its faculty, staff, or students." The scope of this article, however, is limited to the restrictions on student expression.

[20] *See* Rev. Rul. 2007–41, 2007-25 I.R.B. 1422, *available at* https://www.irs.gov/pub/irs-tege/rr2007-41.pdf (explaining the standard by which the IRS evaluates potential violations).

[21] Kindell & Reilly, *supra* note 18, at 344.

[22] A Revenue Ruling is "an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts." *Understanding IRS Guidance – A Brief Primer*, IRS.GOV (Nov. 6, 2019), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer. For additional IRS-provided guidance on campaign prohibitions, *see also Published Guidance on Political Campaign Activity of 501(c)(3) Organizations*, IRS.GOV (Feb. 13, 2020), https://www.irs.gov/charities-non-profits/charitable-organizations /published-guidance-on-political-campaign-activity-of-501c3-organizations.

[23] This section will only cover a selection of rulings that pertain to post-secondary educational organizations that maintain 501(c)(3) status. For a full list of all Revenue Rulings pertaining to Charitable Organizations, *see Exempt Organizations Revenue Rulings*,

participation or intervention in campaign activities applies to 501(c)(3) organizations, not "individuals in their private capacities,"[24] and IRS guidance states in regard to students in particular that "[t]he actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization from a school official."[25]

Most of the IRS Revenue Rulings regarding college and university participation or intervention in political campaigns follow common sense. Nonpartisan voter drives and providing a public forum for all candidates to discuss issues are permissible; a university president endorsing a candidate in an official institutional publication is not.[26] When conducted in a non-partisan manner, voter education activities—such as hosting debates where all candidates are invited, equally providing broadcast time, or otherwise providing a public forum for all candidates—do not constitute a violation of the IRC.[27] Student newspapers may publish editorials on legislative and political issues without endangering their university's tax-exempt status.[28] Professors may even require students to participate in a political campaign of the student's choice as part of relevant coursework, such as in a political science class, in order to obtain course credit.[29]

IRS.GOV (Feb. 13, 2020), https://www.irs.gov/charities-non-profits/exempt-organizations-revenue-rulings.

[24] Kindell & Reilly, *supra* note 18, at 363–64. However, given that entities act through individuals, there are many situations in which an individual's activities can be attributed to the organization, and thus constitute a violation. *See id.* at 364 (observing that individuals engaging in political activity "at official functions of the organization or through the organization's official publications" should be attributed to the organization itself).

[25] *Id.* at 365. The principles of agency generally apply in this area of the law. *See id.* at 364 ("There must be real or apparent authorization by the IRC 501(c)(3) organization of the actions of individuals other than officials before the actions of those individuals will be attributed to the organization.").

[26] Rev. Rul. 2007-41 *supra* note 20, at 1422–23. This Revenue Ruling is the most instructive (and the most recent) ruling regarding 501(c)(3) organizations and political activities because it provides a plethora of sample scenarios and the IRS's position on the issue.

[27] *Id.*; Rev. Rul. 86-95, 1986-2 C.B 73, *available at* https://www.irs.gov/pub/irs-tege/rr86-095.pdf. For a discussion of equal broadcasting opportunities, *see* Rev. Rul. 74-574, 1974-2 C.B. 161 *available at* https://www.irs.gov/pub/irs-tege/rr74-574.pdf. For a further discussion of permissible voter educational activities, *see* Rev. Rul. 78-248, 1978-1 C.B. 154, *available at* https://www.irs.gov/pub/irs-tege/rr78-248.pdf.

[28] Rev. Rul. 72-513, 1972-2 C.B. 246, *available at* https://www.irs.gov/pub/irs-tege/rr72-513.pdf (noting universities fulfill educational aims when supporting student newspaper operations).

[29] Rev. Rul. 72-512, 1972-2 C.B. 246, *available at* https://www.irs.gov/pub/irs-tege/rr72-512.pdf (noting universities fulfill educational mission through extracurricular activity).

ii. Relevant First Amendment Jurisprudence

Despite IRS guidance on the particular issues discussed above, there are more nuanced situations for which the IRS has not provided specific guidance. For example, may student groups (or the student government) use student activity fees to fund partisan political activities? First Amendment jurisprudence on student activity fees at public universities provides guidance where the IRS does not.

The Supreme Court has recognized that the institutional speech of the college or university is distinct from the speech of individual student groups funded by mandatory student activity fees, when such fees are distributed in a viewpoint-neutral manner.[30] Importantly, the Court noted in *Southworth* that when speech is "financed by tuition dollars," with "the University and its officials . . . responsible for its content," then it "might be evaluated on the premise that the government itself is the speaker."[31] However, it may not be assessed in this way when the student groups organize the activities for "the sole purpose of facilitating the free and open exchange of ideas by, and among, its students."[32]

Per the Court's reasoning in *Southworth*, partisan politician expressive activity by student groups funded by a viewpoint-neutral student activity fee scheme is distinct from institutional speech on the issue.[33] Thus, by officially recognizing a "Students for Bernie" group or allowing a College Republicans chapter to use university facilities like a classroom for their "Trump 2020" kickoff meeting, the university itself does not endorse either of these candidates for office.[34]

III. Retention of Rights by Individual Students and Student Groups

As a general matter, students retain their free speech rights and do not endanger their college or university's tax-exempt status when speaking on

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[30] Bd. of Regents of the Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 221 (2000); Gerlich v. Leath 861 F.3d 697, 708 (8th Cir. 2017) (rejecting idea that student organization speech could be considered government speech).

[31] *Southworth*, 529 U.S. at 229.

[32] *Id.*

[33] *See also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841 (1995) (where university adhered to viewpoint neutrality in administering student fee program, student newspaper funded by fee did not speak on behalf of university).

[34] *See* Kindell & Reilly, *supra* note 18, at 378 (discussing facility use by partisan political student organizations). Just like student activity fees, as long as the university offers facilities to non-political student groups, it must also allow political student groups to use the facilities in a similar manner. *See id.*

partisan issues in their individual capacity.[35] Yet, as the following section will illustrate, colleges and universities frequently misapply the law by punishing students for political expression on campus.

It strains credulity to assume that the Facebook post of a student group endorsing Joe Biden for president would lead a reasonable person to assume the student's university endorses Biden for president as well. The presumption in these cases is that when an individual student or group speaks on partisan political issues, this speech is made in their individual capacity and is not considered institutional speech by their college or university.[36] Thus, students are free to engage in a wide range of political expression on campus, such as expressing political viewpoints of their choice, posting political speech and hyperlinks on certain university-affiliated websites,[37] and writing political editorials and opinion pieces in university-affiliated student newspapers.[38] Further, students may form political groups on campus, and may not be denied funding for those groups on the basis of their beliefs when those resources are available for other groups.[39]

IV. Colleges and Universities Maintain Policies That Impermissibly Restrict Political Expression.

Given that the First Amendment fully applies on public university campuses—and that the vast majority of private campuses commit to upholding students' free speech—college administrators cannot in good faith claim individual students' political expression endangers the institution's tax-

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[35] *See generally 2020 Policy Statement on Political Speech on Campus*, FIRE (Feb. 24, 2020), https://www.thefire.org/issues/political-speech/.

[36] *See* Kindell & Reilly, *supra* note 18 at 365. *See also 2020 Policy Statement on Political Speech on Campus*, *supra* note 35 ("The presumption is that the political activity of students and faculty does not represent the views of the university as an institution."). Likewise, it follows that the risk of the appearance of institutional participation in disqualifying activity significantly diminishes as one progresses down the administrative chain of command—and almost never reaches students.

[37] *See Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, IRS.GOV (Feb. 2006), https://www.irs.gov/newsroom/election-year-activities-and-the-prohibition-on-political-campaign-intervention-for-section-501c3-organizations (advising tax-exempt organizations that website links to "candidate-related material" does not "necessarily constitute political campaign intervention" on its own).

[38] *See* Rev. Rul. 72-513, 1972-2 C.B. 246, *available at* https://www.irs.gov/pub/irs-tege/rr72-513.pdf (noting universities fulfill educational aims when supporting student newspaper operations).

[39] *See generally 2020 Policy Statement on Political Speech on Campus supra* note 35.

exempt status under the IRC. In spite of this, far too many colleges and universities maintain policies that restrict political speech.[40]

The Foundation for Individual Rights in Education (FIRE) rates the policies that regulate student expression at 471 colleges and universities across the country, both public and private,[41] based on the extent to which the policy restricts speech that is protected under First Amendment standards.[42]

A recent search of FIRE's "Spotlight" database, which contains FIRE's policy ratings, revealed that 34 institutions currently maintain policies that specifically restrict or overburden political expression.[43] The majority of the identified policies (76.5%) regulate the use of university information technology resources.[44] The City University of New York system, for example, broadly bans the use of resources for "partisan political activity."[45] Similarly, Brown University prohibits any use of its computing services "for political purposes."[46]

As a great deal of expression on college campuses takes place through the use of university computers, a university email account, or the campus's internet network, bans on using these resources for political expression have an extensive reach. For example, a student's use of the campus internet to express support for a political candidate on their personal Twitter account—while unlikely to threaten a university's tax-exempt status or to conflict with state law—would fall under the scope of the prohibitions at CUNY and Brown.

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[40] *See id.* The censorship of political expression may certainly be carried out through policies that do not specifically target political speech, or even independently of written policy. However, this article focuses on the type of campus regulation that explicitly targets political expression on its face. To that extent, this article covers only a small portion of the range of colleges' and universities' infringements on political expression.

[41] FIRE's Spotlight Database, *available at* https://www.thefire.org/resources/spotlight/. The vast majority of private universities promise their students free speech rights in written materials. As these commitments are morally and potentially contractually binding, FIRE evaluates the regulations on expression at private institutions using the same First Amendment standards that bind public institutions.

[42] *Id.*

[43] A full list of these institutions may be viewed here: https://www.thefire.org/march-2020-speech-code-of-the-month-university-of-alaska-anchorage/#list.

[44] *Id.*

[45] *Policy on Acceptable Use of Computer Resources*, CUNY, https://www.ccny.cuny.edu/it/policy-acceptable-use-computer-resources (last updated June 25, 2012).

[46] *Acceptable Use Policy*, BROWN, https://it.brown.edu/computing-policies/acceptable-use-policy (last updated Aug. 3, 2016).

Other policies restrict political expression by regulating posting or distributing political materials and conducting political protests, demonstrations, and events. For example, Bemidji State University's "Political Activity Policy" states that

> [n]o person or group shall have the right to place political signs, posters, banners or similar material on or in University property. Political student organizations which are recognized under the appropriate University regulations may post signs announcing meetings of the organization.[47]

Certainly, there are locations on campus where political signs could reasonably denote university endorsement, such as the university's front gates or the outside of a college administration building that houses the office of the president. The content of signs could also imply the endorsement of the university, such as a sign that states that a particular college department lends support to a candidate. However, Bemidji State's broad ban includes signs that no reasonable observer would attribute to the university.

For another example, California State University, Northridge claims in its "Policy on Time, Place and Manner of Free Expression and the Use of Campus Buildings and Grounds" that "the use of public resources for partisan political activities" is an "[e]xpressive activity not protected by the First Amendment to the U.S. Constitution."[48] Such a broad and inaccurate statement fails to make a distinction between permitted activities and those that would actually threaten the university's tax-exempt status or violate state or federal laws.

Policies that include these types of broad bans on the use of resources for political expression are subject to an overbreadth challenge. A statute or law regulating speech is unconstitutionally overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."[49] In this case, banning political expression does include speech that is not protected by the First Amendment, such as a

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[47] *Political Activity Policy*, BEMIDJI ST. U., https://www.bemidjistate.edu/offices/president/policies/wp-content/uploads/sites/79/2015/06/Political-Activity-Policy.pdf (last updated May 1, 2017).

[48] *Policy on Time, Place and Manner of Free Expression and the Use of Campus Buildings and Grounds*, CAL. ST. U. NORTHRIDGE (Aug. 28, 2017), https://www.csun.edu/sites/default/files/interim-policy-on-time-place-manner-free-expression-use-campus-buildings-grounds.pdf.

[49] Doe v. Univ. of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

statement that is political in nature but also constitutes a "true threat."[50] However, as the exceptions to the First Amendment are narrow, banning the use of resources for political activity across the board encompasses protected speech.

Overbroad policy language invites uneven enforcement, as such language gives administrators unbridled discretion to apply the policy based on their personal preferences. Indeed, in *Minnesota Voters Alliance v. Mansky*, the Supreme Court invalidated an ill-defined ban on "political" attire in nonpublic forums, finding that this type of an "indeterminate prohibition" precluded fair enforcement.[51] For more on issues of application, we turn to a discussion of the consequences of maintaining these policies.

V. Maintenance of Restrictive Policies Has Unacceptable Consequences

As discussed above, violations of the IRC are serious. Administrators crafting policies may intentionally choose broad wording in order to avoid anything close to a violation. However, whether restrictions such as those discussed above were put in place intentionally in order to limit political expression on campus or, rather, are the result of unintentionally imprecise drafting, the continued presence of these and similar policies presents two main concerns.

i. Policies May Be Applied to Restrict Protected Speech

First, restrictive policies may be applied to restrict political expression that is protected under First Amendment standards and does not threaten the institution's tax-exempt status or otherwise threaten its obligations under the law.

For example, in 2015, the Georgetown University Law Center prevented students from tabling on campus in support of Bernie Sanders' 2016 presidential campaign.[52] In doing so, the university pointed to its

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[50] The Supreme Court has defined "true threats" as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003).
[51] Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1892 (2018).
[52] *Georgetown University Law Center: Students Prevented from Campaigning for Democratic Presidential Candidate Due to Ban on Partisan Political Speech*, FIRE (Feb. 2, 2015), https://www.thefire.org/cases/georgetown-university-law-center-students-prevented-from-campaigning-for-democratic-presidential-candidate-due-to-ban-on-partisan-political-speech.

"Student Organization Policy on Partisan Political Activities," which broadly banned "partisan political activity" on campus.[53]

In another example, a few months before the 2012 presidential election, an Ohio University resident assistant threatened discipline when a student posted a political flyer on her dorm room door, applying a residence hall policy that restricted the display of "[p]olitical election posters" to just 14 days before an election.[54]

Administrators may be tempted to apply overbroad restrictions on political speech for a number of reasons. Partisan political expression can cause a number of logistical issues for administrators, including conflict between protesters and counter-protesters, unwanted media attention, and varied demands from alumni and donors. Applying a policy to restrict controversial political speech may seem like a way to reduce these problems, but administrators must resist this impulse, as such application may lead to a lawsuit against the school, the loss of "qualified immunity"[55] from personal liability, and damaging negative media attention.

Even where a current administrator is not applying an overbroad policy in a manner that violates student rights, the policy still presents ongoing concerns, as future administrators may apply the policy restrictively. Thus, the intention of the current administration does not obviate the need for reform. Policies that restrict constitutionally protected speech must be revised so that students under future administrations are protected.

ii. Policies May Chill Protected Speech

The second main concern presented by overbroad policies exists absent any application: a chilling effect on expression. As students reading overbroad restrictions on political speech in university policy may reasonably think they must abstain from any political expression in order to avoid risking

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[53] *Id*.

[54] *Ohio University: Political Flyers Censored in Dorms*, FIRE (Oct. 9, 2012), https://www.thefire.org/cases/ohio-university-political-flyers-censored-in-dorms.

[55] Administrators at public universities can be sued in their individual capacities for violating a student's civil rights under 42 U.S.C. § 1983, and are entitled to "qualified immunity" against personal liability only if their actions do not violate "clearly established" law of which a reasonable person in the official's position would be aware. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Gerlich v. Leath, 861 F.3d at 709. *See also* Azhar Majeed, *Let Valdosta State Ruling Be a Warning to University Administrators: Qualified Immunity Will Not Bail You Out*, FIRE (Sept. 10, 2010), https://www.thefire.org/let-valdosta-state-ruling-be-a-warning-to-university-administrators-qualified-immunity-will-not-bail-you-out/.

punishment, speech that is protected under First Amendment standards may be chilled, whether or not the administration applies the policy broadly in practice.

For example, if a student at the University of Alaska Anchorage reads in a policy that they may not post or transmit content "related to partisan political activities,"[56] they are left to assume that a tweet about the political debate they're watching or an email to their political club about plans for the upcoming election are off-limits.

Chilled speech is especially concerning when universities make explicit that their overbroad policies will be applied to restrict political expression. For example, prior to the 2008 presidential election, all employees of the University of Illinois system, including graduate students, were notified that they were prohibited from engaging in certain types of "political activity," including "[w]earing a pin or t-shirt" in support of a candidate while on campus and "[d]istributing, producing, or posting flyers or other campaign literature on campus during lunch or break time."[57]

That same election season, the University of Oklahoma notified students that "the forwarding of political humor/commentary" using university email accounts was prohibited, and that personal use of the university's email and network systems "may not include political issues outside of the educational context."[58]

As a chilling effect on speech may occur whether or not the policy is applied as written, policies must be revised to remove overbroad bans on political speech.

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[56] *Acceptable Use Policy*, U. OF ALASKA ANCHORAGE, https://www.uaa.alaska.edu/about/administrative-services/policies/information-technology/acceptable-use.cshtml (last visited May 14, 2020).

[57] *University of Illinois System: Faculty and Student Employees Banned from Participating in Political Activity on Campus*, FIRE (Sept. 25, 2008), https://www.thefire.org/cases/university-of-illinois-system-faculty-and-student-employees-banned-from-participating-in-political-activity-on-campus.

[58] *University of Oklahoma: Ban on E-mailing Political Humor or Commentary*, FIRE (Oct. 13, 2008), https://www.thefire.org/cases/university-of-oklahoma-ban-on-e-mailing-political-humor-or-commentary.

VI. These Policies Must be Revised; Resources are Available to Assist Institutions

Discussing state and federal law and IRS obligations while still communicating how students may use resources for political activities may be a difficult balance to strike for administrators. There are, however, resources available for those tackling these issues.

First, FIRE provides informational resources on its website so that administrators,[59] faculty members,[60] and students[61] may better understand this area of the law. FIRE also works one-on-one with administrators to craft policies for their campuses that are speech-protective, while still targeting the misconduct the institution wishes to proscribe.[62] Additionally, colleges may find it helpful to review policies from other institutions that regulate this area with success. For example, Keene State University's "Computer and Network Use Policy" bans the use of IT resources "for the purpose of lobbying that connotes College involvement or endorsement of any political candidate or ballot initiative."[63] The California Institute of Technology similarly narrowly bans the use of electronic information resources "for political or lobbying activities that jeopardize Caltech's tax-exempt status."[64] This sort of narrow language rightly indicates that students may use the university's resources for political expression, so long as their use does not imply university endorsement or otherwise jeopardize its tax-exempt status.

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[59] FIRE's *Correcting Common Mistakes in Campus Speech Policies* guide reviews the most common types of impermissible restrictions on speech and gives suggestions on how to revise them to better meet First Amendment standards, including a section on "Restrictions on Political Speech" in particular. *Correcting Common Mistakes in Campus Speech Policies*, FIRE (2016), https://www.thefire.org/resources/spotlight/correcting-common-mistakes-in-campus-speech-policies/.

[60] FIRE regularly updates its "Policy Statement on Political Speech on Campus," which details the rights of faculty members regarding political expression (as well as the rights of students and student groups). *See 2020 Policy Statement on Political Speech on Campus*, *supra* note 35.

[61] The FIRE Student Network publishes resources geared toward students that outline their free speech rights, with specific documents that explain students' right to engage in political expression on campus. *FIRE's FAQ for Political Speech on Campus*, FIRE, https://www.thefire.org/get-involved/student-network/defend-protect-your-rights/fires-faq-for-political-speech-on-campus/ (last visited Apr. 8, 2020).

[62] Azhar Majeed, *FIRE to university administrators: Let us help you 'go green'*, FIRE (Mar. 17, 2017), https://www.thefire.org/fire-to-university-administrators-let-us-help-you-go-green/.

[63] *Computer and Network Use Policy*, KEANE U., https://www.keene.edu/administration/policy/detail/cnup/ (last updated Aug. 10, 2018).

[64] *Acceptable Use of Electronic Information Resources*, CAL. INST. OF TECH. (Aug. 2019), https://hr.caltech.edu/documents/2649/caltech_institute_policy-acceptable_use_of_electronic_information_resources.pdf.

For another example, Stanford University helpfully provides the following discussion in its "Political, Campaign and Lobbying Activities" policy:

> Because the University encourages freedom of expression, political activities which do not reasonably imply University involvement or identification may be undertaken so long as regular University procedures are followed for use of facilities.[65]

This type of assurance helps to reduce the chilling effect on political speech that policies regulating political expression may have by reaffirming the university's commitment to freedom of expression.

VII. Conclusion

The law is clear. Public universities, and private universities that promise students free speech, may not restrict protected expression merely because it includes partisan political content. Institutions must revise their policies so that they allow for students to engage in political speech that does not run afoul of institutional legal obligations.

The Supreme Court has made clear that political speech is core to the very purpose of the First Amendment. It has emphasized that "speech concerning public affairs is more than self-expression; it is the essence of self-government," and "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[66] Therefore, colleges and universities must remove their restrictions on protected political expression so that their campuses can serve as centers of intellectual debate and inquiry on matters of public concern.

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[65] *1.5.1 Political, Campaign and Lobbying Activities*, STAN. U., https://adminguide.stanford.edu/chapter-1/subchapter-5/policy-1-5-1 (last updated Aug. 14, 2015).

[66] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).