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The Performance of Argument in University Free Speech Legislation:
Lessons for University Leadership in Public Communication

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Table of Contents

Introduction 3

ALEC and the FORUM Act 6

Introduction of the FORUM Act in Various Legislative Settings 8

- Legislative Argumentation in FORUM Act Deliberations 11
- Louisiana (2017-2018) 15
- Kentucky (2018-2019) 18
- Texas (2019) 21
- Maryland (2020) 24
- Ohio (2018-2020) 27

Communication Strategy Recommendations for University Leadership 29

- Strategy Recommendation 1: Reinforce Value of Higher Education 29
- Strategy Recommendation 2: Double-Down on First Amendment Education 30
- Tactical Advice for Higher Education: Consider Different Methods of Persuasion (aka Logic Doesn't Always Work) 31

References 35

1. Introduction

The political landscape is ever a dialectical landscape. Times change, along with the public's perception of the value of traditional institutions. This dialectical process is clearly at work on U.S. public campuses, where attacks against higher education speech policies are regularly launched across the political spectrum, calling repeatedly for university representatives to defend themselves and their institution's policies.[2]

Throughout the 1960s and 1970s, for reasons related to the long-term structural impacts of sexism and racism inhibiting equal opportunity in the United States, university policies and relevant legislation sought to carve out space for historically underrepresented populations, echoing the earlier evolution of voting eligibility laws. As a central part of these long-term policy efforts, designed to support equal opportunity for repressed populations, Diversity, Equity and Inclusion (DEI) efforts accelerated. Affirmative Action policies, Title IX policies, sexual abuse awareness policies, speaker sensitivity workshops and similar programs were designed to minimize both conscious and unconscious traces of racism and sexism in higher education. Simultaneously, in the wake of the early and violent response to campus protests against the Vietnam War, speech policies and speech legislation embraced freer student discourse, thus empowering student speakers.[3]

As a result of these dialectical tensions regarding equal opportunity, including the current conservative backlash against what is presently viewed as increasingly outdated and overly empowered "woke" DEI initiatives, higher education in the United States is once again witnessing significant backlash to free speech rules and DEI policies: changes that are in fact accelerating.[4] While our focus here is on legislative debates over the "Forming Open and Robust University Minds" Act, or the FORUM Act, the lessons learned are fully relevant for upcoming legislative battles over DEI initiatives and attacks on academic freedom and tenure. To locate these lessons, we explore this recent moment in legislation aimed at university free speech policies, map the battle's conceptual and historical terrain, and review the argument strategies – and various types of argumentative performances they entail – at work over policies meant to protect equal opportunity, broadly conceived. We then conclude by providing some fundamental and practical advice for university officials tasked with defending speech standards, or university policies in general, in various legislative settings.

[2] Present challenges, for example, in relation to pro-Palestinian protests and campus free speech policies are explored by Carlos Cortés in "Diversity & Speech Part 43: How 3 College Presidents Flunked Their Speech Midterm Exam."

[3] Papandrea provides an excellent overview of the expansion of student speech rights. She argues that universities should permit the widest latitude of speech, only limiting offensive speech that impinges upon the academic environment. See "The Free Speech Rights of University Students," p. 1802.

[4] A recent AAUP white paper traces over 150 bills introduced in state legislatures designed to more actively control higher education since 2021. See also Kamola, Isaac, "Manufacturing Backlash: Right-Wing Think Tanks and Legislative Attacks on Higher Education, 2021-2023."

The Performance of Argument in University Free Speech Legislation: Lessons for University Leadership in Public Communication

Sponsored by the American Legislative Exchange Council (ALEC), and consistent with a range of politically conservative interests,[5] the FORUM Act has, as of this writing, been introduced in twenty-six states over the last seven years, with approximately a dozen more states considering similar legislation in upcoming sessions.[6]

We are primarily interested in exploring what types of arguments, and what different types of argumentative performances, prevailed in different political settings with particular results, thus providing the groundwork for more strategic university rhetorical performances in different legislative settings. Our study suggests, perhaps unsurprisingly, that argumentative strategies look quite different in states with divided government than in states where one party dominates, as traditional debate is replaced with different sorts of argumentative "shows." Legislators play very different roles in public argument, as we shall show, as do those testifying (or not) before those legislators, and our ultimate purpose is to explain how those defending university policies must adapt their own rhetorical choices according to the range of performative settings they are certain to encounter.

Our analysis is based on a selected subset of cases taken from the states where versions of the FORUM Act were introduced, with the goal being to display the widest possible range of political settings and outcomes. Analytical criteria for determining representative cases included the depth of legislative debate available for analysis, variable political balances of power, and cases that failed, succeeded easily, or were contested over time. Drawing upon these criteria, Louisiana (2018-2019), Kentucky (2018-2019), Texas (2018-2019), Maryland (2020), and Ohio (2018-2020) were selected as the most apt set to represent the range of persuasive contexts involved in the FORUM legislative effort.

Maryland, with a government divided between a Republican governor and Democratic super-majorities in both houses of the legislature, refused the model legislation outright after lack of need was sufficiently established via expert testimony, including from university representatives, reflecting the more traditional debate format. Texas, conversely, without the checks and balances provided by divided government, passed the legislation without significant opposition and in argumentative settings that clearly fall into the "show" category. Louisiana (divided), Kentucky (undivided), and Ohio (undivided) each went through two legislative rounds before passing the FORUM Act in slightly different forms, displaying what might be called learning strategies, as legislative argumentation in support of the act evolved in similar patterns over time. Together, the five cases reveal the major rhetorical patterns at play, the different sorts of performative approaches involved, and their different functions, in this ongoing debate over university free speech policy.

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[5] The FORUM Act, for example, is closely aligned with the conservative legislative agendas of the Foundation for Individual Rights and Expression (FIRE) and the Goldwater Institute. For more information on the Goldwater Institute's policies on free speech, see "Free Speech." *Goldwater Institute.* For more information on FIRE's policy see, "Model Free Speech Policies." *FIRE: Foundation for Individual Rights and Expression*. For more insight into how these bills use and misuse Supreme Court precedent see Chavez, "The Problems with the Solutions: Examining the Response from Universities, President Trump and State Legislatures to Campus Free Speech Issues."

[6] ALEC claims credit for passing FORUM legislation in 20 states thus far (see Williams et. al. pg. 19).

To set the stage for our recommendations, we first briefly explain how model legislation works in general, and then we discuss the origins and development of the FORUM Act by ALEC and fellow conservative policy groups in particular. We then explain how certain political arrangements can distort what would be broadly considered by rhetoric scholars as healthier forms of public argument in relatively divided forms of government, such as instances where one party dominates all key branches of government.[7] Next, we discuss the various legislative debates in some detail, illustrating the argumentative processes the legislation went through, the outcome of those arguments in policy, and how the rhetorical strategies differed depending upon the relative balance of power in the states under consideration. We discuss, for example, how universities, students, and legislatures themselves were characterized, what counted as evidence, how the problem and its causes were articulated, noting the ongoing role of victimization, and noting as well when traditional debate was replaced by argumentative performances ("shows"). We then conclude with recommendations for university leaders on how to best approach public argumentation when confronting these various rhetorical settings.

[7] The literature on what constitutes healthy and unhealthy public spheres is vast. For a key introduction to the concept of the public sphere, see Jürgen Habermas, *The Structural Transformation of the Public Sphere*. See also later work on "counterpublics," such as *Counterpublics and the State*, Robert Asen and Daniel Brower, eds., and Michael Warner's *Publics and Counterpublics*. Put broadly, healthy public spheres include vigorous, evidence-based, argumentation on behalf of the common good, whereas unhealthy public spheres are distorted by various ideological (unreasonable) influences, such as radical self-interest and local prejudice.

2. ALEC and the FORUM Act

There is no question that the emergence of the FORUM Act occurred not in isolation due to concerns about the freedom of speech on college campuses but as part of a broader strategy to preserve and advance conservative thought in the post-Watergate era. This should come as no surprise, as all political parties must strategize when faced with evolving historical circumstances, should they want to retain their influence long-term. In this instance, recognizing that the end of the Nixon presidency could result in public backlash and loss of national political power for conservative forces, potentially for generations to come, strategic conservative thinkers began identifying alternative avenues in which to enshrine their principles and wield influence. Courts, institutions of higher learning, advocacy groups, think tanks, media outlets, and state and local governments emerged as strategic tools that could work in concert to develop support for conservative principles and advance future priorities.[8] If Republican and conservative leaders in every industry and across every discipline had reliable outlets from which to conduct research and communicate their perspectives, then conservative thought could be preserved regardless of shifting public opinion.

Active defense of this conservative thought matrix was premised on a worst-case scenario of conservative loss of power requiring strategic, not merely tactical, intervention. If Republicans lost the American presidency, say, for a generation or more, then conservative priorities could nevertheless prevail through the election of Republican mayors, governors and local legislators. If the loss of the presidency resulted in an era of Democratic presidents packing a liberal United States Supreme Court, then ensuring conservative appointments to state Supreme Courts by governors and state legislatures could balance that loss. Over time, such strategies, in partnership with conservative publishing houses, media outlets, and think tanks, would create a reciprocal relationship between a steady stream of content for distribution and reliable platforms to disseminate that content. The results: a largely self-sufficient political sub-society with significant, widespread, and continued impact on the broader society.

To be clear, this model to overcome the potential loss of national power is by no means unique to the Republican party or to conservative strategists, nor was it a novel concept (i.e., marshalling institutional forces intentionally to preserve a form of thought) following the end of the Nixon presidency. What did make the new conservative thought matrix strategy unique, however, was the sophistication of planning, openness to including seemingly unrelated industries, and targeted investment in activities that would take decades to come to fruition. It was, we argue, these very long-term efforts which brought forth organizations such as ALEC in the late 1970s, providing the perfect vehicle for the wide distribution and enactment of conservative legislation, including the FORUM Act.

[8] Critchlow, *The Conservative Ascendancy.*

The FORUM Act is an instance of model legislation, or legislation created by actors at the national level and then introduced in state legislatures across the country. Model legislation involves drafting generalized legislation that can, as needed, be modified to serve the purposes of individual legislative bodies; it functions as a blueprint or roadmap, containing guidance on the most pressing elements of a policy issue.

Advancing model legislation is neither an inherently good nor bad activity; however, some instances of model legislation are more insidious than others (i.e., more self-interested, masking key facts, driven more by prejudice than objective evidence). Model legislation is drafted by organizations of all political persuasions, including the far Left and the far Right, and its mere existence does not equate to its passage in a legislature. For model legislation to become law, it must pass through the same legislative process as any other measure, and this means moving through the processes of legislative argumentation and the various settings such argumentation involves. Model legislation, in other words, does not receive expedited approval or bypass the legislative process in any way, and its successful passage rests solely on its reception by policymakers and their willingness to adopt and promote the provisions of the model in sufficient numbers.

Model legislation can be a great benefit to policymakers. Primarily, citizens with diverse expertise outside of the political sphere serve in many state legislatures, also known as citizen legislatures,[9] and model legislation provides much-needed guidance on complex policy issues. It is far easier for a citizen legislator to begin addressing an issue with a piece of model legislation that was written by motivated experts than to start from scratch on an issue where the legislator lacks expertise.

Model legislation, however, is not without its drawbacks. First and foremost, it can never be separated fully from the agenda of its advocates, and, even for groups that identify themselves as nonpartisan, as ALEC does, model legislation always pursues a very specific angle on a policy issue, whether acknowledged or not. In the case of the FORUM Act, for example, whether spoken or unspoken, depending upon the legislative setting, the angle was clearly to better protect conservative, belief-based voices on U.S. campuses, as evidenced by the emergent strategy of bringing forward parades of conservative students who claimed to be victimized by higher education.

Another drawback of model legislation in addition to its inevitable bias is that it tends, by its very nature, to be a "one-size-fits-all" approach. Not all states experience the same policy problems in the same way, and what may be a problem in one state may not be a problem in another. In some legislative settings, open debate brings these unique and unspoken aspects out into the open, while in others (where argumentative "shows" replace traditional debate), those unique aspects can go unacknowledged and therefore unaddressed, leading to less effective policy.

[9] The National Conference of State Legislatures divides legislatives bodies into three major types, defined by how much time they spend on the job, how much they are paid, and how much staff support is available. Only 10 states have full time legislatures, which leaves the vast majority of states reliant on citizens to create policy (see https://www.ncsl.org/about-state-legislatures/full-and-part-time-legislatures).

3. Introduction of the FORUM Act in Various Legislative Settings

In 2017, the American Legislative Exchange Council (ALEC), a national think tank that describes itself as "America's largest non-partisan organization of state legislators dedicated to the principle of limited government,"[10] introduced the "Forming Open and Robust University Minds" Act, or the FORUM Act, to its membership. [11]

Although ALEC claims to be nonpartisan, its mission and allegiances clearly embrace a particular conservative viewpoint. ALEC's membership, for instance, consists of approximately 2,000 state legislators who are almost all Republicans, along with a smattering of corporations and corporate officers.[12] Despite having an obviously conservative mission and membership, the rhetoric employed by ALEC to promote the FORUM Act is broadly premised on the traditional values of the First Amendment: viewpoint neutrality, religious freedom, and robust dialogue. Rhetorically, the Act begins with a number of "whereas" statements that frame the model legislation as nonpartisan, including a citation of *Healy v. James*, a landmark Supreme Court case determining that institutions of higher education are particularly bound to the principles of the First Amendment.[13] In fact, PEN America,[14] in an analysis of the implications of the proposed campus free speech regulations, agreed "with the spirit of the FORUM Act, [and] its emphasis on educating students about the First Amendment."[15]

As is normally the case with model legislation, the FORUM Act is written in such a way that it can be introduced by state legislators without any editing whatsoever, although ALEC explicitly advises that the model be tailored to fit the unique needs of individual states. Specifically, while there are multiple codicils and definitions in the model FORUM Act, seven actions are explicitly recommended:

1. eliminating restrictive free speech zones on campuses.
2. protecting the rights of all people, not just members of the campus community, to engage in lawful expression on campus.

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10 See "About ALEC."

11 See Emmett and Johnson for ALEC's pitch on the FORUM Act.

12 See Feldman, p. 986.

13 *Healy v. James* is a particularly pernicious source as the base of the FORUM Act. While it clearly provides context for student speech and for the right of association, it is premised on "recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" (p. 408).

14 PEN America does not claim a particular political agenda; however, its focus is more traditionally liberal and connected with literary arts. "Founded in 1922, PEN America is the largest of the more than 100 centers worldwide that make up the PEN International network. PEN America works to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to access the views, ideas, and literatures of others. Our strength is our Membership—a nationwide community of more than 4,500 novelists, journalists, nonfiction writers, editors, poets, essayists, playwrights, publishers, translators, agents, and other writing professionals, as well as devoted readers and supporters who join with them to carry out PEN America's mission" (see "About Us." *PEN America*)

15 See PEN America "Legislative and Political Action on Campus Free Speech: An Analysis."

3. protecting students and student groups from disciplinary or exclusionary action, particularly when they have membership requirements that are belief-based.
4. requiring students to be educated regarding their speech rights.
5. requiring that university personnel understand their duties to protect student speech rights.
6. empowering legislators to hold universities accountable by requiring annual free speech reports prior to the legislative appropriations process.
7. allowing students to sue universities for violation of their speech rights.[16]

To best understand the outcome of this policy when ALEC members, most of whom were conservative state legislators, returned to their states to introduce the proposed FORUM Act, it is crucial to first understand the various political landscapes involved in each state where the Act was introduced, since those landscapes largely determined argumentative styles.

Control of a legislative body, as is well known, is ultimately just a numbers game. Many legislators read these numbers as mandates to pursue actions in line with a specific political viewpoint, and, in some cases, this may indeed be the voters' intent.[17] Control of a legislature, however, is ultimately nothing more than the result of one political party having higher numbers of members than another. That said, based on how a state is broken into districts, control of a legislature may not be a mandate-oriented outcome, but instead the result of political ideology clusters achieved through gerrymandering, as is the case in Texas.[18] Regardless, realistically speaking, the political party with the most members in a body controls the administrative functions of the legislature through, for instance, the speakership of a House of Representatives or Presidency in the Senate. These roles are responsible for setting the legislative agenda for the state, and their unique combinations can either expedite or impede a bill's ultimate success.

Theoretically, there are only two types of power structures in legislative bodies: those constructed and constrained by effective political opposition (i.e., mixed, divided government) and those that are constructed without such opposition. While the two types come in various shapes and sizes, the way legislative arguments function is directly influenced by the differences involved. To clarify these differences, and to further set the stage for our reading of the various argumentation strategies involved in FORUM Act legislation, we must briefly review how divided/balanced government can be influenced, and thus public argument distorted, by supermajorities (i.e., where one party dominates, by numbers alone, a legislative branch), trifectas (where one party controls all branches of government), and triplexes (where the Governor, the Secretary of State, and the Attorney General are

16 "FORUM Act," American Legislative Exchange Council.

17 The debate over the proper role of the legislative representative, as either a superior expert who gathers evidence and makes the best decision for the people on the basis of that expertise, as opposed to a subservient agent who defends the opinions of local constituents, often at the expense of public reason, was perhaps most eloquently expressed by Edmund Burke in 1774 to the electors at Bristol. For a key excerpt, see "Representation: Edmund Burke, Speech to the Electors at Bristol."

18 See Li and Boland, "Anatomy of the Texas Gerrymander."

all from the same party). Why? Because where supermajorities, trifectas, and triplexes occur we tend to see the replacement of relatively healthy, traditional, public debate (e.g., legitimate, fact-based concerns that must be addressed) by argumentative "shows," since the opposition, no matter how reasonable and fact-based concerns might be, is structurally powerless.

A supermajority in any legislative chamber means that a single political party holds a disproportionate number of seats, usually two-thirds of the total. Depending on the rules of a given state legislature, such a supermajority could, for example, override a governor's veto and/or pass legislation without consideration of arguments from minority party members. The goal of every political party, of course, is to at least hold a simple majority (half of the seats plus one), as this allows for general control of the legislative body, as well as control over which bills will be brought to relevant legislative committees for consideration. A supermajority, however, means that one party has so many members in the legislative body that nearly all barriers to passing effectively uncriticized legislation are removed, which of course is anything but ideal when it comes to public policy. A trifecta can be equally distorting when it comes to legislative argumentation, and this occurs when a single political party controls the governorship and all chambers of the state's legislature. Trifectas play a critical role because they enable a political party to advance its legislative agenda far more quickly than in a divided government. In short, both supermajorities and trifectas reduce effective opposition and reduce the need for addressing counter-arguments. Furthermore, having a governor of the same party likewise reduces opposition to legislation and increases the likelihood that a bill will be signed into law.

A triplex occurs when a state's Governor, Secretary of State, and Attorney General are all members of the same political party. This too can impact a bill's success, although triplexes are arguably most influential once a bill has been signed into law. Having these three roles united in political perspective significantly impacts how a law is interpreted and enforced within a state, usually negatively influencing otherwise effective, critical, fact-based opposition.

All political parties, regardless of their argumentative shortcomings, strive for supermajorities, trifectas and triplexes. They are the most expedient ways to pass and enforce legislation regardless of content, but they are especially helpful when legislation is controversial or rooted in ideological differences, as those controversies and differences can simply be erased by artful showmanship, rather than reasonable debate, where fact-based concerns must otherwise be addressed.

Divided government occurs when the governorship and/or chambers of a state's legislature are held by members of different political parties. A divided government can occur, as noted, when the governor is of one party but control of all legislative chambers rests with a different party, as with two of our case studies: Louisiana and Maryland. Divided or balanced government also occurs when the governor and one chamber of a legislature are controlled by the same party but the other is controlled by a different political party. In divided governments, often the most productive condition is to have all legislative chambers united by a single political party's control and an oppositional governor, but it is equally

important to have sufficient balance in numbers in the legislative branches so that effective criticisms of proposed policies take place at that level as well. Together, these productive conditions increase pressure on the state's executive to sign legislation that might otherwise be rejected for ideological, rather than evidence-based, reasons. Additionally, legislation coming out of these conditions, where reasonable opposition must be responsibly addressed, will likely be more balanced and less ideologically polarized, the result of a legislature trying to pass something reasonable that the governor will sign, and the governor providing input to the legislature about what would be vetoed.

To begin our analysis proper, and in light of these different legislative settings and their argumentative consequences, we provide a general guide to the legislative environments in which FORUM Act legislative argumentation occurred, given our representative examples, with general notes on the outcome of that argumentation.

State	Government Type	Bill/Status	Year
Louisiana	Divided (Democratic Governor, Republican Super Majorities in both houses)	HB 269 Failed SB 364 Passed	2017 2018
Kentucky	Trifecta with Super Majorities in both houses	SB 237 Failed HB 254 Passed	2018 2019
Texas	Trifecta	TX SB 19 Passed	2019
Maryland	Divided government with Republican Governor, Democratic Super Majorities in both houses	HB 796 Failed	2020
Ohio	Trifecta with Super Majorities in both houses	HB 758 Failed SB 40 Passed	2018 2020

3.1 Legislative Argumentation in FORUM Act Deliberations

We are now in a position to turn directly to the processes and argumentation strategies employed by legislators, national organizations, and university officials advocating for free speech on college campuses in relation to the FORUM Act in different legislative settings. As we shall see, very different strategies were deployed in states with relatively divided versus relatively undivided governments, and tactical choices in "showmanship" were made to implement lessons learned in real time as the legislation spread across the country. The goals of these strategic choices and shifting tactics included expediting the legislation's passage, counteracting or avoiding anticipated oppositional arguments, drawing upon enthymemes aligned with dominant ideology, and streamlining provisions so that legislation could withstand known legal challenges.

The Performance of Argument in University Free Speech Legislation: Lessons for University Leadership in Public Communication

Tactical choices in legislative argumentation are evident in our analysis via two different scenarios. The first scenario occurs within a single state by examining the strategies employed during the legislation's first introduction (when it ultimately failed) and its second introduction in a later legislative session (when it ultimately passed). The second scenario occurs as the legislation is introduced in different states across time, where the argumentative strategies used reflect lessons learned from previous states where legislation passed.

Louisiana (divided government) and Kentucky (undivided government), which we review first, are two states exemplifying the first scenario, where FORUM Act legislation took two sessions to pass. During the first attempt, both states defended the general provisions of the model legislation offered by ALEC. Additionally, in both states during the first introduction, the problem of free speech on college campuses was depicted as a problem facing other states, not their own, but that action was required in order to prevent future problems like the ones being witnessed nationwide, mainly revolving around the repression of conservative, belief-based, political voices. Opponents of the proposed legislation in both states questioned the need, claiming it was a "solution in search of a problem." During the second attempt at passage, tactics similarly changed. In Kentucky, advocates framed the issue as an ongoing and persistent problem within Kentucky's universities, citing a report authored by FIRE that found the majority of Kentucky's universities were in violation of First Amendment protections, enlisting students as proxies to share their stories of being unfairly silenced by university officials. Louisiana followed a similar path, if a bit more colorfully, initially introducing the legislation to prevent problems that had plagued other states before changing tactics and identifying specific concerns within Louisiana. Some of the more unique strategies that Louisiana incorporated included hokey storytelling to "smoke out" early opposition, then changing the public presentation of the argumentation from "hokey" to "serious," and bringing in students from other states to advocate on behalf of the legislation. Advocates never persuasively articulated why the legislation was necessary, given the status quo, yet the focus on the part of universities turned to suggested amendments.

The second scenario, where FORUM Act proponents revised strategies based on experiences in other states, shows up most clearly in Texas (undivided government) and Ohio (undivided government). The first introduction of the measure in Ohio clearly incorporated experiences from states like Louisiana and Kentucky, who initially proposed the legislation not because of present need but future prevention. Upon first being introduced in Ohio, college students from the state's institutions testified about their experiences of being silenced, and efforts were made from the beginning to identify the problem as a clear issue in Ohio, not just other states. When the legislation failed to pass on its first attempt, advocates doubled down on this strategy, having even more students from a wider variety of campuses provide testimony in support of the legislation. This was almost always in the absence of any defenders of the status quo, particularly from universities, who testified separately when consulted, assuming they were engaging in a traditional debate setting. Texas likewise incorporated displays of student victims from the beginning of their advocacy attempts. These student representatives came from multiple campuses and spoke about either their personal experiences or the experiences of others on their campuses, and almost all grievances came from conservative, belief-based individuals and groups. Later, in the Senate hearing for the bill, a representative from FIRE discussed proposed changes to the bill in order to incorporate recommendations based on past experiences with legislation in other states.

In Maryland (divided government), traditional debate norms prevailed and university officials in a traditional debate environment were able to show with sufficient effect that there was no need for the legislation; therefore, the bill was effectively killed on the spot.

The table below provides basic timelines and generalized changes that occurred as the legislation moved through the various states.

Legislation (in chronological order)	Date of Introduction	Date of Final Action	Result	Rationale for Results/ Strategic Choices
LA HB 269 (2017)	3/30/2017	6/26/2017	Passed both LA House and Senate but vetoed by Governor.	Frank, early discussion about the legislation being model legislation. Media reports that the Governor did not support the measure because it was sponsored by a House rival.
KY SB 237 (2018)	3/1/2018	3/16/2018	Passed Senate but died in House.	Direct questions raised by opposition about the measure being model legislation from ALEC. Testimony in favor of the bill only provided by the sponsor.
LA SB 364 (2018)	3/2/2018	6/1/2018	Passed both chambers and signed into law.	Introduced in the Senate for attempt #2 and a different legislator sponsored the legislation. While the first attempt was a productive, although "hokey" show; the second attempt was more "serious," victim-centered.

Legislation (in chronological order)	Date of Introduction	Date of Final Action	Result	Rationale for Results/ Strategic Choices
OH HB 758 (2018)	11/1/2018	11/13/2018	Hearings held in House but never presented for a vote. Died in committee.	Introduced explicitly as protection for conservative speech. Enlisted testimony from students who spoke about their personal experiences, all from a conservative perspective.
KY HB 254 (2019)	2/6/2019	3/26/2019	Passed both chambers and signed into law.	Introduced in House for attempt #2. Openly addressed the involvement of national organizations like FIRE as why the legislation should be passed. Enlisted testimony from students who spoke about the experience of other students. Victim show, without effective defenders of the status quo. Student testimony orchestrated to appear nonpartisan.
TX SB 18 (2019)	2/25/2019	6/10/2019	Passed both chambers and signed into law.	Testimony in Senate committee hearing from FIRE representative indicates they offered amendments to bring the legislation in line with other states based on lessons learned in other jurisdictions. Hearings with university and status quo experts segregated from "victim shows" in key legislative moments. The most "show-like" of all cases.
MD HB 796 (2020)	2/3/2020	2/10/2020	Hearing held but never presented for a vote. Died in committee in the House.	That the measure was even introduced in a state like Maryland demonstrates enough success in other states for a trial balloon in a state without a conservative dominant ideology but need for the legislation not established, which killed the bill in a traditional debate format.
OH SB 40 (2020)	2/12/2019	12/3/2020	Passed both chambers and signed into law.	Introduced in the Senate for attempt #2. Again, enlisted testimony from students, but more students from a greater number of campuses submitted testimony. No effective defense of the status quo by university officials.

3.2 Louisiana (2017-2018)

Louisiana took two attempts to pass the FORUM Act under a divided government with Republican supermajorities in both its House and Senate and a Democratic Governor. House Bill 269 was introduced by Republican Representative Lance Harris in 2017,[19] passed both chambers, and was then vetoed by Louisiana's Democratic Governor as a "solution in search of a problem."[20] Harris, playing the role of a well-meaning good old boy, perhaps a bit hokey, at an opening meeting with the House Education Committee on May 2, 2017, admitted he had not discussed his proposal with the Board of Regents and was not really aware of the status quo regarding free speech rules in Louisiana higher education. He nevertheless noted there was "a national movement by intellectuals to actually have [the FORUM Act] passed." He added that he had "attended some meetings" (likely at least one sponsored by ALEC) and had been "reading up on this," and there was no doubt that university officials were placating overly-sensitive liberal voices instead of supporting "honest debate."[21] Performatively, from the very beginning, Harris engaged in a folksy style, using slightly different versions of a personal story to make his argument, and whenever an area of ignorance on his part was exposed he would use such phrases as, "Well, I'm just here to smoke out the critters," or "Now you are just getting lawyerly on me," while aides took careful notes on the main issues of concern. In 2018, a second attempt to pass the FORUM Act occurred, this time introduced in the Senate as Bill 364 by a far more "serious" Republican Senator Rick Ward. This nearly identical measure again passed both chambers, and the same Democratic Governor who vetoed the previous attempt signed it into law, given, he noted, the inclusion of new protections for universities in various amendments.

Louisiana's divided government ensured early, and consequential, dialogue and debate on LA HB 269 (2017) and LA SB 364 (2018), and most of the early debate was relatively sincere, as the legislature was incentivized to produce legislation that would be signed into law by the Democratic Governor, who was a known political opponent of Harris.

Louisiana provides an early and interesting example of the development of speech legislation and a unique form of productive legislative performance early in the process. The measure went through relatively vigorous debate only to be vetoed in 2017, and then the measure was passed in a very different style in 2018, where the voice of the university system was usually at the table. While the legislation that passed was arguably largely unnecessary, it was modified in light of reasonable objections largely voiced in the first round. Then, building upon those modifications in the second round, it was only then that the proponents of the bill used a tactic we label "the parade of victims," as the deal, by then, was largely done, and university discourse focused on amendments, likely knowing the legislation by then was a *fait accompli*.

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19 Full text of the vetoed 2017 version of Louisiana's FORUM Act may be found here: https://legiscan.com/LA/text/HB269/2017.

20 Will Sentell, "Campus Free Speech Measure Becomes Law in Louisiana, a Year After Similar Plan Vetoed."

21 Louisiana House Education Committee Hearing on 5.2.2017 about LA HB 269 (2017) (begins at the appx. 3 hour and 18-minute mark), 3:42:55 – 3:44. https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2017/may/0502_17_ED

Harris, in a performative style unseen in other cases but undoubtedly common, particularly in the U.S. South and Midwest, utilized an interesting and planned storytelling approach to draw out various objections, particularly in the House and Senate Education Committee hearing in 2017. Louisiana demonstrates an attempt by the proponents of the bill to work with its opponents; one of the first questions posed to Harris at the 2017 hearing was whether or not he had spoken with the Board of Regents, which he admitted he had not, but by the time of the Senate Education Committee meeting only weeks later, he certainly had, bringing along a legal representative from Louisiana State University, who laughingly noted that he too had been "smoked out." This move illustrates an interesting mixture of sincere belief and more Machiavellian approaches to public argument. On the one hand, it is clear from testimony that Harris was genuinely concerned that conservative voices were being shouted down and repressed on campuses nationwide and something needed to be done. On the other hand, his mode of storytelling, repeated at the beginning of key testimony in various settings, reveals an argumentative approach involving strategic evasions and misrepresentations, moving the setting more toward "show" than honest debate. Nevertheless, this semi-cynical performance mode was productive, as it did indeed "smoke out" the things that needed to be adjusted for the law to pass.

A review of Harris's "good old boy" performance is worth discussing in some detail, as it illustrates a type of "mask wearing" to achieve legislative goals via indirect means (as opposed to the more cynical mask of using students as proxies to bypass university expertise). At the Senate and House Education Committee meetings and then later on the House Floor, the same general story was told up front by Harris.[22] Noting that freedom of speech was under threat across the country, and that other states were already doing something about this, Harris takes his audience back to his high school days to provide a moral lesson about tolerance for difference. In one form or another, the story goes like this. Representative Harris went to high school in the admittedly hick town of Pineville, Louisiana, wore a cowboy hat sometimes, played football and baseball, went to Friday night bonfires on the Red River and sang George Jones and Kenny Rogers songs, but his parents wanted him to see the world, go to college, and learn other points of view. As a result, Harris went on to become a Liberal Arts major, focusing on the piano, and by the time he graduated he had been exposed to Beethoven. Imagine that. This, he claims, proves that his university was "viewpoint neutral," allowing him to "listen to views different from those back home," and this is what college education should be about when training future leaders: learn to listen to all sides, particularly those that at first seem strange, unfamiliar, or disagreeable.[23] In telling this story, Harris repeated that free expression was under threat, and that all citizens had to do was pick up a paper to see that faculty had abandoned free speech to placate woke protesters and keep campuses calm. Such is the nature of his evidence.

[22] Video on House Floor on 5.18.2017 about LA HB 269 (2017) (begins appx. 2 hour and 47 minute, 10 second mark) https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2017/may/0518_17_Day24_2017R.

[23] For Harris's storytelling, see Video of House Education Committee Hearing on 5.2.2017 about LA HB 269 (2017), 3:19:45 to 3:22; https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2017/may/0502_17_ED; Video on House Floor on 5.18.2017 about LA HB 269 (2017), 2:48:20 to 2:59:50 https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2017/may/0518_17_Day24_2017; Video of Senate Education Committee on 6.1.2017 on LA HB 269 (2017), 2:04:40 – 2:06:30. https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2017/06/060117EDUC_0.

Then, after explaining what the FORUM Act is meant to accomplish, ensuring that "all voices are heard," that reasonable debate prevails, and that "people cannot simply shout down people whose ideas differ from their own" (all while avoiding the issue that it is conservative voices that are being repressed), he opens the floor in each instance for questions, and the criticisms, particularly early on, come flying. Harris admits that his job is to "smoke out the critters," knowing that his presentation would "smoke everybody [and their concerns] out." When Representative Shadoin noted that the FORUM Act would allow for private legal actions to be taken against universities – something Harris certainly understood – he replied that Shadoin was "getting lawyerly" on him. In sum, Harris, playing the dumb hick from a conservative background who got wise by going to college and hearing opposing views, and in doing so reversing the notion of an oppressive conservative White Man trying to control the narrative, uses his play acting in the early rounds of public debate to do what he says: smoke out the critters, which in this case means "identify the concerns of the opposition so I can get this thing moving forward," and this is a reasonable move that is frankly unnecessary, and almost always futile, in undivided government.

Not only in subsequent presentations had Harris worked with the Board of Regents and university leadership on the bill; after the Governor's veto, the legislation shifted to a much less colorful figure: Senator Ward, who had switched from the Democratic to the Republican party in 2013. Now, there was no longer the need to "smoke out" the resistance, as that had already been done, and some bipartisan agreement was already at hand. The university system was granted final power on wording to ensure the changes did not undermine existing constitutional protections or otherwise include onerous, time-consuming duties, and only then did a parade of conservative "victims" come forth, in settings without opposition, to make the need for the legislation clear. When the bill eventually passed, it eliminated free speech zones on state campuses, called for annual training for incoming students (primarily to ensure that they were not permitted to heckle or interfere with controversial speakers), and required annual reports on any free speech controversies for legislative review. Interestingly, specific wording was also required to the effect that "it is not the proper role of an institution to shield individuals from . . . opinions and ideas they find unwelcome, disagreeable, or even deeply offensive," and that students and faculty had "the freedom to discuss any topic that presents itself, as provided under the First Amendment of the Constitution." The right of a student to bring private suit against higher education institutions was rejected.[24]

Over the course of the debate, the problem needing to be addressed was consistently characterized as a university system that was placating overly sensitive students and that faculty had abandoned the responsibility to provide students with the full range of ideas, which is what college is supposed to do. Students need to be better protected so they can take moral stands and fight for their beliefs, even when offensive to others, as long as they do not disrupt formal educational activities. The victims, clearly, though mostly going unspecified early in the debate, but then paraded out later, were

[24] Full text of the Louisiana FORUM Act as passed may be found here: (Louisiana State, Legislature. Senate Bill 364 https://legiscan.com/LA/tex/SB 364/2018.

conservative students whose voices they claimed had been crushed because of their beliefs. Only new legislation, protecting all voices from all political perspectives, could possibly resolve this crisis, and this is the argument that ultimately prevailed.

3.3 Kentucky (2018-2019)

Kentucky's first attempt to pass the FORUM Act occurred in 2018, sponsored by Senator Will Schroder (R).[25] The model legislation was initially discussed in the Senate Education Committee, then passed by the full Senate. The passed bill was then sent to the Kentucky House and referred to the House Education Committee, where it died without a hearing.

The bill was brought back to the Kentucky legislature in 2019 by Rep. Savannah Maddox (R) as HB 254, and there were no substantial differences between the two versions.[26] After its introduction in the House, the bill was referred to the House Education Committee, which passed it back to the full House. Following passage in the Kentucky House, KY HB 254 was sent to the Kentucky Senate, where it was referred to the Senate State and Local Government Committee. On March 13, 2019, the Senate State and Local Government Committee held a public hearing to discuss the bill, which was then passed out of committee and presented for a vote before the full Kentucky Senate the next day. KY HB 254 passed the Senate as amended by the House on March 14, and the bill was signed by Governor Andy Beshear (R) on March 26, 2019.[27]

As passed, Kentucky's FORUM Act is arguably even more extreme than the model legislation proposed by ALEC, though its essential planks contain most of the model's elements.[28] There are two notable additions that stand out. First, there is an explicit admonishment to faculty that they may not stifle students' beliefs: "The expression of a student's religious or political viewpoints in classroom, homework, artwork, and other written and oral assignments is free from discrimination or penalty based on the religious or political content of the submissions."[29] Second, the Kentucky legislation provides extensive protections to invited speakers, including students who may be invited to speak at official events.[30] Neither of these additions were noted in the argumentation at any hearing or vote, where university voices were all but absent.

[25] Full text of the 2018 SB 237 may be found here: https://legiscan.com/KY/text/SB237/2018

[26] The primary difference was the exclusion of a definition of student on student harassment that became a primary point of contention in both 2018 and 2019 because it ran afoul of federal law (see section 2 (p) of the Louisiana Forum Act for more detail).

[27] Full text of the bill may be found here: Kentucky State, Legislature. House Bill 254. "An Act relating to freedom of speech at public postsecondary education institutions." https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb254/bill.pdf.

[28] Included in the final version of the bill are the following requirements: (1) the prohibition against free speech zones; (2) the ability of belief and ideologically based student organizations to access student fee funding; (3) the requirement that universities publish their speech policies in the student handbook and on their websites, and (4) allowing any person to have a cause of action against a university who has been aggrieved.

[29] See section e.

[30] See sections f, m, n, o.

The FORUM Act took two attempts before passing in Kentucky, even though Republicans held a trifecta in the state and supermajorities in both houses of the legislature. Kentucky's first attempt to pass the act most likely died due to concerns raised about language included or excluded from the bill that went against established constitutional law, as such subtleties could impact Kentucky's compliance with federal law.[31]

In the bill's ill-fated 2018 bid, Senator Schroder, the bill's sponsor, was the single voice in support of the act. His argument, which contains most of the themes repeated in the following year's session, begins with a story about a lunch he had with a student from Northern Kentucky University (NKU), who was a member of a right to life organization. As Schroder's narrative unfurls, he paints a picture of a harsh university climate that betrayed students who simply wanted to express their beliefs.[32] Schroder portrays students as needing protections from institutions of higher education that indiscriminately limit student speech, and he utilizes a single, supposedly representative, example to support his claim: crosses erected by the right to life organization at NKU were kicked over. Schroder's tale is repeated in both Senate venues, and his initial argument is followed by rather robust questioning from the floor, primarily focusing on the lack of need for the bill.

When the FORUM Act was reintroduced in 2019, the tactics used by its supporters looked far different. Initially, the bill emerged from the House (where it was defeated the year before); however, the most important change is that the advocates who speak the most are two students, picked from a "coalition of over 20 nonpartisan student groups who support the bill."[33] These two students, Sebastian Torres, a law student at NKU and representative of conservative student groups, and Michael Fraser, an undergraduate student at the University of Kentucky (UK) who represents both Democrats and LGBTQ students, spoke in front of both the House and Senate subcommittees as proxies for the bill.

The primary focus of the students' testimony is on what they called "Orwellian Free Speech Zones," dramatized by an example from the UK, where the speech zone was placed on a slanted lawn that was away from general student traffic patterns. Fraser relies on pathos in his characterization of the zone, citing the example of a Baptist student group prohibited from giving hugs on free hug day because they were two feet outside of the zone.[34] These arguments move quickly to an accusation against universities in general, claiming that "they care more about PR, marketing and student tours than student speech." Fraser offers the image of students overwhelmed by the draconian power of the university: students who lose their chance to be students in order to fight for their First Amendment

[31] The particular concern was raised by the KY Association of Sexual Assault Programs that the definition of harassment ran counter to Title IX legislation.

[32] See https://ket.org/legislature/archives/2018/regular/senate-education-committee-8373 at approximately the 8-minute mark.

[33] This coalition is not identified, although during testimony in front of the Senate, Maddox reels off a list of student groups from across the political spectrum. See Stein.

[34] See https://ket.org/legislature/archives/2019/regular/house-education-committee-8107 approximately 25:45 and https://ket.org/legislature/archives/2019/regular/senate-state-and-local-government-committee-8036 approximately 28:10.

rights. Universities, by deduction, are characterized as unreasonable and impeding student rights. No university voices are there to respond to these accusations.[35]

Kentucky also provides us with a particularly disturbing moment: the tepid reaction from university representatives when given the opportunity to speak in relation to the Act. In response to a question from a member of the House, who appeared to oppose the bill, a representative from the University of Kentucky (UK) is called on in an impromptu manner and simply states that they "have no issues and support the bill 100 percent." A second group, the Council for Post-Secondary Education, repeats the UK's lack of opposition.[36] This exchange stands out as a particularly grievous mistake: in their haste to make the argument that they already adequately protect speech on campuses, they apparently did not take the time to understand the implications of the FORUM Act, which ultimately were, and now remain, substantial.

The FORUM Act, as in Louisiana, took two attempts before passing in Kentucky. Arguably, the political climate in Kentucky in 2018 and 2019 was ideal for expedient progression of partisan legislation. Not only did a single party hold authority over both chambers of the legislature and the executive office in the state, but there were also supermajorities in both chambers. Even if members of the party splintered off to vote against the legislation, the number of legislators in the majority virtually ensured passage of any party-backed legislation.

Despite this favorable political climate, Kentucky nevertheless required two attempts before passing its version of the FORUM Act, though the initial failure of KY SB 237 (2018) was less about responsibly responding to fact-based concerns raised by effective political opposition than the potential unintended consequences of the bill as written in the absence of such feedback. Once the language aligned with existing definitions of federal law and policies, KY HB 254 (2019) followed the anticipated, expedited process expected of a trifecta state with supermajorities in both chambers: little meaningful opposition and, as a result, a highly controversial bill ensuring that the "content of a student's beliefs" cannot be the basis for analytical criticism on the part of faculty.

There is also evidence here of learning from Louisiana, as proponents of the bill went from stories of one example of a clearly conservative voice being oppressed on a local campus to students from across the political spectrum servings as proxies, telling their stories of unjust victimage in the absence of any sort of institutional rebuttal from representatives of the status quo. Even though such voices would have surely been "in the wilderness," in fact there were no effective oppositional voices whatsoever.

[35] Maddox repeats the characterization of both students and the universities in her explanation of the bill during the vote on the house floor. See https://ket.org/legislature/archives/2019/regular/house-chambers-part-1-201081 approximately 37:45. See also, Watkins, "Kentucky legislature passes college free speech bill opposed by ACLU."

[36] See https://ket.org/legislature/archives/2019/regular/house-education-committee-8107 approximately 46:20. Even given a second chance to defend the university with a question from a different representative, who wonders if FIRE's assessment of issues in KY universities is accurate, the representatives from both the UK and from The Council state that they are comfortable with the bill and that institutions are already complying with federal free speech law.

3.4 Texas (2019)

Texas undoubtedly demonstrated the most expedient passage of the FORUM Act, entertaining Senate Bill 18 over the course of several months in 2019, though discussions with university officials over the need for such legislation occurred in 2018. Introduced in the wake of those discussions by Republican Senator Joan Huffman, and supported as well by then fellow Republican Senator Pat Fallon, the measure passed the Texas Senate and then the Texas House in one attempt under a Republican trifecta that included majorities in both the Texas House and Senate.

Texas's political climate favored expedited passage of the FORUM Act, but in a slightly less advantageous way than states like Kentucky and Ohio. While the Republican party held a trifecta, Republicans held only majorities, not supermajorities, in both the Texas House and Senate. Thus, the dominant party could not afford to alienate its members, and they needed to work in a united and careful way to ensure passage of the bill. Their efforts were successful. TX SB 18 (2019) passed in its first attempt with limited debate, while the groundwork for a "victim performance" before the Senate, orchestrated by Senator Fallon, just prior to passage, had been laid in the prior interim session through a seemingly frank discussion with university officials.

Universities were broadly used as tools in the entire legislative process, first via a road show hearing at Texas State University San Marcos, where legislators' concerns about free speech in higher education were introduced, and where highly informed expert university voices made it universally clear, to the apparent general satisfaction of all, that the bill was "a solution in search of a problem." Video evidence shows the veneer of the State having listened, as legislators had no additional questions and seemed satisfied with the university response to their questions.[37] Within a year, however, a very different type of show was produced, managed before the Senate by Fallon,[38] where a veritable parade of conservative victims of purportedly unfair university free speech rules presented testimony completely divorced from the reasonable discussions held with university officials months earlier. It was as if the meeting in San Marcos had never even happened, or that the arguments presented there were not worth raising as voting approached.

Senator Huffman, seeking rhetorically to transcend the clearly conservative partisanship behind the legislation, maintained that Senate Bill 18 was "constructed in an objective, non-partisan manner and will be applied equally to all groups and points of view."[39] Importantly, she added, "Campus leadership should never stymie free speech at an institution of higher learning simply because of disagreement in ideology or politics." This, of course, implies that this was precisely what universities *were* doing (i.e., stymying free speech because of political ideology).

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37 To hear the extensive hearing held at the University of San Marcos, which includes testimony not only on the part of numerous university officials, but also shows a series of very reasonable questions on how campuses could encourage speech: https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=13137.

38 It is difficult to ascertain who was in charge of inviting speakers and if speakers were invited and turned down that invitation.

39 "Senator Huffman Files SB 18 to Protect Constitutional Free Speech on College Campuses."

The Performance of Argument in University Free Speech Legislation: Lessons for University Leadership in Public Communication

From the beginning of testimony from university officials in 2018 through the victim performance before the Senate State Affairs Committee in 2019, there was an interesting separation of the voices of defenders and critics of free speech policies in Texas higher education. As noted, in the San Marcos hearing, a series of university officials universally concurred there was nothing wrong with free speech policies on university campuses and gave extensive commentary on the potential negative impacts of the proposed model legislation. For example, President Denise Trauth clearly detailed the reasonable rules surrounding public speech at Texas State University, showing that no problem existed on her campus. In fact, the level of detail on how speech policies work, their strengths and weaknesses, and why certain limits existed (e.g., on carrying clubs, body armor, or masks calculated to obstruct law enforcement), were spelled out in exacting detail. There were no critical questions from the Senate State Affairs Committee, and everyone seemed to agree that things were in good shape, free speech-wise, in Texas higher education. Conversely, before the Senate the following March, and just before the vote on Bill 18, Senator Fallon directed a round table display of conservative students who claimed to be victims of free speech violations across the state, framing the discussion by claiming that back "in the 60s it was the Left whose voice was being squelched, and now it is the Right."[40] No university defender was present to respond, and there were no references to the earlier, and quite reasonable, meeting with top education administrators.[41]

The bill, which made significant changes to free speech policy at Texas universities, was signed into law by Governor Greg Abbott in June and took effect in September 2019. It eliminated free speech zones, ensuring that "common outdoor areas of the institution's campuses are deemed traditional public forums." It also requires that all institutions of higher learning "adopt a policy detailing students' rights and responsibilities regarding expressive activities;" provide for disciplinary sanctions against anyone interfering with the expressive rights of others; be content-neutral and viewpoint neutral when it comes to approving speakers; be prohibited from considering any anticipated controversy; and provide a report to the legislature showing they are following the rules, reporting any and all free speech controversies.[42] As with Louisiana, the only key plank of the model legislation that failed to survive was the one allowing students to bring legal action against universities.

The impact on Texas universities, while not as draconian as in Kentucky, was nonetheless substantial. In the end, all of the early and reasonable public discourse on the part of university officials, effectively proving that in fact there was no problem, had no influence whatsoever, save for a re-emphasis on the university system's continued right to establish time, place, and manner restrictions to protect learning spaces proper.

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40 See https://tlcsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=13922 approximately 1 hour 19-minute mark.

41 In fact, in the early reference to the San Marcos meeting, Fallon only mentions that they heard from several university students.

42 For a copy of the specific language of the bill as passed in Texas, see Texas State, Legislature. Senate Bill 18. "An Act relating to the protection of expressive activities at public institutions of higher education" https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00018F.htm.

As opposed to Louisiana, where early dialogue, even if sometimes hokey and staged, led directly to reasonable policy enhancements and adjustments, and where the strong signs of relatively healthy public debate were evident, no such critical influence on policy can be detected in Texas, where even providing an opportunity for university officials to present their arguments ultimately had little impact on policy, and a victim show, directed personally by a Senator, took place in the absence of any reasonable voices in defense of status quo speech policies during key legislative performances. The result was ultimately a policy closely mirroring the precise goals of the FORUM Act as model legislation.

An overall cynicism, in relation to legislative argumentation, seems to pervade the situation in Texas, although the outcome in this particular case was ultimately similar to the one in Louisiana, for better or worse. Nevertheless, Texas provides an opportunity to witness an ultimately meaningless traditional debate strategy, where university officials were invited to make their case, which they did without objection, that they were handling free speech issues perfectly fine already.[43] Those reasonable and persuasive voices showed that indeed there were no problems with freedom of speech on Texas campuses. However, they were fully absent from the victim show held at the Senate Committee on State Affairs Hearing the following year, when Senator Fallon, sitting compassionately with the students who presented as victims, commiserated with them about 109 faculty complaining about the appearance of conservative performance artist Milo Yiannopoulous, suggesting that "their Ph.D.'s might fall off of their cards or something," and then praised the students for "taking stands, risk, paying the price for doing what you do, and your protecting a lot of other people's rights for what they do."[44] Fallon then made his above-mentioned reference to similarities with the voices of the Left being squashed in the 1960s, and how "it was evil then and it is evil now." Within a month the bill would pass without significant opposition.

What is clearly noticeable, for our purposes, is the complete disconnection between the reasonable university voices in San Marcos in 2018 and the uncontested "victim show" before the Senate in 2019, where no university voices were present whatsoever. Toward the end of what in retrospect appears to be the faux traditional argument setting in San Marcos, legislators appeared satisfied, with one noting that the main reason for the discussion in the first place was to ensure that "students have sufficient respect for speakers with whom they disagree," and no lingering concerns were raised. This suggests that the reasonable and traditional debate setting, where facts and reasonable counter-arguments were brought to bear against the need for the FORUM Act, showing no problem existed with free speech, were in fact simply part of the "show," and a carefully orchestrated one at that, given the complete absence of university voices in key legislative hearings in the weeks before passage.

43 Audio hearing with university officials at Texas State University, San Marcos, in 2018, https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=13137.

44 Broadcast recording of the "victim show" in a hearing before the Texas Senate Committee on State Affairs, March 11, 2019 (discussion of SB 18 begins at the 1 hour 13 minute mark), see https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=13922.

3.5 Maryland (2020)

Maryland provides us with an example of the exact opposite of Texas. In both states, early traditional argument allowed for an initial round of reasonable university discourse. In Maryland, however, as opposed to Texas, university officials, in proving there was no problem with current free speech policy, were effective in immediately stopping the proposed legislation.

MD HB 796 (2020) was introduced by Delegate Robin Grammer (R) in the Maryland House in February of 2020. Grammer was the sole sponsor of this bill. It was referred to the Maryland House Appropriations Committee and was addressed briefly in a public hearing. Although there was little debate, the few arguments offered in support of the legislation followed a similar pattern to those in other states.

Maryland's FORUM Act was almost identical to the model bill designed by ALEC. Although there were a few differences in wording and in the organization of the planks, the bill introduced by Grammer contained all of the provisions included in the model legislation. Unlike the situation in the other states identified in this study, the bill died quickly, given the lack of proof of a problem. Outside of the initial introduction on the floor of the Appropriations Committee, no other support was recorded in the official record. Grammer's presentation of the need for the legislation appeared desultory and perfunctory, perhaps sensing his argument that Maryland universities were harming student speech was doomed from the beginning. Letters of opposition provided by the University System, the Prince George's County Government, the ACLU and others presented robust counter-arguments that proved effective.

The FORUM Act was introduced on the floor of the Appropriations Committee in March 2020, and Grammer's entire statement follows (with only a few words omitted for clarity):

> HB 796 puts in place protections for lawful speech and expression of our students. HB 796 prohibits speech codes, protecting what students say, prohibits speech zones, protecting where students can speak, and finally protects freedom of association, protecting with whom students can express themselves and how they do so. Campuses can be hostile grounds for folks of different opinions, and we are seeing oppression of speech today on campuses across the country, including in Maryland. Schools shouldn't treat groups differently based on belief. HB 796 addresses this by putting in place protections that apply to all students.[45]

No questions were addressed to Grammer, and a single witness appeared to oppose the bill: Samantha McGuire, on behalf of American Atheists. The committee devoted less than four minutes to the matter.

[45] Video of Maryland House Appropriations Committee Hearing, March 10, 2020, 28 minute mark, https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=app&clip=APP_3_10_2020_meeting_1&ys=2020rs

While there was little substance to Grammer's argument, there are several argument strategies employed within it that function as enthymemes for favorable audiences, particularly around the nature of the university and the nature of students. Universities, he claimed, are "hostile grounds for folks of differing opinions," and students are portrayed as needing protection for what they can say, where they can say it, and who they can speak with. Values implicit in Grammer's argument included the protection of belief-based groups, which was a theme that occurred across all of our cases. No evidence was given for any of these claims; they relied on the audience to fill in its own preconceptions of campus culture. The enthymemes failed, however, with the heavily Democratic Maryland legislature, whereas the exact sort of enthymemes would likely succeed in Texas.

Testimony opposing HB 796 significantly overwhelmed support for the bill. Two higher education systems, the University System of Maryland and Prince George's Community College (PGCC), provided detailed arguments against the bill, with both arguing that the legislation was unnecessary, and that higher education in the state already fully supported the First Amendment and established free speech law. The University System of Maryland also submitted its Freedom of Expression Value Statement and Guidelines, approved by the Board of Regents in 2019, as evidence of its commitment to help institutions navigate complex freedom of expression issues on campuses statewide. PGCC took direct aim at the suggested free speech zone changes, arguing that the "requirements in this bill counter what is constitutionally permissible by shifting public institutions from a limited public forum status to a traditional public forum status, which does not comport with Supreme Court precedent."[46] The argument concluded that PGCC has a responsibility to provide a learning environment that is not unduly disrupted, while simultaneously supporting protected speech, and that equating campuses more generally with public parks was misguided.

Three other groups – the ACLU of Maryland, Americans United for the Separation of Church and State, and American Atheists – argued using a similar theme against the proposed legislation. Each argued that the bill was not only unnecessary but would undermine established constitutional principles. American Atheists, both in oral and written testimony, for example, argued that the proposed legislation would undermine critical student nondiscrimination protections.

[46] A crucial point: are universities more like courts and legislatures, where speech is obviously constrained, if otherwise free under highly specific rules given the goals and purposes of the court or legislative system, or more like public parks? Higher education officials in Maryland here were emphasizing that universities are much more like courts and legislatures than parks, since, as with courts and legislatures, universities too have highly specific speech rules, variable in different institutional contexts, given the goals and purposes of higher education. We unequivocally agree that freedom of speech must always be maximized, as in courts and legislatures, but universities are decidedly *not* public parks. Following FORUM Act logic, however, universities are viewed as not being at all like courts or legislative bodies, where speech is constrained for reasonable public purposes to be achieved, but more like "purposeless" parks, which is obviously not the case.

> This language would prevent a college or university from enforcing its policies to prevent discrimination, thereby allowing religious and other student organizations to exclude students, impose dangerous or discriminatory rules on students, or sanction harassment. Based on this language, for example, a "College Christian Nationalist Club" could form and exclude Jewish Students, Black students, and even Christians with differing beliefs, such as Mormons or Catholics, or those they deem insufficiently pious. They could do so while receiving monies and resources provided by taxpayers and by other students at the institution. This is not about free speech; by creating a novel definition of "expressive activities" that includes complete freedom to restrict membership and leaders, the bill masks the fact that it is simply authorizing discrimination against other students.

Americans United for the Separation of Church and State relied on precedent to argue that the bill failed to support freedom of expression, and in fact sanctioned rather than discouraged discrimination.[47] The ACLU also argued that the bill gave student groups the "privilege" to discriminate.[48]

Maryland provides an interesting contrast to the other states analyzed in this study. Its government was divided, with a Republican governor and Democratic supermajorities in both its House of Delegates and its Senate. In this type of divided government, as noted, the legislature is incentivized to work with the governor and the governor is incentivized to work with the legislature to ensure passage of measures that would successfully pass both houses and be signed into law. While the debate was certainly neither robust nor long-lasting, the response from the University system and other public interest groups was thorough, direct and well-argued for this type of legislative environment. The primary argument structure used by the bill's proponent consisted of failed enthymemes, given the composition of the audience; therefore, unsupported claims were quickly dismissed. In this legislative argument setting, as opposed to those in states such as Kentucky and Texas, university representatives and other education experts had a favorable audience. The counter-arguments presented in written testimony reinforced higher education's credibility in the state, and opponents of the model legislation relied on evidence that was accepted by a friendly audience in a traditional argument setting.

At the time Maryland encountered FORUM Act legislation, the state's political climate represented a nearly ideal balance of power. Having both chambers of the legislature run by one party with an executive of a different party served as a valuable check and balance on legislation, similar in ways to Louisiana. One drawback to Maryland's political landscape was that the Democrats held

[47] The relevant passage in support of this argument states: "These policies do not target the religious nature of any group—organizations of any political, religious, or ideological stripe can become recognized groups and access funds provided they adhere to the nondiscrimination policy. And if a religious club decides it wants to discriminate anyway, it will not be silenced or driven off campus; instead, it, like any other club, simply cannot receive official recognition and funding. In fact, the Supreme Court upheld an "accept-all-comers" policy in *Christian Legal Society v. Martinez* against claims that it violated the religious freedom of Christian student groups. The Court explained that the policies do not violate the First Amendment because the denial of benefits is based on the group's conduct, not their views."

[48] "Although the bill may seem to propose equal rights for student groups to express sincerely held beliefs, it will give religious campus organizations a privilege to discriminate, enabling a harmful university culture."

supermajorities in both chambers, enabling them to override a Governor's veto. While reason may have ultimately prevailed in Maryland, there was in fact little debate given the Democratic supermajorities, and the same enthymematic arguments that failed in Maryland, given those supermajorities, succeeded elsewhere, given their supermajorities.

3.6 Ohio (2018-2020)

Under a Republican trifecta and supermajorities in both chambers of its legislature, the FORUM Act took two attempts before passing in Ohio in 2020. Three Republican Representatives initially sponsored House Bill 758, which died in the Ohio House Higher Education and Workforce Development Committee before being brought to a recorded vote. In 2020, the FORUM Act reappeared as Senate Bill 40,[49] introduced by Senator Brenner (R), which passed the Ohio Senate and then the Ohio House before being signed into law.

Like Kentucky, the political climate in Ohio between 2018 and 2020 was ideal for passing partisan legislation. The Republican trifecta and supermajorities in both chambers produced a mathematical reality highly favorable to passage without the need for robust dialogue or compromise. The necessity of two attempts to pass the FORUM Act in Ohio was more a function of framing the potential benefits of the bill too narrowly to help only some voices – conservative voices – in 2018. When OH SB 40 (2020) was introduced, the expressed need for legislation, as well as descriptions of who would benefit from it, were broader and more inclusive, enabling the legislation to proceed efficiently through the system.

In 2018, testimony around the bill was explicitly partisan; its house sponsor, Representative Antani, introduced Ben Shapiro to frame the need for the FORUM Act. "Mr. Shapiro has seen first-hand how conservative speech can be silenced on college campuses, with his appearance at UCLA in 2016 resulting in a blockade of the entrance, a fire alarm being pulled during his speech, and him being escorted out by police for his safety."[50] Other voices backing the bill included FIRE, Citizens for Community Values, and the Alliance Defending Freedom Center for Academic Freedom. Two students also appeared in support of the bill.[51]

The legislative efforts in 2019-2020 were highly orchestrated, and indeed constitute something of a war against a presumed liberal bias in higher education, though the argumentation was more balanced in Senate deliberations, where largely supportive groups such as FIRE and Citizens for

[49] The FORUM Act was amended to the Buckeye Forever Act in 2020. See Ohio State, Legislature. Senate Bill 40.

[50] See https://search-prod.lis.state.oh.us/api/v2/general_assembly_132/committees/cmte_h_highered_1/meetings/cmte_h_highered_1_2018-11-13-0100_1583/testimony/9294/uploaded-doc/ for Antani's introduction of Ben Shapiro.

[51] Ellen Whitman, a student at Miami University, tells a personal story about how she "personally had my freedom of speech attacked by my administration." This is the only narrative that provides factual evidence of a student who felt silenced by a college. That said, the institution only asked for a trigger warning for a right to life display, and no details are given about the content. See https://search-prod.lis.state.oh.us/api/v2/general_assembly_132/committees/cmte_h_highered_1/meetings/cmte_h_highered_1_2018-11-13-0100_1583/testimony/9299/uploaded-doc/.

Community Values were met with opposition from the Inter-University Council of Ohio and the American Association of University Professors. Proponents noted that free speech zones were overly restrictive, that hecklers needed to be controlled more effectively, and that universities had a duty to more explicitly educate their students on their First Amendment rights and to report any conflicts or violations annually to the legislature. Opponents argued that universities were limited public forums, that Supreme Court precedent indicated they were already closely following the law, and they had effective strategies to handle heckling.

Once the bill moved to the House, supporters paraded a series of students who viewed themselves as victims (e.g., for their religious beliefs, pro-gun stances, and right to life efforts) whose voices were being silenced by liberal universities, and this voice of the victim, as we have seen elsewhere, took center stage.[52] This argument strategy occurred in the context of a trifecta supermajority, where sympathies were high for the victimhood narrative construction.

Just before the bill passed, the Inter-University Council of Ohio (IUC), the AAUP, and the Ohio Education Association made last minute pitches before the House, reinforcing that the bill was a solution to a problem that did not exist. The AAUP noted that advocates for the legislation were from "conservative advocacy groups, part of national movements seeking political advantage," and the IUC stressed again how universities were already doing an excellent job protecting free speech within a limited public forum.[53] However, there is no evidence that this testimony had any effect whatsoever on the final version of the bill.

There are two important strategies to note that differentiate Ohio from the other states we have analyzed. First, Ohio brought a new series of argumentation to bear in the Senate testimony: the importance of preparing students to be part of the workforce. Brenner, in his introduction to the bill on the Senate floor before its vote, touts this bill as shaping "the minds and talents of the workforce."[54] Testimony from the Alliance Defending Freedom and Americans for Prosperity echo the concerns that universities are not adequately preparing the future leaders of Ohio. The second strategy offered by Ohio is an old legislative trick. In 2020 the FORUM Act was appended to the Buckeye Forever Act, a straightforward piece of legislation that allows students who earn a G.E.D. to qualify for residency status. Interestingly, the debate on both the Senate and House floors of this bill barely mentions the Buckeye Forever provisions, concentrating instead on the FORUM Act. It is unclear, though, how much support for this act was attached to the first part of the bill.[55]

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[52] Twelve students provided testimony in support of the bill, ten of whom clearly identified as members of conservative and faith-based campus organizations. The two students who were not affiliated with conservative groups provided no direct testimony that other points of view were being suppressed. All testimony concerning the bill can be found here: https://www.legislature.ohio.gov/legislation/133/sb40/committee. Student testimony was heard on May 26, 2020.

[53] Testimony against the bill was heard on October 19, 2020 in the Senate.

[54] See https://www.ohiochannel.org/video/ohio-senate-1-28-2020 approximately 7 minutes 20 seconds.

[55] During one particularly testy exchange on the House floor between Representatives Antani and Ingram, Antani claims that the bill passed the Senate with "unanimous bi-partisan support." The final vote from the Senate was indeed unanimous at 33-0.

4. Communication Strategy Recommendations for University Leadership

So, what is to be done? Clearly conservative forces have succeeded, admittedly largely in conservative states, to persuade legislators that (conservative) voices are being unduly oppressed by (woke) forces too weak to withstand the viewpoints of others. We also know that the strategies deployed with increasing efficiency in relation to the FORUM Act are now being applied with vigor to higher education DEI policies. As we observed in Texas, Ohio and Kentucky, university officials, while often making very reasonable cases before legislative bodies proving there was no problem with the protection of free speech in higher education, and noting that extreme voices of all types will always be testing the limits of speech, ultimately had little to no impact on legislation, suggesting that without mixed government the voice of reason is faint at best, and that effective criticism based on traditional legislative argument is certainly not welcome. Unfortunately, the states that have the least healthy government types are also the ones that are most likely to be targeted by ALEC and other actors whose goal is to tame higher education. How can higher education hope to survive this continued onslaught? We offer a few suggestions of strategies and tactics university leadership may employ, grounded in rhetorical and argumentation theory. Before we delve into these strategies, it is important to understand the limits of power in the public sphere. In some cases, the public relations war is unwinnable; however, we believe it is still important to engage.

4.1 Strategy Recommendation 1: Reinforce Value of Higher Education

Higher education must continually reinforce its unique value to the state. Most, if not all, institutions and systems of higher education already have communication or public relations offices that may be working toward reputation management. This work, however, has primarily focused on promoting the "brand" of the institution rather than advancing the value of higher education.[56] Creating a reputation premised on public good must be an integral part of the mission of communication offices. This work must be ongoing, coordinated and sustained. Communities and legislators need to trust higher education, and trust is built on knowledge and relationships. It is much easier to scapegoat an organization when it is seen as distant and unknowable.[57] The tactics employed by FORUM Act advocates in every state we analyzed employed distorted images of higher education as silencing powerless students through Orwellian free speech zones (Kentucky), creating subjective speech

[56] Generally, public relations practices in higher education are focused on increasing enrollment, fundraising, and promoting events. See Taylor, "Introduction: Possibilities of Collaboration Between Public Memory Scholars and Higher Education Public Relations Professionals" pg.158.

[57] Kenneth Burke's theory on the scapegoat as part of the redemption/purification cycle is helpful here. Burke posits that scapegoats function to allow humans to assuage guilt; i.e. by blaming universities for silencing students, critics can feel better about their own shortcomings and achieve catharsis. See Burke, *The Rhetoric of Motives*, and *A Grammar of Motives*. Burke's theory is dense, and we unfortunately do not have the space to do it justice; however, Brummett's article, "Burkean Scapegoating, Mortification, and Transcendence in Presidential Campaign Rhetoric," provides a straightforward explanation of how scapegoating works in political discourse.

policies that suppress conservative speech (Texas), and generally untrustworthy (Ohio). Unfortunately, media outlets, both local and national, are amplifying these unidimensional narratives by focusing coverage on controversial speakers and protests. Universities are complex spaces, both literally and metaphorically, and these intricacies are invisible even to those who currently inhabit that space, let alone legislators whose college years are often at least a decade behind them. Combined with a news cycle that reports only problems on campuses, higher education is easily essentialized into a caricature.[58] Even in states with a conservative trifecta and triplex, higher education needs to create a sense of presence for itself, if not in the legislature, then in other narratives that permeate the public sphere. Institutions of higher education must understand that in some states no strategy based on reason will be effective, and that unnecessary and onerous policies will pass based upon various ranges of ideological erasure.[59] That does not mean, however, that effective counter-narratives are unneeded, as oftentimes fire must be met with fire.

4.2 Strategy Recommendation 2: Double-Down on First Amendment Education

The second strategy we recommend is that institutions fully embrace the charge required by the FORUM Act to educate students, faculty, and staff about their free speech rights through a variety of means. It is clear from our analysis that there are significant misconceptions about the protections guaranteed by the First Amendment that are feeding the ability of ALEC and other actors to undermine the unique mission of universities.[60] We envision that these educational programs would provide more than a straightforward review of policy and include critical thinking and ethics components that would enrich students' experiences. Although some students will still be weaponized against the university after such education, we hope that the majority of students will gain a better understanding of the contours of their First Amendment rights and could perhaps become spokespersons for what is going well on their campuses in future legislative hearings. These mandated FORUM Act educations are ripe for providing argument and critical thinking instruction as well, which we hope will ensure a more robust public sphere when the students higher education is educating now become powerful voices in their future communities, and even legislatures.

[58] Perelman and Olbrecthts-Tyteca refer to this as "presence," or the notion that by selecting certain elements to present to an audience, their importance is elevated. See pp. 116-120 in *The New Rhetoric.*

[59] This, by necessity, brings us to ideological criticism, or the analysis of prejudicial, and usually harmful, taken for granted assumptions that serve a purpose beyond what's stated. Thus, the need for critical rhetorical analysis, of the identification of what voices get "shut down," particularly when they have something relevant to say. For various introductions to this key area of study, see Terry Eagleton, *Ideology: An Introduction*; Peter Sloterdijk, *Critique of Cynical Reason*; and M. Lane Bruner's *Repressive Regimes, Aesthetic States, and Arts of Resistance*.

[60] Take, for example, the hearing at Texas State San Marcos, where private university presidents were brought to testify, and at one point were told that the legislature had First Amendment jurisdiction over their policies. We also saw misrepresentation abound over First Amendment protections for religious freedom and the misinterpretation of the First Amendment as guaranteeing the right to an audience.

While these strategies require long term commitment and will ultimately benefit campuses, they do not address the immediate need of higher education to respond to emerging legislation. As rhetorical argument scholars, we are saddened at the de-evolution of traditional argument strategies we observed in most states, where political posturing replaced thoughtful engagement with policymaking. However, as much as we wish for reasoned argument over issues, including the need for new regulations, it is unlikely that political climates will suddenly revert to this deliberative ideal. Instead, our advice is premised on the assumption that, in most cases, representatives of higher education are going to be arguing in ideologically charged arenas where assumptions about truth are hidden, perhaps even unconsciously.[61]

Even in legislative argumentation environment where reasoned debate is all but impossible, universities still, as Carlos Cortés notes, are morally responsible: university representatives cannot assume they are talking to the Board of Regents, or legal counsel, but instead must assume they are involved in a public morality play, and one in which they are often cast as the evil-doer. In such performative environments, universities have a duty, a moral obligation, to defend their actions and the status quo, yet they are presently as bad at that as they are at putting on "shows" of their own, or explaining precisely why universities are not like public parks. The strategies we observed employed in Texas, Ohio and Louisiana, where representatives of higher education provided well-evidenced and traditionally argued positions, likely reinforced the morality play of the "out of touch eggheads" victimizing conservative students.

4.3 Tactical Advice for Higher Education: Consider Different Methods of Persuasion (aka Logic Doesn't Always Work)

First and foremost, university representatives must be prepared to make presentations in front of very different audiences requiring very different tactics. The notion that traditional argumentation is the most effective strategy was clearly disproven in the Texas case, where university experts unanimously agreed there was no problem on campuses that warranted the FORUM Act, yet the Act passed anyway to protect against the presumed repression of conservative voices. Sometimes, as in Maryland, facts will prevail, but this is far from the norm; instead, university officials should expect that oftentimes facts will have no impact whatsoever on the outcome of policy, and thus they must turn to alternative persuasive means.

University representatives must have a better understanding of the argumentative environment when they are being asked to speak before legislative bodies. The greater the ideological unity of the legislative body, the more one can assume that fact-based arguments will be of little avail; instead,

[61] M. Lane Bruner's work on the rhetorical unconscious is instructive here. He argues that intentional persuasion is built on the foundations of the unconscious. See *Rhetorical Unconsciousness and Political Psychoanalysis.*

universities, too, must think of other ways to tell their story.[62] Why, for example, did university officials never bring students in to discuss how their First Amendment rights have been completely and intelligently protected? Worse yet, in ideologically charged environments where cynical argumentative "shows" replace more traditional forms of debate, and where reasonable objections are not required to be addressed, it is likely that university voices will not even be invited to participate in certain aspects of the legislative process. In Texas, for example, it would be interesting to know if any university officials were invited to testify before the Senate outside of the San Marcos hearing. If they were invited and turned the invitation down, it was a great opportunity lost, even if the outcome was assured and the effort was ultimately hopeless. If they were not invited, then the question is who was in charge of the invitation list, and how can universities better ensure when "shows" are happening that they have opportunities for their own "shows," or at least can be present at the "show" to provide a "counter-show." Perhaps the most disappointing response we saw from higher education occurred in Kentucky, where representatives from the University of Kentucky and the Council for Post-Secondary Education were called upon to comment on the bill. In their haste to assure the legislatures that they were protecting speech, the president of UK unfortunately stated that "they have no issues and support the bill one hundred percent."[63]

There are multiple rhetorical variables that advocates have at their disposal: selecting the spokesperson, designing the message, choosing the channel(s) of communication, and deciding which audiences to address with which messages.[64] As illustrated in our studies, higher education seems fixated on a particular type of logical argument delivered by either high-level administrators or faculty representatives unconnected to a particular campus.[65] These strategies may be effective in legislative venues where traditional argument prevails, but they fail to address legislatures where moral rather than logical arguments triumph. While we cannot predict every legislative environment university representatives are likely to encounter, we can provide advice on how to better represent the interests of higher education in the legislature. Before we introduce our suggestions, however, we need to provide strong caution. We have divided legislative situations into two for the sake of simplicity: divided governments and trifectas/supermajorities. Although the chart below portrays discrete categories, all legislative environments sit on a spectrum from healthy argument to unhealthy "shows."

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62 Walter Fisher's narrative paradigm is particularly useful here. Fisher posits five assumptions that form the foundation of his theory: 1) people are natural storytellers; 2) people decide based on good reasons; 3) good reasons are based on history, biography, culture, and character; 4) narrative coherence—whether the story is rational—is based on whether the story holds together; and 5) narrative fidelity (whether the story rings true), as people constantly reevaluate their lives based on the world of stories available for their choosing. See Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument."

63 See https://ket.org/legislature/archives/2019/regular/house-education-committee-8107 approximately 46:20. Even given a second chance to defend the university with a question from a different representative, who wonders if FIRE's assessment of issues in KY universities are accurate, the representatives from both the University of Kentucky and from The Council state that they are comfortable with the bill and that institutions are already complying with federal free speech law.

64 It is wise to remember Aristotle's admonition that rhetoric is "observing, in a given case, the available means of persuasion." Implicit in this advice is that rhetoric should never be considered a one-size-fits-all art.

65 We often observed the AAUP or the Council of Academic Senates testifying, but no individual faculty or staff.

Even what we see as healthy divided governments may have forces working on them that may negate the impact of traditional argument.

In general, in a divided government, legislative argument allows a full range of rhetorical strategies and promotes open dialogue to produce the most productive legislation. Divided governments encourage compromise, which often equates to serious consideration of issues inherent in policy arguments.[66] Conversely, trifecta/supermajority governments function less on argument and instead rely on emotion. These legislative environments are ideologically charged and function on enthymematic moral stories. Legislatures in this scenario see themselves as the hero saving the oppressed, and in our study the oppressed are identified as conservative students being unfairly silenced. Emotion trumps logic: testimony focuses on stories of oppression. In these trifecta/supermajority settings, we recommend that higher education points out the performative nature of this testimony, but this strategy requires care, both in terms of the ethical deployment of students and other proxies who can speak to the legitimacy of free speech on their campus, and in terms of navigating the credibility of the institution.[67] We also need to reinforce that higher education must temper expectations in such settings. It is unlikely that it will be possible to overcome the ideological wall erected by the legislature; instead, the focus should be on giving hope to supporters and providing a historical record so lessons can be learned for potential future battles.

[66] In general, when policies are debated, the issues that are discussed include the following: 1) is there a problem or need that should be addressed; 2) what is the cause of the problem in the present system; 3) what change needs to be made and does that change solve the problem and its cause/s; and 4) what is the cost of the solution? In each state that passed the FORUM Act, there were significant policy questions that went unanswered.

[67] Credibility is granted by the audience to the speaker, and this credibility is established prior to a speaking situation. Credibility, however, is not an inherent characteristic: it has to be earned. In general, credibility is judged based on three criteria: 1) is the speaker competent; 2) does the speaker show good character; and 3) does the audience believe the speaker shows good will?

A summary of our recommendations is below:

	Speaker Choice	Message Choice	Channel Choice	Audience Choice
Divided Governments	Respected university representatives	· Traditional policy issues (argue need) · Logical argument · Significantly strengthen public arguments about the university's character and build emotional connections.	· In the legislature · Develop strategic plan for community and reputation building	· Legislature itself (need to build ethos prior to speaking)
Trifecta	Heroes speaking in support of the university	· Use credibility and emotion to counter narrative. · Strategic performance techniques of pointing out ideological closure	· Strategic reputation plan that helps communities understand the ethics of the institution · Do not avoid the legislature, but expand channels	· Public · Media · Must speak to the legislature, but don't assume traditional argument will prevail

In sum, those defending the moral character of their institutions must find ways to perform that character beyond the logical presentation of facts, particularly when faced with monolithic ideological conditions. As always, they must be prepared to use traditional argumentation strategies in divided forms of government where fact-based concerns must be addressed, but they must also be prepared to present a "show" of their own when needed, using, for example, students and others as proxies, when facts no longer matter and the environment is instead a morality play. This means that university officials responsible for public communication with legislatures must know precisely when they are and are not being invited to different, key legislative scenes; they need to find ways to get on stage when traditional argument devolves into cynical showmanship; and they must understand that under the conditions of cynical showmanship that a presentation of character is more important than all the facts in the world.

At the time of this writing, the United States is facing an unprecedented crisis of reason; new media, cable news, political discourse, commercial messages, and other forms of self-interested discourse dominate as never before. The locus of responsibility for repairing this ongoing damage to the public sphere undeniably rests with institutions of higher learning. If our educational institutions cannot adapt their rhetorical approach to defend themselves more effectively in legislative environments, especially those where ideology and "shows" prevail, then all is lost.

5. References

"About ALEC." *American Legislative Exchange Council*, alec.org/about/. Accessed 11 June 2024.

"About Us." *PEN America*, pen.org/about-us/. Accessed June 11, 2024.

Asen, Robert and Daniel Brower, editors. *Counterpublics and the State*, SUNY Press, 2001.

Bruner, M. Lane. *Rhetorical Unconsciousness and Political Psychoanalysis.* University of South Carolina Press, 2019.

---. *Repressive Regimes, Aesthetic States, and Arts of Resistance.* Peter Lang, 2012.

Burke, Kenneth. *A Rhetoric of Motives*. University of California Press, 1950.

---. *A Grammar of Motives*. University of California Press, 1945.

Brummett, Barry. "Burkean Scapegoating, Mortification, and Transcendence in Presidential Campaign Rhetoric." *Central States Speech Journal*, vol 32, pp. 254-264.

Chavez, Katarina. "The Problems with the Solutions: Examining the Response from Universities, President Trump and State Legislatures to Campus Free Speech Issues." *Ave Maria Law Review*, vol 19, 2021 pp. 146-178.

Cortés, Carlos "Diversity & Speech Part 43: How 3 College Presidents Flunked Their Speech Midterm Exam." *American Diversity Report*, https://americandiversityreport.com/diversity-and-speech-part-43-how-three-college-presidents-flunked-their-speech-midterm-exam-by-carlos-cortes/. Accessed June 11, 2024.

Critchlow, Donald. *The Conservative Ascendancy: How the Republican Right Rose to Power in Modern America*. 2nd ed., University Press of Kansas, 2011.

Eagleton, Terry. *Ideology: An Introduction*. Verso, 1991.

Emmett, Shelby and Kensey Johnson, "The FORUM Act – A Model Policy Proposal." *American Legislative Exchange Council*, 6 September 2017, alec.org/article/forum-act/

Feldman, Stephen. "Broken Platforms, Broken Communities? Free Speech on Campus," *William & Mary Bill of Rights Journal*, vol 27, no. 4, 2019, pp. 949-988.

Fisher, Walter R. "Narration as a Human Communication Paradigm: The Case of Public Moral Argument." *Communications Monographs*, vol 51, no.1, 1984, pp. 1–22.

---. "The Narrative Paradigm: An Elaboration," *Communications Monographs*, vol. 52, no. 4,1985, pp. 347–67.

"FORUM Act," American Legislative Exchange Council. alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/#:~:text=Any%20person%20who%20wishes%20to,to%20the%20requirements%20of%20section. Accessed 11 June 2024.

"Free Speech." *Goldwater Institute*, www.goldwaterinstitute.org/issues/free-speech, Accessed 11 June 2024.

"Full and Part Time Legislatures." *National Conference on State Legislatures*, www.ncsl.org/about-state-legislatures/full-and-part-time-legislatures, Accessed 11 June 2024.

Habermas, Jürgen. *The Structural Transformation of the Public Sphere*. MIT Press, 1991.

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

Hutchison, Harry G. "Campus Free Speech in the Mirror of Rising Anti-Semitism," *Mary's Law Journal*, vol. 52 pp., 2021, pp. 419-493.

Kamola, Isaac. "Manufacturing Backlash: Right-Wing Think Tanks and Legislative Attacks on Higher Education, 2021-2023," www.aaup.org/article/manufacturing-backlash, Accessed 11 June 2024.

Kentucky State, Legislature. House Bill 254. "An Act relating to freedom of speech at public postsecondary education institutions." 26 March 2019, https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb254/bill.pdf

Li, Michael and Julia Boland, "Anatomy of the Texas Gerrymander," *Brennan Center for Justice*, 7 December, 2021. www.brennancenter.org/our-work/analysis-opinion/anatomy-texas-gerrymander

Louisiana State, Legislature. Senate Bill 364. 1 June 2018, https://legiscan.com/LA/text/SB364/2018

"Model Free Speech Policies." *FIRE: Foundation for Individual Rights and Expression*, www.thefire.org/research-learn/model-speech-policies-college-campuses, Accessed June 11, 2024.

Ohio State, Legislature. Senate Bill 40. "An act to amend sections 3333.31, 3345.021, and 3345.21 and to enact sections 3345.0211, 3345.0212, 3345.0213, and 3345.0214 of the Revised Code to expand the "Forever Buckeye" program by granting in-state college tuition to individuals who receive a certificate of high school equivalence in Ohio and to enact the "Forming Open and Robust University Minds Act" regarding free speech on college campuses." 3 December 2020. https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/sb40/EN/06/sb40_06_EN?format=pdf

Papandrea, Mary-Rose. "The Free Speech Rights of University Students." *Minnesota Law Review*, vol.101, 2017, pp. 1801-1861.

PEN America, "Legislative and Political Action on Campus Free Speech: An Analysis," *Seton Hall Legislative Journal*, vol 43, 2019 pp. 405-428.

Perelman, Chaim and Lucie Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*. University of Notre Dame Press, 1969.

"Representation: Edmund Burke, Speech to the Electors at Bristol," University of Chicago Press Electronic Resources. https://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html. Accessed July 5, 2024.

Sarabyn, Kelly. "The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights." *Texas Journal on Civil Liberties & Civil Rights*, vol. 14, no.1, 2008, pp 27-93.

Sentell, Will. "Campus Free Speech Measure Becomes Law in Louisiana, a Year After Similar Plan Vetoed," *The Advocate* (June 8, 2018), https://www.theadvocate.com/baton_rouge/news/politics/legislature/campus-free-speech-measure-becomes-law-in-louisiana-a-year-after-similar-plan-vetoed/article_9f2242fe-6a8f-11e8-9937-7b6131abfe91.html.

"Senator Huffman Files SB 18 to Protect Constitutional Free Speech on College Campuses," https://www.joanhuffman.com/senator-huffman-files-sb-18-to-protect-constitutional-free-speech-on-college-campuses, Accessed 11 June 2024.

Sloterdijk, Peter. *Critique of Cynical Reason*. University of Minnesota Press, 1987.

Stein, Matthew. "Ky. Student leaders petition lawmakers for free speech." *Campus Reform*. 11 February, 2019 https://www.campusreform.org/article/ky-student-leaders-petition-lawmakers-for-free-speech/11857

Taylor, LaTonya J. "Introduction: Possibilities of Collaboration Between Public Memory Scholars and Higher Education Public Relations Professionals," *Communication and Critical/Cultural Studies*, vol 20, 2024 157-164.

Texas State, Legislature. Senate Bill 18. "An Act relating to the protection of expressive activities at public institutions of higher education." 10 June 2019, https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00018F.htm

Watkins, Megan. "Kentucky legislature passes college free speech bill opposed by ACLU." *Courier Journal* 14 March 2019, https://www.courier-journal.com/story/news/politics/ky-legislature/2019/03/14/kentucky-lawmakers-consider-college-free-speech-protections/3154292002/

Warner, Michael. *Publics and Counterpublics*. MIT Press, 2005.

Williams, Joanna. "A Critical Exploration of Changing Definitions of Public Good in Relation to Higher Education," *Studies in Higher Education* vol 41, 2016, 619-630.

Williams, Jonathan, Lee Schalk, and Rose Laoutaris. 2023. "2024 Essential Policy Solutions." *American Legislative Exchange Council* alec.org/wp-content/uploads/2023/11/2024-ALEC-Policy-Solutions_Web.pdf. Accessed 11 June 2024.