

Policy Paper: Defending the Right to Free Speech and the Legitimacy of Boycott, Divestment, and Sanctions (BDS) in Michigan

Introduction

The Boycott, Divestment, and Sanctions (BDS) movement has emerged as a significant form of protest against Israel's policies towards Palestinians, invoking both national and international discourse on human rights, state policy, and economic activism. At its core, the BDS movement seeks to apply economic and political pressure on Israel to comply with international law, particularly concerning the rights of Palestinians. However, in the United States, including Michigan, legislative efforts have sought to limit or even criminalize participation in the BDS movement, raising significant concerns about the infringement of free speech rights.

This policy paper argues in favor of the BDS movement as a legitimate form of protest and economic activism. It examines Michigan's laws that restrict BDS activities, analyzes the implications for free speech, and advocates for the protection of First Amendment rights against any legislation that seeks to limit the ability to engage in boycotts as a form of political expression.

I. The Boycott, Divestment, and Sanctions (BDS) Movement: A Brief Overview

The BDS movement was initiated in 2005 by Palestinian civil society groups as a non-violent means to pressure Israel to end its occupation of Palestinian territories, recognize the rights of Palestinian citizens, and uphold the right of return for Palestinian refugees. The movement calls for:

1. **Boycotts** of Israeli goods, academic institutions, and cultural exchanges.
2. **Divestment** from companies that are complicit in the violation of Palestinian rights.
3. **Sanctions** against Israel by governments until it complies with international law.

BDS is modeled after the global anti-apartheid movement that successfully applied pressure on South Africa to end its system of racial segregation and discrimination. Proponents of BDS argue that it is a peaceful and moral strategy aimed at achieving justice and human rights for Palestinians.

II. The Legal Landscape in Michigan

Michigan, like several other U.S. states, has enacted legislation aimed at countering the BDS movement. These laws generally prohibit state agencies from contracting with or investing in entities that boycott Israel. The key pieces of legislation include:

1. **Michigan House Bill 5821 (2016):** This bill prohibits the state from entering into contracts with companies that participate in boycotts of Israel. It requires any company seeking a state contract to certify that it is not engaged in a boycott of Israel .
2. **Michigan House Bill 5822 (2016):** This bill mandates the creation of a blacklist of companies that boycott Israel and prohibits the state from investing in such companies .

These laws were passed under the guise of protecting economic interests and opposing discrimination. However, they have been criticized for infringing upon the First Amendment rights of individuals and entities that choose to engage in boycotts as a form of political expression .

III. The Right to Boycott: A Constitutional Analysis

The right to boycott is firmly rooted in the First Amendment, which guarantees freedom of speech, assembly, and the right to petition the government for redress of grievances. The U.S. Supreme Court has long recognized that boycotts are a form of protected speech. Notably:

- **NAACP v. Claiborne Hardware Co. (1982):** The Supreme Court held that a boycott aimed at achieving political, social, and economic change through nonviolent means was protected by the First Amendment. The Court recognized that such boycotts are a form of political expression .
- **Holder v. Humanitarian Law Project (2010):** While addressing a different context, this case reaffirmed the principle that political expression, even when controversial, is entitled to a high level of protection under the First Amendment .

Michigan's anti-BDS laws conflict with these constitutional protections. By requiring companies to certify that they are not participating in boycotts, these laws compel speech and violate the right of individuals and businesses to engage in political protest. Furthermore, the creation of blacklists of companies that boycott Israel is a form of government retaliation against protected political expression, which is also unconstitutional .

IV. Implications of Anti-BDS Legislation

Anti-BDS legislation has far-reaching implications for civil liberties, particularly the rights to free speech and political protest. The following concerns highlight the dangers of such legislation:

1. **Chilling Effect on Free Speech:** These laws create a chilling effect on free speech by discouraging individuals and entities from engaging in or supporting boycotts. Fear of being blacklisted or losing state contracts can silence dissenting voices and suppress legitimate political discourse .
2. **Erosion of Democratic Principles:** In a democracy, the ability to engage in peaceful protest and to express opposition to government policies or actions is fundamental.

Anti-BDS laws erode these principles by penalizing those who choose to exercise their right to protest through economic means .

3. **Selective Protection of Rights:** By targeting only boycotts of Israel, these laws selectively protect free speech, favoring certain viewpoints while suppressing others. This undermines the principle of viewpoint neutrality, a cornerstone of First Amendment jurisprudence .
4. **International Implications:** These laws may also have international implications by aligning U.S. policy with one side of a complex geopolitical issue, potentially undermining the country's credibility as a neutral mediator in the Israeli-Palestinian conflict .

V. Policy Recommendations

To uphold the constitutional rights of Michiganders and to maintain the integrity of democratic principles, the following policy recommendations are proposed:

1. **Repeal Anti-BDS Legislation:** Michigan should repeal its anti-BDS laws to ensure that individuals and businesses are free to engage in political boycotts without fear of state retaliation. Repealing these laws would restore the state's commitment to protecting free speech and political expression .
2. **Affirm First Amendment Protections:** Michigan should adopt legislation that explicitly affirms the right to engage in boycotts as a form of protected speech. This would provide clarity and protection for those who choose to engage in economic activism as a means of political protest .
3. **Promote Dialogue and Education:** Instead of penalizing political expression, Michigan should promote dialogue and education about the Israeli-Palestinian conflict. This approach would foster understanding and encourage peaceful resolution of conflicts through open debate rather than suppression of dissenting views .
4. **Support Broader Human Rights Efforts:** Michigan should ensure that its policies and investments are consistent with broader human rights principles, supporting initiatives that promote peace, justice, and equality for all peoples, including Palestinians and Israelis .

Conclusion

The BDS movement represents a legitimate and constitutionally protected form of political protest. Michigan's anti-BDS laws, by restricting the right to boycott, undermine fundamental democratic principles and infringe upon First Amendment rights. Protecting the right to engage in boycotts is essential to maintaining a vibrant and open democracy where individuals are free to express their views and advocate for justice through peaceful means.

Michigan must repeal its anti-BDS legislation, affirm the right to boycott as a protected form of speech, and promote policies that align with the state's commitment to human rights and

democratic values. In doing so, Michigan can ensure that it remains a place where freedom of speech is respected and where the principles of justice and equality are upheld for all.

This policy paper highlights the legal and constitutional issues surrounding Michigan's anti-BDS laws and makes the case for upholding the right to free speech and political protest in the context of the BDS movement. It is crucial that any policy affecting these rights be thoroughly examined to ensure that they do not infringe upon the foundational liberties that are central to a democratic society.

References

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