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?ENOUGH?S ENOUGH?: PROTEST LAW AND THE TRADITION OF CHILLING INDIGENOUS FREE SPEECH

Alix H. Bruce
American University Washington College of Law

"ENOUGH'S ENOUGH": PROTEST LAW AND THE TRADITION OF CHILLING INDIGENOUS FREE SPEECH

Alix Bruce[*]

[*] Third year *juris doctor* candidate at American University, Washington College of Law. My thanks and fond regards to the fantastic folks of the Potter's House, DC for tolerating my constant presence; Ezra Rosser, for guiding me; Leonard Gorman, Lauren Bernally, and the other fantastic civil and human rights defenders of the Navajo Nation Human Rights Commission, for inspiring me; and to the many hundreds and thousands of Indigenous peoples fighting for their rights and the protection of the Earth.

I. INTRODUCTION

These are our only remaining homelands. We have to protect them. Enough's enough.
–Jodi Gillette, Fmr. White House Advisor on Native American Affairs.[1]

The history of Indigenous[2] resistance in the United States predates the establishment of the country itself. [3] Before the Thirteen Colonies even formed a government, Indigenous peoples of North America were pushing back against European whites infiltrating or outright conquering territories Indigenous people had resided in for centuries.[4] Even during the height of Manifest Destiny, Indigenous people continued their rebellion against the federal government, through actions ranging from Indigenous protest of the laying in of railroads across the western United States[5] to the American Indian Movement of the 1960s and 1970s.[6]

The 2010s have marked an upsurge in Indigenous resistance and protest, particularly in the realm of environmental law. The #NoDAPL protests in North Dakota may be the most famous example of this phenomenon.[7] Multiple protestors (who came to be known as "Water Protectors") remain in federal custody today,

[1] Divided Films, *Mni Wiconi: The Stand at Standing Rock*, YOUTUBE (Nov. 14, 2016), https://www.youtube.com/watch?v=4FDuqYld8C8 [https://perma.cc/K5Z7-2S9J].

[2] It must be unequivocally stated that I am white, not Indigenous. I am deliberately choosing to use the term Indigenous to describe the First Peoples of the United States, rather than Indian, Native American, or Native, for both personal reasons and for purposes of consistency throughout the paper. In circumstances where the terms of "Native American" or "Indian" must be used—ex. the Indian Civil Rights Act—it is for ease of recognition by readers and academics. Similarly, by writing on this topic I am attempting to utilize the societal privilege I have been granted, as a white person who was able to attend both university and law school, to bring awareness to issues that may not otherwise be discussed. I do not wish to be credited for the fantastic work of Indigenous environmental protestors around the world, and if anything in this paper is offensive or egregious to anyone, please feel free to contact me at alixbruce@protonmail.com.

[3] *See generally* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES (2014).

[4] *See id*.

[5] DINA GILIO-WHITAKER, AS LONG AS GRASS GROWS 58 (2019).

[6] *See generally* DENNIS BANKS WITH RICHARD ERDOES, OJIBWA WARRIOR: DENNIS BANKS AND THE RISE OF THE AMERICAN INDIAN MOVEMENT (2004); *see generally* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969).

[7] GILIO-WHITAKER, *supra* note 5, at 3-10.

including Red Fawn Fallis, who was sentenced to almost five years of prison time for possession of a weapon brought into the Water Protector camp by an agent of the Federal Bureau of Investigation.[8] Similar examples of resistance include Indigenous defenders of Bears Ears Monument in Utah; Standing Rock veterans protesting the Line 5 installation in Michigan in Camp Anishinaabek; Water Protectors in Louisiana at the L'eau Est Vie ("Water is Life") camp standing against the Bayou Bridge Pipeline; and Society of Native Nations members protesting the installation of the Kinder Morgan Pipeline in San Antonio, Texas.[9] Indigenous peoples have been and continue to be on the front lines of peaceful protest in the United States.

However, in the wake of these massive protests, state governments across the nation have begun to enact laws that curtail or outright prohibit protest. At the time of this writing, more than 100 bills have been considered or enacted across the United States, with nine states enshrining anti-protest edicts into law: Indiana, Louisiana, Missouri, North and South Dakota, Oklahoma, Tennessee, Texas, and West Virginia.[10] Other states, including Arkansas, Idaho, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, North and South Carolina, Ohio, and Pennsylvania, have anti-protest legislation up for consideration. These proposed laws range in topic from imposing mandatory

[8] Will Parrish, *An Activist Stands Accused of Firing a Gun at Standing Rock. It Belonged to Her Lover—An FBI Informant.*, THE INTERCEPT (Dec. 11, 2017, 4:11 PM), https://theintercept.com/2017/12/11/standing-rock-dakota-access-pipeline-fbi-informant-red-fawn-fallis/ [https://perma.cc/J4L4-GL9M].

[9] Joe Fox et al., *What Remains of Bears Ears*, THE WASH. POST (Apr. 2, 2019), https://www.washingtonpost.com/graphics/2019/national/bears-ears/?utm_term=.cc5e5fd1d014 [https://perma.cc/7ZPH-L23D]; Gina Kaufman and Robert Allen, *Standing Rock protestors now protesting Line 5 pipeline*, DETROIT FREE PRESS (Aug. 11, 2018, 7:17 PM), https://www.freep.com/story/news/local/michigan/2018/08/11/standing-rock-protesters-line-5-pipeline/968405002/ [https://perma.cc/BPA8-PGEA]; Levi Rickert, *Four Water Protectors Arrested at Bayou Bridge Pipeline Construction Site*, NATIVE NEWS ONLINE (Sept. 5, 2018), https://nativenewsonline.net/currents/four-water-protectors-arrested-at-bayou-bridge-pipeline-construction-site/ [https://perma.cc/NW8S-YLUW]; Frank Hopper, *'Kill the bill! Save the land!' Native protectors disrupt Texas legislature*, INDIAN COUNTRY TODAY (May 10, 2019), https://newsmaven.io/indiancountrytoday/news/kill-the-bill-save-the-land-native-protectors-disrupt-texas-legislature-qNlvwX7lPkeLgU5y6wJVpw [https://perma.cc/ZXB7-EEJS].

[10] US Protest Law Tracker, *Enacted Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L., .http://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative [https://perma.cc/VCD6-59LU].

sanctions for campus protestors (SB 33, North Carolina) to expanding the definition of a riot (AB 2853, New Jersey), expanding the definition for unlawful assembly (HB 288, Missouri), or prohibiting masked demonstrations (HD 2639, Massachusetts).[11]

The most troubling of these anti-protest laws are those that penalize protests near gas and oil pipelines.[12] Frequently described by state legislatures as "penalties for protests near critical infrastructure," these laws criminalize protests near gas or oil pipelines, including those under construction at the time of the protest.[13] Although these laws may not expressly target Indigenous peoples, the implications of the laws inevitably prevent Indigenous peoples from exercising their First Amendment Rights.

Part I of this paper provides a timeline of protests and First Amendment law in the United States, describing the First Amendment's development and connection to the Due Process Clause of the Fourteenth Amendment, and its progression to the current era. Part II examines the application and provision of civil rights to Indigenous communities in the United States, including the application of First Amendment rights to Indigenous peoples. Part III describes the #NoDAPL protests in North Dakota, their political impact, and the resulting wave of anti-protest laws. Part III will also provide an overview of anti-protest laws in five states, focusing specifically on laws being enacted or debated in North and South Dakota, Oklahoma, Louisiana, and Texas, as well as the newest proposed federal law protecting against "critical infrastructure" destruction. Part IV links these anti-protest laws to the long history of chilling of Indigenous free speech and stifling of Indigenous civil rights in the United States, particularly by exploring the way each law violates the First Amendment. Part V considers the consequences of these anti-protest laws—not only on Indigenous peoples, but on the United States as a whole. Finally, Part VI provides recommendations on how the United States can repair these issues and perhaps move forward more in line with the goals of the United Nations Declaration on the Rights of Indigenous

11 US Protest Law Tracker, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/usprotestlawtracker/ [https://perma.cc/HZE7-5UGN].
12 US Protest Law Tracker, *Pending Bills*, INT'L CTR. FOR NOT-FOR-PROFIT L., .http://www.icnl.org/usprotestlawtracker/?location=&status=pending&issue=&date=&type=legislative [https://perma.cc/YN7Q-ZLE5].
13 *See* American Legislative Exchange Council, *Critical Infrastructure Protection Act*, ALEC, https://www.alec.org/model-policy/critical-infrastructure-protection-act/ [https://perma.cc/2J36-P7UN].

Peoples (hereafter "UNDRIP").

II. AN OVERVIEW OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION IN THE UNITED STATES

The First Amendment of the United States Constitution states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[14] Legal applications of the First Amendment are varied, with the interpretations of the various clauses by the Supreme Court changing depending on era and cultural norms. To better understand how critical infrastructure/anti-protest laws violate the First Amendment rights of Indigenous peoples, the applicable case law of both freedom of speech and freedom of association must be explored.

A. *Freedom of Speech*

The history of the Supreme Court's examination of the First Amendment dates back almost perfectly to the First Amendment's drafting and addition to the U.S. Constitution in 1791; the application of First Amendment protections continue to be a highly litigated area of law.[15] When it comes to freedom of expression, which encompasses both freedom of speech and freedom of the press (only tangentially relevant here), the Supreme Court has established, edited, and transformed a series of tests to apply to state or federal laws which seek to regulate free speech to determine their constitutionality. The clear and present danger test, established in 1941 with *Thornhill v. Alabama*[16] and ending in 1951 with *Dennis v. United States*[17], attempted to put forward the idea that First Amendment rights to freedom of speech and expression could only be abridged if there was "[a] clear and present danger of destruction of right or property, or invasion of the right of privacy, or breach of

[14] U.S. CONST. amend. I.
[15] American Legion v. American Humanist Assn., 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019); Bill of Rights (1791), OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=13 [https://perma.cc/4VDK-6XMZ].
[16] 310 U.S. 88 (1940).
[17] 341 U.S. 494 (1951).

the peace that can be thought to be inherent in the activities of every person . . . "[18] Under this rule, free speech would be protected by the courts *so long as* the exercise of that right to free speech did not endanger, harm, or result in endangering or harming people or property. As presented in *Thornhill*, a case dealing with anti-picketing laws, so long as people or property (like a pipeline) were not harmed in a person exercising their right to free speech, that free speech was legal and protected.[19]

However, the clear and present danger test was transformed by Justice Frankfurter's concurrence in *Dennis*. Rather than continue using the clear and present danger test, Justice Frankfurter's concurrence suggested the implementation of a balancing test—one which required courts to examine laws or cases that might violate free speech by considering whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[20]

Justice Frankfurter's balancing test was used throughout the 1950s and 1960s, until the lines began to blur because the Supreme Court used the balancing test in some cases[21] but not others.[22] The test slowly transformed into a concept of examining vagueness or the "overbreadth" of a law rather than simply balancing, as Chief Judge Learned Hand wrote, "the gravity of the evil" with the infringement on free speech.[23] In 1997, the Supreme Court in *Reno v. American Civil Liberties Union* (hereafter "*Reno*") stated that an overbroad law might be cured of its unconstitutionality by "severing [a] term . . . pursuant to its severability clause."[24] In *Virginia v. Hicks* (hereafter "*Hicks*"), the Supreme Court determined that a statute which "authorized the Richmond police to serve notice on any person lacking a 'legitimate business or social purpose'" for being on the property of a low income housing development in Richmond, Virginia was not overbroad.[25] The Supreme Court in *Hicks* stated that:

> The showing that a law punishes a "substantial"

[18] *Thornhill*, 310 U.S. at 105.
[19] *Id*.
[20] 183 F.2d 201, 212 (1950), *cited in* Dennis v. United States, 341 U.S. at 510.
[21] *See* Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).
[22] *See* Edwards v. South Carolina, 372 U.S. 229 (1963).
[23] 183 F.2d at 212.
[24] 521 U.S. 844, 844 (1997).
[25] 539 U.S. 113, 113 (2003).

> amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'[26]

The Supreme Court provides this remedy "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[27] This does not mean that a law should not be enforced so long as it has a legitimate purpose in "maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[28] However, if a law, federal or state, sufficiently chills free speech to the point where people will choose not to exercise that free speech because of potential criminal consequences, then that law should be severed, amended, or invalidated as it may become necessary.[29]

The Supreme Court will also frequently examine whether a law is sufficiently precise to ensure that any action taken in the course of the exercise of free speech may be potentially criminal conduct.[30] Specifically in regards to public demonstrations or protests, vagueness can be combined with the examination of a statute as being potentially overbroad.[31] *National Association for the Advancement of Colored People v. Button* will be discussed further

[26] *Id*. at 119 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).
[27] *Id*.
[28] *Id*.
[29] *Id*. (citing Broadrick v. Oklahoma, 413 U.S. at 615) (following with "[f]or there are substantial social costs *created* by the overbreadth doctrine. . . [t]o ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . . before applying the 'strong medicine' of overbreadth invalidation", 119-120).
[30] *See* Connally v. General Const. Co., 269 U.S. 385 (1926); Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (1982).
[31] Nat'l Ass'n for Advancement of Colored People (NAACP) v. Button, 371 U.S. 415, 432-33 (1963) (examining the constitutionality of Chapter 33 of the Virginia Acts of Assembly, which prohibited "solicitation of legal business by a 'runner' or 'capper' to include, in the definition[s] . . . an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability," which the Court held unconstitutional under the First and Fourteenth Amendments).

below in terms of freedom of association, but it provides the most cogent description of the Supreme Court's doctrine regarding vagueness or overbreadth. According to the Supreme Court, the consequences of a law which is either overly vague or overly broad can be immense; in *NAACP v. Button*, Justice Brennan states:

> The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible to sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious . . . sanctions may deter their exercise almost as potently as the actual application of sanctions.[32]

The use of vague language or overbreadth in a statute limiting free speech is not limited, like in other constitutional questions, to whether the statute provides fair notice of whether a criminal act could be committed. Rather, as per Justice Brennan, the overbreadth or vagueness of the statute itself could result in the criminalization of protected speech.

Perhaps one of the most significant cases in the context of this issue is *Brandenburg v. Ohio*, decided by the Supreme Court in 1969.[33] The defendant in *Brandenburg*, a member of the Ku Klux Klan in Ohio, had been convicted under the Ohio Criminal Syndicalism Act, which criminalized the "advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[34] After inviting a television crew to attend a group meeting, the defendant stated at some point that "it's possible that there might have to be some revengeance [sic] taken" on the President, Congress, and the Supreme Court for recent decisions during the Civil Rights era. [35] The Ohio Supreme Court's affirmation of the man's conviction was overturned by the Supreme Court, which stated that:

[32] *Id*.
[33] 395 U.S. 444, 448 (1969).
[34] *Id*. at 444-45 (citing Ohio Rev. Code Ann. § 2923.13).
[35] *Id*. at 446.

> [We] have fashioned the principle that the constitutional guarantees of free speech . . . do not permit a state to forbid or proscribe the advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 'the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' [Citations omitted.] A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. [Citations omitted.][36]

The Supreme Court continued by stating that the Ohio Criminal Syndicalism Act violated the First and Fourteenth Amendments, as it "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."[37] The Ohio Criminal Syndicalism Act had criminalized the advocacy of violence "as a means of accomplishing industrial or political reform."[38]

It is apropos to mention that while the intent of the lower courts in this case was to convict a Klansman who had been advocating the overthrow of the executive, legislative, and judicial branches, the end result was unconstitutional.[39] Thus, state laws which interfere with the freedom of speech, even if that speech advocates use of force or violation of the law, are unconstitutional when that speech does not *incite* the use of force or breaking the law.[40] To regulate free speech, a legislature must weigh the intent of the speaker, the likelihood of violence being the result of the speech, or the actual imminence of the possible violence which are critical in regulating free speech. Laws which infringe on these things

[36] *Id*. at 447-48.
[37] *Id*. at 449.
[38] *Id*.
[39] *Id*. at 446, 449.
[40] *Id*. at 449.

without just cause are unconstitutional.[41]

B. *Freedom of Association*

Freedom of association is inherently linked to and derived from freedom of speech.[42] In 1958, the Supreme Court reasoned in *National Association for Advancement of Colored People v. State of Alabama* that group association inherently enhances advocacy of both public and private concerns.[43] The Supreme Court in *NAACP v. Alabama* stated that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[44]

The Supreme Court further established in *Kusper v. Pontikes* that the freedom to associate with like-minded people, especially in political contexts, is protected by both the First Amendment and the Fourteenth Amendment, and that showing a legitimate state interest alone is not enough to justify encroaching on it.[45] This link between the First Amendment and the Fourteenth is based entirely in the concept of liberty as put forward by the Due Process Clause of the Fourteenth Amendment. Section One of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its

[41] Complaint, Dakota Rural Action et al. v. Kristi Noem et al., Case No. 5:19-cv-5046 (W.D. S.D., Mar. 28, 2019), *7.
[42] *See* Nat'l Ass'n for the Advancement of Colored People (NAACP) v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958).
[43] *Id*. at 460 (stating that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association").
[44] *Id*. at 460-61.
[45] 414 U.S. 51, 56-57 (1973) (stating that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom").

jurisdiction the equal protection of the laws.[46]

The Supreme Court explained in *NAACP v. Alabama* that the First and Fourteenth Amendments are inherently linked, because the Fourteenth Amendment "embraces freedom of speech." Cases involving freedom of association usually examine laws restricting political parties: the construction or limitation of political parties, how they choose candidates, how its membership is limited, and other issues. However, particularly in *NAACP v. Alabama*, freedom of association comes into play with non-profit organizations in regards to membership lists in organizations.[47] It is within the right of a private organization, like the NAACP, to not be required to disclose membership lists of their organization; "[i]mmunity from state scrutiny . . . is so related to the right of [the NAACP's] members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment."[48] State and federal governments cannot compel non-profit associations, political parties, labor unions, or other groups to disclose their associations with individual members, as it "may constitute as effective a restraint on freedom of association . . . [t]his Supreme Court has recognized the vital relationship between freedom to associate and privacy in one's associations."[49]

NAACP v. Alabama was followed five years later by *NAACP v. Button*, which further analyzed the actions and activities of organizations to determine whether they were protected by the First and Fourteenth Amendments.[50] In *NAACP v. Button*, the state of Virginia had drafted and passed a new chapter of the Virginia legal code, Chapter 33, that prevented any kind of "runner" or "capper" to solicit legal business.[51] This included "in the definition of 'runner' or 'capper,' an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[52] The NAACP rightly claimed that the addition of this chapter in Virginia

[46] U.S. CONST. amend. XIV, § 1 (emphasis added).
[47] *NAACP*, 357 U.S. at 450.
[48] *Id*.
[49] *Id*. at 462.
[50] *Button,* 371 U.S. 415 (1963).
[51] *Id*. at 423-24.
[52] *Id*.

law "infringe[d] the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[53] The context and wording of Chapter 33 ensured that any person who informs another that they have experienced an infringement on their legal rights and recommends that they speak to an attorney or specific legal group has committed a crime.[54] Chapter 33 was found to be both vague and overbroad due to its lack of definition of illegal activity and its prevention of association protected by the First Amendment.[55] The Supreme Court also found Chapter 33 violated the Fourteenth Amendment by "unduly inhibiting protected freedoms of expression and association."[56] In his majority opinion, Justice Brennan wrote that:

> [A] State cannot foreclose the exercise of constitutional rights by mere labels . . . [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. [Citations omitted.] . . . [L]itigation is not a technique of solving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local . . . [and] is thus a form of political expression.[57]

Following the determination in *NAACP v. Alabama* that it is a constitutional right for people to associate with each other to advance ideas or beliefs, the Supreme Court held that the First Amendment protects not just individual association or the right of people to gather in unions or political parties, but the actions of litigation groups in associating with people who need legal assistance.[58] The First Amendment right to freedom of association, then, protects not only the right of individuals to associate in groups advocating for political action, but also the right of non-profit and

[53] *Id*. at 428.
[54] *Id*. at 434.
[55] *Id*. at 435.
[56] *Id*. at 437.
[57] *Id*. at 429.
[58] *Id*.

legal aid organizations to provide aid in these contexts.

III. CIVIL RIGHTS FOR INDIGENOUS PEOPLES IN THE UNITED STATES

A. *"Kill the Indian, Save the Man": Indigenous Civil Rights Pre-1924*

The relationship between Indigenous peoples and the federal government of the United States has been fraught with racism, imperialism, abuse, erasure, and genocide.[59] There is a plethora of documentation regarding the mass murder, rape, assault, trauma, and resistance of Indigenous peoples to colonial rule; to recount it here would do an injustice to the lives and stories of Indigenous peoples, and would take up more space than any one paper could possibly contain.[60] However, there are a handful of particular "eras" in the abusive "relationship" between the United States state and federal governments and Indigenous peoples which provide context to the mantle that these current era critical infrastructure/anti-protest laws wear.

The first of these eras is generally termed the "relocation" era, a name which evokes images of Indigenous peoples being removed from their ancestral lands. During this era, many Indigenous communities, tribes, and groups were ripped from their home territories and moved across the United States in anticipation of white immigration into the area. Legally, there were no real repercussions. In the words of Dina Gilio-Whitaker, "[w]hen courts disregard histories of dispossession . . . the action constitutes a form of erasure and weakens the legal foundations upon which environmental justice might otherwise be constructed.

[59] It is difficult to describe the progression, and regression, of Indigenous civil rights in the United States without falling into the trap of what has been rightfully described as "poverty porn." Indigenous communities remain simultaneously some of the poorest, yet some of the most vibrant and politically active, communities in the United States. However, Indigenous reservations remain mostly under the purview of the federal government. Many treatises and international laws have been written regarding the potential for tribal self-determination. The intention of this paper is to analyze current violations of Indigenous civil and human rights under the framework in which Indigenous peoples currently exist in the United States, and while referencing the UN Declaration on the Rights of Indigenous Peoples, the focus will remain on state and federal government violations of Indigenous civil rights.

[60] *See generally* DUNBAR-ORTIZ, *supra* note 3.

Decontextualization . . . is one way the State system fails Indigenous peoples' ability to experience environmental justice."[61]

The most famous events of the relocation era are the forced marches such as the Trail of Tears, which forcefully relocated the Five Civilized Tribes (Cherokee, Creek, Chickasaw, Seminole, and Choctaw) from their homelands in the Southeastern United States to Oklahoma in 1838-39, and the Long Walk forced on the Navajo (Diné) in 1864.[62] However, displacement of Indigenous peoples from their ancestral homelands—homelands which, in "a Native worldview . . . makes no distinction between people and land"[63]—occurred over more than a century of forced colonization of the North American continent.[64] Native peoples were pushed out of their territories and into distant reservations, which were divorced entirely from their histories, customs, and cultures.[65] Frequently, instead of relocation, Indigenous people were simply killed.

Relocation continued, in other forms, throughout the years. For example, in 1892, a man named Capt. Richard H. Pratt read aloud a paper at a convention for like-minded men in the United States. "A great general has said that the only good Indian is a dead one," he said, ". . . [i]n a sense, I agree . . . but only in this: that all the Indian there is in the race should be dead. Kill the Indian . . . save the man."[66] Pratt is widely credited for founding the first federally-funded, off-reservation boarding school for Indigenous children.[67] These schools were meant to strip Indigenous children of their communal and familial identities, "civilize" them to the standards of white, European, colonial society, and thus "kill" whatever remained of Indigenous peoples post-mass colonization.[68] Schools like Pratt's were highly emblematic of the policies of assimilation inherent to the post-Civil War era.[69] The Supreme

61 GILIO-WHITAKER, *supra* note 5, at 57.
62 DUNBAR-ORTIZ, *supra* note 3, at 112-14, 138-39.
63 GILIO-WHITAKER, *supra* note 5, at 36.
64 *Id*. at 44-49.
65 *Id*.
66 Richard H. Pratt, O*fficial Report of the Nineteenth Annual Conference of Charities and Correction* (1892), 46-59, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 260 (Francis Paul Prucha ed., 1973).
67 *Id*.
68 DUNBAR-ORTIZ, *supra* note 3, at 211-14.
69 *Id*. at 212 (quoting Sun Elk (Taos Pueblo) describing his boarding school experience: "They told us that Indian ways were bad . . . they kept teaching us for seven years. And the books told how bad the Indians had been to the white men—burning their towns and killing their women and children . . . We all wore

Court adopted a similar viewpoint. In 1886, *United States v. Kagama* cemented Indigenous territories and reservations as subordinate to the whims of Congress, declaring that the Major Crimes Act of 1885—which provided federal, not tribal, courts jurisdiction over certain crimes committed in Indigenous communities—constitutional.[70] Justice Miller, in his opinion, stated that:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, — dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the state, and receive from them no protection . . . From their very weakness and helplessness, so largely due to the course of dealing with them . . . there arises a duty of protection, and with it the power . . . The power of the government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.[71]

United States rhetoric around Indigenous peoples and their communities is and has always been both capitalistic and colonialist. Not even the Supreme Court was exempt from this; the language in *Kagama* was that of a colonizer to the conquered. To the Supreme Court, Indigenous peoples were wards of the nation, entirely dependent on the United States and with no real say either in the running of their communities or on the development of the lands they now dwelt in. [72]

Kagama was quickly followed by the Dawes Act (P.L. 49-119) in 1887, dividing reservation territory into individual allotments for each Indigenous person; this has become known as the "allotment" era.[73] Initially, these lots could not be sold; however, leftover lots—that is, lots that were not provided to Indigenous

white man's clothes and ate white man's food and went to white man's churches and spoke white man's talk. And so, after a while we also began to say that Indians were bad").

[70] 118 U.S. 375 (1886).

[71] *Id*. at 383-85.

[72] *See id*.

[73] The Dawes Act of 1887, 25 U.S.C. § 331 (repealed 2000).

people—could be sold to outsiders.[74] The Dawes Act also provided an opportunity for Indigenous people in the United States to obtain U.S. citizenship, but only if they "adopted the habits of civilized life," became Christianized, and essentially abandoned their cultures and heritage.[75] Allotment would, especially in large reservations, open up "surplus" allotments for settlement by non-Indigenous peoples, and, in the words of Charles Wilkinson, "fit nicely with the individualistic tone of American society and the assimilationist views held by the evangelical Christians then active in Indian policy."[76] These requirements for obtaining citizenship, even to the casual observer, violate the First, Fifth, Eighth, and Fourteenth Amendment rights of Indigenous peoples—but at the time, Indigenous peoples could not become citizens save through "adopting civilized life," and thus were not afforded the protections of the Constitution. In fact, roughly fifty years earlier, *Cherokee Nation v. Georgia* (1830), had essentially closed the courts to Indigenous peoples, regardless of the veracity or the atrocities put forward in their legal claims.[77] "If it be true that the Cherokee nation have rights," wrote Justice Marshall, "this is not the tribunal in which those rights are to be asserted . . . this is not the tribunal which can redress the past or prevent the future."[78]

Lone Wolf v. Hitchcock (1903) firmly cemented the position of Indigenous peoples as subject to the whims of Congress, opening the doors for Congress to dismantle reservations without even consulting with tribes.[79] This resulted in the 1906 creation of the state of Oklahoma. Following the broad language presented in *Kagama*, the Supreme Court followed up with *United States v. Sandoval*, which upheld Congress's contested ability to regulate Indigenous peoples in the United States.[80] "In short," states Walter Echo-Hawk, "every time the government acted during the period from 1886 to 1934 . . . it invoked the guardianship principle like an unabashed colonial power."[81]

74 *Id*.
75 *Id*.
76 CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 46 (2005).
77 Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
78 *Id*. at 20.
79 *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
80 United States v. Sandoval, 231 U.S. 28 (1913).
81 WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 207 (2010).

Finally, the Supreme Court's 1884 decision in *Elk v. Wilkins* stated that Indigenous people were not citizens of the United States but of their own, individual nations, and thus could not claim citizenship regardless of whether they had been born outside of Indigenous territory.[82] There were no voting rights for Indigenous peoples in the United States—and, without citizenship, no constitutional ones, either.[83] This was, however, soon to change.

B. *8 U.S.C. § 1401(a)(2) and the Rise of Red Power*

Section 1401(b) of Title 8 of the United States Code states that "The following shall be nationals and citizens of the United States at birth: (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe . . . ."[84] As citizens of the United States, this means that all Indigenous peoples born within the borders of the United States hold the same state and federal rights as all other citizens—including free speech, freedom of assembly, and the entitlement of the full protection of the Fourteenth Amendment.[85] The Fourteenth Amendment, particularly, states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[86] Section 1401(b) was added to the United States Code in 1924 via the Indian Citizenship Act; however, it took until the mid-1970s for the establishment of Indigenous peoples as citizens of the United States to be fully confirmed.[87]

Defendants in *Goodluck v. Apache County* made the claim that following *Elk v. Wilkins* in 1884, Indigenous peoples were not subject to the jurisdiction of the United States and thus not citizens entitled to voting rights under the Fifth and Fourteenth Amendments.[88] The lower court in that case held that when any party is subject to the plenary power of another, like Indigenous reservations are to Congressional authority, that party is subject to the "complete and immediate" jurisdiction of the party with plenary

82 Elk v. Wilkins, 112 U.S. 94 (1884).
83 *See* 8 U.S.C. § 1401(b) (1924); *see also* U.S. CONST. amend. I-XIV.
84 8 U.S.C. § 1401(b) (1924).
85 *See id*.; *see also* U.S. CONST. amend. XIV.
86 U.S. CONST. amend. XIV.
87 Goodluck v. Apache County, 417 F. Supp. 13, 14 (D. Ariz. 1975).
88 *Id*. at 15.

power.[89] The Supreme Court affirmed the district court's decision in *Apache County v. United States* the following year.[90]

The enshrinement of Indigenous peoples as United States citizens via the 1924 Indian Citizenship Act ensured Indigenous peoples were now in possession of state and federal constitutional rights of free speech and assembly.[91] However, civil rights protections were grossly underenforced. After the allotment era ended, the highly encouraged relocation of Indigenous peoples off reservations and into cities allowed for the termination of Indigenous reservations. Through this, the assimilation/termination era spawned.[92] Thirteen separate termination acts were passed throughout the 1950s and 1960s, terminating "more than a hundred tribes, including many small, impoverished bands and rancherias in California and Oregon . . . [affecting] at least 1.3 million acres and 11, 000 people . . . cutting off federal services for 3 percent of all federally recognized Indians."[93]

Allotment/termination policies—had an impact on Indigenous peoples beyond the violation of their rights as citizens of the United States. Enduring such brutal attacks on their civil rights inspired Indigenous peoples to push back. In 1944, the inaugural National Congress of American Indians (hereafter "NCAI") met in Denver, Colorado and demanded tribal sovereignty.[94] Simultaneously, Indigenous activists also pushed for tribal sovereignty, as well as combating Indigenous poverty; retaining Indigenous territory; and preventing Army Corps projects, particularly dams, from damaging lands and rivers that were critical to Indigenous communities.[95] In 1963, Alcatraz Prison was shut down, and after a few false starts, in 1969, a group of Indigenous protestors landed on the island and claimed it for Indigenous peoples. They called themselves the Indians of All Tribes, and they occupied the island for nineteen months.[96] A year before, in 1968, a group of young Chippewa men, including Dennis Banks and Clyde Bellecourt, founded the American Indian Movement (hereafter "AIM") to aid Indigenous peoples who had been relocated,

[89] *Id*. at 16.
[90] 429 U.S. 876, 876 (1976).
[91] U.S. CONST. amend. I.
[92] WILKINSON, *supra* note 76, 64-65.
[93] *Id*. at 81.
[94] *Id*. at 103.
[95] *Id.* at 113-28.
[96] *Id*. at 133-34.

forcefully or otherwise, from reservations to the slums of Minneapolis.[97] AIM quickly developed into a national movement. It hosted a "counter-celebration" at Mount Rushmore[98]; led the Trail of Broken Treaties to Washington, D.C.; occupied the Bureau of Indian Affairs building; protested the infamous Guardians Of the Oglala Nation ("GOON") squad of Oglala Sioux tribal chairman Dick Wilson;[99] and, perhaps most famously, occupied Wounded Knee for 71 days. By the end of the occupation, two Sioux men had been shot to death, there had been more than a dozen firefights between occupiers and federal agents, and more than 1,200 people had been arrested.[100]

Similarly, Indigenous women (who had been excluded from AIM due to "men who had become so acculturated to dominant white society . . . [that it] translated into sexist, repressive behavior towards women") founded Women of All Red Nations (hereafter "WARN") in 1974.[101] Some of those founders, including Phyllis Young and Madonna Thunderhawk, were present for the entirety of the 2016-2017 protests at Standing Rock.[102] Indigenous peoples were applying their constitutional right to free speech and assembly—and the government was taking notice. Hundreds of AIM and WARN members were charged with felonies, in an echo of what would occur at the #NoDAPL protests more than forty years later.[103]

At the same time, the Keweenaw Bay Band of Chippewa were protesting too, using an elegant combination of illegal fishing and filing court cases to enforce treaty rights.[104] The Yakama Nation in Oregon pushed back against state regulations preventing them, and other Indigenous peoples—including the Umatilla, Warm Springs, and Nez Pearce—from fishing in waters protected by

97 *Id*. at 137.
98 *Id*. at 139.
99 *Id*. *at* 144 (describing the squad as "a tribal security force . . . to keep law and order. This translated into close and tough surveillance—and, apparently, beatings—of Wilson's political opponents, especially AIM supporters…").
100 Alysa Landry, *Native History: AIM Occupation of Wounded Knee Begins*, INDIAN COUNTRY TODAY (Feb. 27, 2017), https://newsmaven.io/indiancountrytoday/archive/native-history-aim-occupation-of-wounded-knee-begins-8Ub_qxe5Tk-RPjNdSvvYDQ/ [https://perma.cc/473J-7SWK].
101 GILIO-WHITAKER, *supra* note 5, at 116-17.
102 *Id*.
103 *Id*. at 148; *see also* WATER PROTECTOR LEGAL COLLECTIVE, waterprotectorlegal.org.
104 WILKINSON, *supra* note 76, at 156-57.

treaties the state of Oregon had ignored.[105] In 1969, they won.[106] From the 1960s onward, Indigenous activists utilized mass organization and the First Amendment to push for religious, reproductive, social, cultural, and environmental equality, with Indigenous activists—particularly women—"[vaulting] into mainstream visibility.[107] The use of protest and free speech by Indigenous peoples was vastly increasing, and the government—both state and federal—was taking notice.

C. *The First Amendment as Applied to the Indigenous Peoples of the United States*

The majority of precedent regarding the application of the First Amendment to Indigenous peoples in the United States relates to the Establishment Clause—the clause which solemnifies freedom of religion in the United States. Notably, in the *Encyclopedia of American Indian Civil Rights*, the listing for "First Amendment" redirects to "Religious Freedom."[108] Primarily First Amendment litigation in Indigenous contexts has been focused on issues such as the possession and use of peyote,[109] the use of eagle feathers in religious ceremonies; and other elements of traditional religious practices. The Indian Civil Rights Act, which partly imposes the Bill of Rights on Indigenous tribal reservations,[110] does not contain an Establishment Clause. As explained by Vine Deloria Jr.:

> The Free Exercise clause . . . since it does not expressly mention Indian tribes, cannot be used as a protective constitutional cloak . . . . Congress did specifically protect individual religious freedoms in

[105] *Id*. at 165.
[106] *Id*.
[107] GILIO-WHITAKER, *supra* note 5, at 118-19.
[108] JAMES S. OLSON, ENCYCLOPEDIA OF AMERICAN INDIAN CIVIL RIGHTS 130 (James S. Olson et al. eds.1997).
[109] *See* Employment Division v. Smith, 494 U.S. 872 (1990); People v. Woody, 61 Cal. 2d 716 (1964); *see also* Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
[110] 25 U.S.C. § 1301-1303. The Indian Civil Rights Act only applies some civil rights to tribal jurisdictions; some, including the Fifteenth Amendment, are absent. Similarly, ICRA places Indigenous jurisdictions under the control of federal courts in civil rights matters, and "permits federal judges to overrule decisions made by tribal officials in the administration of tribal law" when civil rights are involved. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 241(4th ed. 2012).

> the 1968 Indian Civil Rights Act, which prevents tribal governments from making or enforcing any laws prohibiting the free exercise of religion . . . . The 1968 act does not, however, contain an Establishment Clause, as it is regarded as less important for Indians. [111]

There is little if any legal or historic precedent regarding the exercise of free speech and of free assembly by Indigenous peoples off of Indigenous land. The primary cases involving Indigenous rights to free speech, *Dodge v. Nakai*[112], *Big Eagle v. Andera*[113], and *Janis v. Wilson*[114], among others, mainly explore the conflict between Indigenous tribal law and the interpretation of the Indian Civil Rights Act by either federal or the Supreme Court. The cases do not, and to this point have not, examined the First Amendment rights violations in response to Indigenous-led protests.[115] As will be explored, however, state legislatures violated Indigenous peoples' First Amendment rights to freedom of speech and freedom of association through the construction of critical infrastructure/anti-protest laws. Though these laws were not written to directly target Indigenous peoples, these laws may unconstitutionally target Indigenous peoples through their application, preventing them from fully enjoying their civil rights under the Due Process Clause of the Fourteenth Amendment.[116]

IV. III. CURRENT TRENDS

A. *Indigenizing Environmental Justice*

In January of 2016, the Michigan Civil Rights Commission began holding a series of hearings to "determine if any civil rights

111 VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 233 (1983).
112 298 F. Supp. 26 (D. Ariz. 1969).
113 508 F.2d 1293 (D. S.D. 1976).
114 385 F. Supp. 1143 (D. S.D. 1974).
115 *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); *see also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
116 *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Brown v. Board of Education, 347 U.S. 483 (1954); *but see* Hirabayashi v. United States, 320 U.S. 81 (1943).

had been abridged by the contamination of the Flint water distribution system."[117] These hearings followed in a long line of similar studies and analyses based around the concept of environmental racism.

Environmental racism is defined by the Michigan Civil Rights Commission as "[what] occurs when people of color repeatedly suffer disproportionate risks and harms from policies and decisions that equally benefit all. This injustice is even greater when the benefits of those policies and decisions harm people of color while disproportionately benefiting [whites]."[118] This definition—based off the definition offered by Professor Robert D. Bullard, who has been described as "the father of environmental justice"[119]—is incomplete when describing incidents of environmental racism against Indigenous peoples. Not only does this definition of environmental racism eliminate the incidents of poor white communities being affected by pollution, pipeline placements, and oil spills[120], but the very definitions of environment, justice, and racism in the terms "environmental racism" and "environmental justice" transform when examined via an Indigenous lens. "Emphasizing the ways that a solely distributive notion of environmental justice fails Indigenous peoples, EJ scholar David Schlosberg notes . . . that too often Indigenous conceptions of justice—and Indigenous ways of understanding land and human relations with it—are obstructed or not recognized at all."[121] As stated by Gilio-Whitaker:

> Applying the lens of settler colonialism to the topic of environmental justice sheds a different light on the processes of history, providing irrefutable linkages between all eras and aspects of settler and Indigenous contact, environmental injustice, and genocide; they are inseparable. As a facet of settler colonialism, environmental injustice is linked with a larger ongoing process of Indigenous erasure that is built

117 *Systemic Racism Through the Lens of Flint*, MICH. C.R. COMM'N, *iii, https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf [https://perma.cc/9GVM-RUCF].
118 *Id*. at 93.
119 *Id*. at 93, fn. 240.
120 See *infra* Part III.B.3.
121 GILIO-WHITAKER, *supra* note 5, at 23.

> into the structure of the State . . . These actions are not new revelations of previously unknown US histories; they are familiar genocidal patterns but viewed now through a lens focused on environmental factors. They are acts of ecological disruption that constitute the origin of injustices towards Native peoples in what might be called an Indigenous peoples' environmental history of the United States.[122]

Under this application, environmental injustice and environmental inequity are, in themselves, violations of the civil and human rights of Indigenous peoples, under both U.S. law and UNDRIP.[123] The relocation of Indigenous peoples from their ancestral homelands is enough to qualify under this model, even without taking into consideration every other atrocity committed against Indigenous peoples in the United States. Similarly, acts of environmental racism or injustice against Indigenous peoples in the United States are not a new violation of their civil and human rights, but an inherited one. Under Gilio-Whitaker's model, the genocide of Indigenous peoples of the Americas—the destruction and deprivation of Indigenous agricultural resources, deliberate infection of Indigenous communities with European diseases, enslavement, forced relocation and displacement, and the deliberate erasure of Indigenous religions, histories, and cultures—is itself environmental injustice.[124] "[I]f settler colonialism is environmental injustice and settler colonialism is a genocidal structure, then environmental justice as an analytical framework must be capable of acknowledging the extent to which historical environmental disruption structures Native lives today and should factor into the formation of EJ laws and policies."[125] Indigenous lives, civil rights, and human rights under UNDRIP are intimately linked to environmental justice, and Indigenous peoples have and will continue to exercise their First Amendment right to free speech in order to protest the violation of those rights.

As explored below, the systemic violations of Indigenous

[122] *Id*. at 39.
[123] G.A. 61/295, 2007 Declaration of the Rights of Indigenous Peoples (Oct. 2, 2007), Art. 32 §§ 2-3.
[124] *See* GILIO-WHITAKER, *supra* note 5, at 52.
[125] *Id*.

civil rights via state legislatures across the country follows a similar path of environmental and civil injustice through a legal framework.

B. *Mni Wiconi and Oceti Sakowin: The Timeline of #NoDAPL*

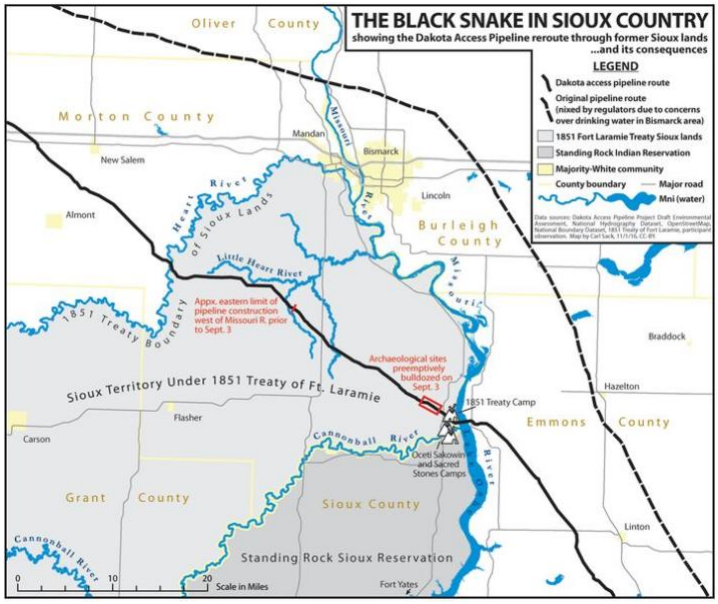
The impact of the protests at Standing Rock on the First Amendment rights of Indigenous peoples and on protest law across the United States cannot be overstated. In December 2015, the U.S. Army Corps of Engineers (hereafter "Army Corps" or "Corps") published a draft that outlined its plan to approve the expansion of the Dakota Access Pipeline (hereafter "DAPL") route underneath the Missouri River at the Lake Oahe Reservoir.[126] The reservoir, which is Corps-controlled, sits several miles upstream of where both the Standing Rock Sioux Reservation and Cheyenne River Sioux Reservation get their water.[127] Several months previously, the Corps, in a previous plan, had projected the construction of the pipeline a few miles north of Bismarck, North Dakota; the Corps abruptly changed its proposal after an environmental assessment indicated that it would be too dangerous for the municipal water supply to have a pipeline installed so close to Bismarck.[128] This sudden change was widely criticized as an act of environmental racism, as Bismarck, per the U.S. Census, is approximately 91% white.[129]

126 Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NAT'L PUB. RADIO (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight [https://perma.cc/FW2H-H9QQ].

127 *Id*.

128 *Id*.

129 Ramon Jacobs-Shaw, *What Standing Rock Teaches Us About Environmental Racism and Justice*, HEALTH AFFAIRS (Apr. 17. 2017), https://www.healthaffairs.org/do/10.1377/hblog20170417.059659/full/ [https://perma.cc/5LWF-ADC2]; *see also Systemic Racism Through the Lens of Flint*, MICH. C.R. COMM'N, *93, https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf [https://perma.cc/9GVM-RUCF]; *see also* U.S. Census, *Bismarck, North Dakota*, U.S. CENSUS, https://www.census.gov/quickfacts/fact/table/bismarckcitynorthdakota/RHI125218 (5-year estimate post-the 2017 American Community Survey) [https://perma.cc/EK4J-GRBV].



Carl Sack, CC-BY[130]

The Corps archaeologist determined during the Corps' survey of the new proposed installation site at Lake Oahe that there were at least five "recorded cultural sites" which might be affected by the construction and installation of the pipeline, but that "no historic properties will be subject to effect."[131] Similarly, the Advisory Council on Historic Preservation recommended the Corps to cooperate with tribal leaders.[132] On July 25, 2016, the Corps approved the pipeline route, with a district director claiming that they had "evaluated the anticipated environmental, economic, cultural, and social effects, and any cumulative effects of [the crossing] . . . [it is] not injurious to the public interest."[133] They had not met with tribal leaders.

The Standing Rock Sioux Tribe sued the Army Corps, claiming that the Corps had not consulted tribe members prior to the approval of the pipeline as they were required to, and the Dakota Access Pipeline would cause extreme risk to the historic sites within the realm of potential impact.[134] In April 2016, a few women from the Standing Rock Sioux set up camp and named it the Camp of

130 Carl Sack, *A #NoDAPL Map*, HUFFINGTON POST (Nov. 2, 2016, 11:48AM, updated Dec. 2, 2016) https://www.huffpost.com/entry/a-nodapl-map_b_581a0623e4b014443087af35 [https://perma.cc/UR2Z-V5WG].
131 Hersher, *supra* note 126.
132 *Id*.
133 *Id*.
134 *Id*.

Sacred Stones ("Sacred Stone Camp"), the first in what became a sprawling, long-term, multi-camp protest.[135] Sacred Stone Camp was intended to monitor the construction of the pipeline as well as indicating tribal dissent to the project.[136] As time passed, more and more protestors—later known as Water Protectors—amassed near the Lake Oahe crossing. Hundreds of tribes—by the end, more than three hundred—traveled to the Standing Rock camp in North Dakota to stand against the construction of the DAPL. Hashtags dominated Twitter, including #MniWiconi, #NoDAPL, and #StandwithStandingRock as the world began to take notice.[137] Eventually, there were three camps: Sacred Stone Camp, Oceti Sakowin (meaning "Seven Council Fires," the proper name for the Sioux people) Camp, and the 1851 Treaty Camp, named for the Treaty of Fort Laramie.[138]

Pipeline construction, which was scheduled to start on August 10, could not begin due to protesters demonstrating at the Lake Oahe River crossing.[139] Dakota Access LLC, a subsidiary of the pipeline Energy Transfer Partners (hereafter "ETP"), countersued the Standing Rock Sioux in retaliation.[140] ETP also hired private security officers, which eventually led to violent clashes between the Standing Rock protestors.[141] Notably, on September 3:

> [A]s people attempted to block the digging up of a sacred site, ETP brought in a private security firm armed with approximately eight attack dogs and

135 GILIO-WHITAKER, *supra* note 5, at 3.
136 *Id*.
137 *Id*.
138 *Section 3: The Treaties of Fort Laramie, 1851 & 1868*, N.D. STUDIES, https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868 [https://perma.cc/5C65-FGDJ] (describing the treaties which established the boundaries of Indigenous territory in the Great Plains at that time, and which the Standing Rock Sioux had never ceded to the United States).
139 Hersher, *supra* note 126.
140 *Id*.
141 Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NAT'L PUB. RADIO (Sept. 4, 2016, 4:14 PM), https://www.npr.org/sections/thetwo-way/2016/09/04/492625850/dakota-access-pipeline-protests-in-north-dakota-turn-violent [https://perma.cc/UF53-9HKZ] (stating that "[v]ideo from the scene showed security officers threatening the protestors with dogs").

> mace. The security personnel sprayed people directly in the face and eyes and pushed the dogs to bite people. One dog was unleashed and ran into the crowd in attack mode. At least five people and a horse were bitten, and around thirty people were injured via the chemical spray. Images and video of the dog attack went viral on social media, thanks to the handful of journalists at the site, particularly Amy Goodman of the popular program *Democracy Now!*, for whom an arrest warrant was later issued by the Morton County Sheriff's Department.[142]

Though District Judge James Boasberg ordered a temporary halt on the pipeline on September 6, 2016, the Governor of North Dakota ordered the North Dakota National Guard to "assist local law enforcement that had been monitoring demonstrations."[143] The Standing Rock Sioux's motion to enjoin the construction of the pipeline was denied on September 9.[144] In response, the Department of Justice (hereafter "DOJ"), the Department of the Army (hereafter "DOA") and the Department of the Interior (hereafter "the Interior") stated that the construction project should not proceed until the Corps had further consulted with the Standing Rock and Cheyenne River Sioux tribes.[145] ETP ignored this request, and continued construction, resulting in twenty-seven Water Protectors were arrested by law enforcement for demonstrating at the river crossing.[146] That same law enforcement—a mix of private security companies, the North Dakota National Guard, and the Morton County Sheriff's Department—were filmed using tear gas and water cannons against Water Protectors.[147] Water Protectors then claimed eminent domain on the next segment of land meant for the pipeline, citing the 1851 Treaty of Fort Laramie and stating that the Sioux had never ceded the land the pipeline was now meant to be built on.[148]

142 GILIO-WHITAKER, *supra* note 5, at 4.
143 Hersher, *supra* note 126.
144 *Id*.
145 *Id*.
146 *Id*.
147 *Id*.
148 *See Section 3: Treaties of Fort Laramie, 1851 & 1868*, N.D. STUDIES, https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868 [https://perma.cc/5C65-FGDJ].

In retaliation, the military police hired by the ETP conducted a raid.[149] Weapons used in the raid included Long Range Acoustic Devices (LRADs), tasers, concussion grenades, batons, snipers, and pepper spray, among other weapons.[150] The October 27 assault on the camps resulted in the arrest of 141 Water Protectors and many injuries.[151]

On December 4, the Army Corps announced that it would not grant the lake crossing permit, and that "the best way to complete [the pipeline] responsibly and expeditiously is to explore alternate routes for the pipeline crossing."[152] However, after the election of Donald Trump and his inauguration on January 20, 2017, the #NoDAPL protests and the camps were doomed. On January 24, 2017, President Trump issued a Presidential Memorandum authorizing both the Dakota Access Pipeline and the Keystone XL Pipeline.[153] On February 23, 2017, the remaining protestors at the Oceti Sakowin camp were arrested and removed.[154]

While the protest itself was forcibly ended and the camps dismantled, the legal battle over the construction and use of the DAPL is continuing. Even as the camps were being taken down, the Standing Rock and Cheyenne River Sioux have been in a contentious legal battle with the Army Corps. The most recent filing is a supplemental complaint made by the Standing Rock and Cheyenne River Sioux tribes.[155] The complaint demands that "the Corps' decision to affirm its original decision [of pipeline placement] without a comprehensive environmental review and adequate consultation with the Tribe was arbitrary, capricious, and in violation of the [Administrative Procedure Act], [the National Environmental Policy Act], and the Tribe's treaty rights."[156] As of this time, there has been no response to the complaint from the ETP

149 Hersher, *supra* note 126.
150 GILIO-WHITAKER, supra note 5, at 7.
151 *Id*.
152 *Id*. at 9.
153 *Id*.
154 Julia Carrie Wong, *Police remove last Standing Rock protestors in military-style takeover*, THE GUARDIAN, (Feb. 23, 2017 4:52 PM) https://www.theguardian.com/us-news/2017/feb/23/dakota-access-pipeline-camp-cleared-standing-rock [https://perma.cc/6YCM-PL48].
155 *The Standing Rock Sioux Tribes Litigation on the Dakota Access Pipeline*, EARTHJUSTICE (updated Nov. 1, 2018), https://earthjustice.org/features/faq-standing-rock-litigation [https://perma.cc/N3VC-T7LH].
156 First Supplemental Complaint, Standing Rock Sioux Tribe & Cheyenne River Sioux Tribe v. U.S. Army Corps of Eng'rs, Case No. 1:16-cv-1534-JEB (D.D.C., Nov. 1, 2018), *2.

or the Dakota Access Pipeline.

Soon after the protests at Standing Rock were shut down, bills began to churn out of state legislatures. Oklahoma was most likely the first state to sign such a law into effect. As stated above, there have been more than 100 laws that have been proposed around the United States regarding the restriction or criminalization of protests.[157] Many of these laws, particularly in the Dakotas, have been directly inspired by or constructed from what lawmakers and oil companies observed occurring at the #NoDAPL protests. The International Human Rights Advocacy Workshop at the University of Arizona compiled a report citing the spike in anti-protest law in response to the Standing Rock protests.[158] The report claims that "[t]hese laws progress towards criminalizing dissent and condoning the use of excessive force towards human rights defenders including Indigenous peoples."[159] As many bills and laws continue to be proposed, discussed, and passed across the United States—many more than can be handled in a single paper—only a handful of them will be examined here.

It must be noted that after the writing, passing, and implementation of a critical infrastructure law in Oklahoma, the American Legislative Exchange Council (hereafter "ALEC") drafted a sample bill based upon the Oklahoma law, and released it on their website. ALEC is an organization of state legislators and representatives from the private sector—including oil companies—which frequently collaborate on the construction of model bills for state governments.[160] A notable example of ALEC's sample bills is the Support Our Law Enforcement and Safe Neighborhoods Act,

[157] US Protest Law Tracker, Int'l Ctr. for Not-For-Profit Law, *Enacted Bills*, http://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative [https://perma.cc/YN7Q-ZLE5].

[158] *Indigenous Resistance to the Dakota Access Pipeline: Criminalization of Dissent and Suppression of Protest*, Rep. to the U.N. Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, Int'l Hum. Rts. Advocacy Workshop at the U. of A. Rogers College of L. on behalf of the Water Protector Legal Collective, https://law.arizona.edu/sites/default/files/Indigenous%20Resistance%20to%20the%20Dakota%20Access%20Pipeline%20Criminalization%20of%20Dissent%20and%20Suppression%20of%20Protest.pdf [https://perma.cc/NP69-YLDZ].

[159] *Id*.

[160] American Legislative Exchange Council, *Critical Infrastructure Protection Act*, ALEC, https://www.alec.org/model-policy/critical-infrastructure-protection-act/ [https://perma.cc/2J36-P7UN] (states that the sample bill "[draws] inspiration from two laws enacted in 2017 by the State of Oklahoma").

popularly known in Arizona as SB 1070.[161] A number of states have used the sample critical infrastructure bill drafted by ALEC to draft their own critical infrastructure laws; much of the same language is to be found in the federal Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019 (hereafter "the Pipelines Act"), the draft of which was released online on March 5, 2019.[162]

C. *Current Laws*

1. Oklahoma

The impact of the #NoDAPL protests have been felt across the country. Not only were the camps at Standing Rock unprecedented—at their height they housed thousands of people[163], with a population representing more than 300 Indigenous tribes and communities in the United States—but legislators around the U.S. watched and listened. Before the camps were even dismantled, in January 2017, lawmakers in Oklahoma introduced House Bill 1123 (hereafter "HB 1123"), codifying a new subsection, Section 1792 of Title 21 of the Oklahoma Statutes, which stated:

> A. Any person who shall willingly trespass or enter property containing a critical infrastructure facility without permission by the owner . . . or lawful occupant . . . shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for a term of six (6) months, or by both such fine and imprisonment. If it

[161] Talk of the Nation, *How Corporate Interests Got SB 1070 Passed*, NAT'L PUB. RADIO (Nov. 9, 2010, 1:00 PM) https://www.npr.org/2010/11/09/131191523/how-corporate-interests-got-sb-1070-passed [https://perma.cc/UGP7-AMGM].

[162] Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/ [https://perma.cc/K322-PJ89].

[163] Alleen Brown, *Trump Administration Asks Congress to Make Disrupting Pipeline Construction a Crime Punishable by 20 Years in Prison*, THE INTERCEPT (June 5, 2019, 11:10AM), https://theintercept.com/2019/06/05/pipeline-protests-proposed-legislation-phmsa-alec/ [https://perma.cc/3ARU-PM3G].

> is determined the intent of the trespasser is to willfully damage, destroy . . . or impede or inhibit operations of the facility . . . [they shall be fined] not less than Ten Thousand Dollars ($10,000.00) or by an imprisonment in the custody of the Department of Corrections for a term of one (1) year, or by both . . .
> D. As used in this section, "critical infrastructure facility means:
> 1. One of the following . . .
> p. a crude oil or refined products storage and distribution facility including, but not limited to . . . pipeline interconnections . . . [or] below or aboveground pipeline . . .[164]

HB 1123 also fines any organization it deems or have been found to be conspirators "ten times the amount of said fine authorized by the appropriate provision of this section"—that is, anywhere up to a million dollars.[165]

The sponsor of the bill, Rep. Scott Biggs of the Oklahoma State House, stated that he developed the bill as a response to watching the #NoDAPL protests unfold in North Dakota.[166] On the House floor, he stated, "[a]cross the country, we have seen time and time again these protests have turned violent, these protests have disrupted the infrastructure in other states . . . . This is a preventative measure . . . to make sure that doesn't happen here."[167]

HB 1123 is one of many bills claiming to "protect critical infrastructure." As noted above, the language used in HB 1123 has been closely modeled by ALEC.

[164] H.B. 1123, 2017 Leg., Reg. Sess. (Okla. 2017).
[165] *Id*.
[166] Staff, *In wake of environmental protests, legislation aims to protect critical infrastructure—2017*, GEO. UNIV.: THE FREE SPEECH PROJECT (Aug. 22, 2017, 12:00AM) https://freespeechproject.georgetown.edu/tracker-entries/legislation-aims-to-protect-critical-infrastructure-in-wake-of-environmental-protests/ [https://perma.cc/R7JB-WWEH].
[167] *Id*.

2. North and South Dakota[168]

It is perhaps unsurprising that North Dakota, the epicenter of the Standing Rock protests, has had not one, but five separate laws criminalizing protest within its borders—the most of any state in the nation.[169] One of them, House Bill 1203 (Eliminating driver liability for hitting protestors) was defeated in the House, but the other four have been enacted into law.[170] Two bills stand out: Senate Bill 2044 (Heightened penalties for protests near critical infrastructures) (hereafter "SB 2044"), which was signed into law by Governor Doug Burgum on April 10, 2019) and House Bill 1293 (Expanded scope of criminal trespass) (hereafter "HB 1293"). HB 1293 was signed into law on February 23, 2017—the same day that the camps at Lake Oahe Reservoir were violently dismantled by the Morris County Sheriff's Department.[171] Analysis of North Dakota statutes will be restricted to SB 2044, as it is a critical infrastructure law, but it is important to note that HB 1293 "allows officers to issue a citation with a $250 fine for trespassing, as opposed to filing criminal charges."[172] Further analysis of the implications of HB 1293 must be conducted elsewhere.

SB 2044 (codified at 12.1-21-06 in the North Dakota Century Code) amends the code to make it a Class C felony[173]—punishable by a maximum fine of $10,000, an imprisonment of up to five years, or both[174]—if any person intentionally causes:

> 1. [A] substantial interruption or impairment of a critical infrastructure facility or a public service by:

168 North and South Dakota have multiple Indigenous communities which, similar to the Navajo Nation in the Four Corners, are not contained by state borders. The Standing Rock Sioux Reservation crosses the border between North and South Dakota. It is for this reason they have been grouped together in this segment of the paper.

169 U.S. Protest Law Tracker, *Enacted Laws*, http://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative [https://perma.cc/VCD6-59LU].

170 H.B. 1203, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

171 S.B. 2044, 66th Leg. Assemb., Reg. Sess. (N.D. 2019); H.B. 1293, 2019 Leg., 66th Sess. (N.D. 2019).

172 Office of the Governor, *Burgum signs bills into law to protect landowner rights, deter criminal activity*, N.D. State Gov't (Feb. 23, 2017, 5:00 PM), https://www.governor.nd.gov/news/burgum-signs-bills-law-protect-landowner-rights-deter-criminal-activity [https://perma.cc/B8HR-KHCW].

173 H.B. 1293, 2019 Leg., 66th Sess. (N.D. 2019).

174 N.D. CENT. CODE § 12.1-32-01 (2019).

> a. Tampering with or damaging the tangible property of another; . . .
> c. Damaging, destroying, vandalizing, defacing, or tampering with equipment in a critical infrastructure facility;
> d. Damaging, destroying, vandalizing, defacing, impeding, inhibiting, or tampering with the operations of a critical structure facility; or
> e. Interfering, inhibiting, impeding, or preventing the construction or repair of a critical infrastructure facility.[175]

On its face, SB 2044 is a direct reaction to the Standing Rock protests, where Indigenous protestors would chain themselves to heavy equipment, stand in the way of machinery, or raise flags on unceded territory.[176] However, SB 2044 contains another subsection which overtly criminalizes organizations which "[have] pled guilty *or been convicted of a violation* under section 12.1-06-04 for conspiring with an individual who has pled guilty or been convicted under subsection 1 must be assessed a fine equivalent to the penalty . . . not to exceed one hundred thousand dollars."[177] The concepts of *interfering with*, *inhibiting*, and *impeding* the construction or repair of a critical infrastructure facility—the definition of which includes everything from a railway switchyard to below- or above-ground pipelines—are not defined in-statute.[178]

South Dakota has drafted and passed similar laws. Most notably, the South Dakota State Senate drafted Senate Bill 189 (hereafter "SB 189"), which was signed by the Governor of South Dakota, Kristi Noem, on March 27, 2019. SB 189, described as a preventative against "riot boosting." While SB 189 is not a critical infrastructure law, it shares multiple qualities with the critical infrastructure laws investigated in this paper, and was derived from similar motives, as will be explored later. SB 189 declares liability to the state if:

> [J]ointly and severally with any other person . . . the

175 N.D. CENT. CODE § 12.1-21-06(1) (2019).
176 GILIO-WHITAKER, *supra* note 5, 3-10.
177 N.D. CENT. CODE § 12.1-21-06(4) (2019).
178 N.D. CENT. CODE § 12.1-21-06(1)(e) (2019). *See also* N.D. CENT. CODE § 12.1-21.06(6)(a)-(s) (2019).

> person:
> 1) Participates in any riot and directs, *advises, encourages, or solicits* any other person participating in the riot to acts of force or violence;
> 2) *Does not personally participate in any riot but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence,* or;
> 3) Upon the direction, *advice, encouragement, or solicitation* of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law. . . .[179]

A "person" is "any individual, joint venture, association, partnership, cooperative, limited liability company, corporation, [non-profit], other entity, or any group acting as a unit."[180] A riot, according to South Dakota law, is a felony which involves "[a]ny use of force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law . . . ."[181] SB 189 also subjects any person to the jurisdiction of South Dakota courts "for riot boosting that results in *a riot in this state*, regardless of whether the person engages in riot boosting personally, or through any employee, agent, or subsidiary."[182] This means, essentially, that any person—including non-profits—who encourages someone found to have been "rioting" under this statute, whether in person, over the phone, over a text message, via a retweet on Twitter, or any other form of "encouragement or solicitation," may be found liable in a South Dakota court. This is regardless of whether that person or organization was present in South Dakota at the time of the riot.

[179] S.B. 189, 94th Sess., Leg. Assemb. 2019, § 2(1)-(3) (S.D. 2018) (emphasis added).
[180] *Id*. at § 1.
[181] S.D. CODIFIED LAWS § 20-10-1 (2019).
[182] S.B. 189, 94th Sess., Leg. Assemb. 2019 at § 3.

3. Louisiana

The Bayou Bridge Pipeline actually connects with the Dakota Access Pipeline in a somewhat roundabout way, linking thousands of miles across the nation at the southern border of Colorado.[183] The pipeline is, according to the American Civil Liberties Union (hereafter "ACLU"), 162.5 miles long, "from Lake Charles to St. James, through 700 bodies of water, including the Atchafalaya Basin and Bayou LaFourche, the source of drinking water for the United Houma Nation and other surrounding communities."[184]

Map of Bayou Bridge Pipeline, Dan Swenson, *The Advocate*[185]

Approximately three months after the end of the Standing Rock protests, the Louisiana state legislature passed House Bill 727 (hereafter "HB 727"). HB 727 amended Louisiana laws R.S. 14:61, and enacted R.S. 14:61(B)(3) as well as 14:61.1. HB 727 was drafted by the Louisiana Mid-Continent Oil and Gas Association (hereafter "LMOGA"). The new text of the law, which went into effect on August 1, 2018, states the following:

[183] Connor Gibson, *State Bills to Criminalize Peaceful Protest of Oil & Gas "Critical Infrastructure,* POLLUTERWATCH (Feb. 18, 2019) https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines [https://perma.cc/Z2LT-9ESX] (citing map).
[184] Complaint, *White Hat et al. v. Landry et al.*, Case No. 3:19-cv-00322, *4 (M.D. La., May 22, 2019).
[185] David J. Mitchell, *Bayou Bridge Pipeline ready for service April 1, companies say*, THE ADVOCATE (Mar. 27, 2019, 2:40 PM), https://www.theadvocate.com/acadiana/news/article_2a386fac-50c8-11e9-8d66-0b06203b8ae1.html [https://perma.cc/8VQN-EZVL].

> 61. Unauthorized entry of a critical infrastructure.
> B. For the purposes of this Section, the following words shall have the following meanings:
> (1) "Critical infrastructure" means any and all structures, equipment, or other immovable or movable property located upon . . . *pipelines . . . or any site where the construction or improvement of any facility or structure referenced in this Section is occurring* . . . .
> *(3) Pipeline means flow, transmission, distribution, or gathering lines, regardless of size or length, which transmit and transport oil, gas, petrochemicals, minerals or water in a solid, liquid, or gaseous state.*
> . . .
> D. Nothing in this Section shall be construed to *apply to or* prevent *the following:*
> *(1) Lawful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas or views regarding legitimate matters of public interest, including but not limited to any labor dispute* . . . .
> *(2) Lawful commercial or recreational activities*...[186]

The phrasing of the 14:61 and 14:61.1 amendments and additions drafted in HB 727 do not demarcate between visible, above-ground pipeline and invisible, below-ground pipeline.[187]

4. Texas

Similar to bills listed above, House Bill 3557 (hereafter "HB 3557") provides amendments to Subtitle B, Title 4 of the Texas Government Code to provide a new chapter.

> 424.001. Definition. In this chapter, "critical infrastructure facility" has the meaning assigned by Section 423.0045(a)(1-a) and also includes:
> (1) *any* pipeline transporting oil or gas or the products or constituents of oil or gas; and

[186] LA. REV. STAT. §§ 14:61(B)-(D) (2018) (emphasis added on new text of law).
[187] *Id*. at § (B)(1).

> (2) a facility or pipeline described by this section that is under construction and all equipment and appurtenances used during that construction . . .
> 424.052. Offense: Impairing or Interrupting Operation of Critical Infrastructure Facility.
> (a) A person commits an offense if, without the effective consent of the owner, the person enters or remains on or in a critical infrastructure facility and intentionally or knowingly *impairs or interrupts* the operation of the facility.
> (b) An offense under this section is a state jail felony
>
> 424.054. Offense: *Intent to Impair or Interrupt Operation of a Critical Infrastructure Facility.*
> (a) A person commits an offense if, without the effective consent of the owner, the person enters or remains on or in a critical infrastructure facility with *the intent to impair or interrupt* the operation of the facility…
>
> 424.055. Punishment for Corporations and Associations. Notwithstanding Section 12.51, Penal Code, a court shall sentence a corporation or association adjudged guilty of an offense under this subchapter to pay a fine not to exceed $500,000.[188]

Sections 424.052 and 424.054 are both categorized as state jail felonies, which in Texas law are punishable by "confinement in a state jail for any term of not more than two years or less than 180 days."[189] Additionally, those convicted of state jail felonies "[i]n addition to confinement . . . may be punished by a fine not to exceed $10,000."[190] Similar to HB 727 in Louisiana, HB 3557 does not differentiate between above- or below-ground pipelines. It does not differentiate between the importance of "equipment or appurtenances" when they are on- or off-grounds of a pipeline facility. This bill was signed into law on June 14, 2019 and will go into effect on September 1, 2019.[191]

[188] H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019).
[189] TEX. PENAL CODE § 12.35(a) (2019).
[190] *Id*. at (b).
[191] H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019).

5. Federal

The development of the state anti-protest laws detailed above appears to only be the opening act. As of June 3, 2019, the Trump administration has proposed a new act, the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019. This act correlates almost exactly to similar laws first proposed in Oklahoma and then adopted by states around the nation via ALEC's sample critical infrastructure bill.[192] Under the Pipelines Act, Section 60123(b) of Title 49 of the U.S. Code—already a stalwart defense against any attack on pipelines in the U.S., with a twenty year prison sentence for anyone found to be damaging or destroying those pipes—is amended to:

> (1) [strike] "damaging or destroying" and [insert] "damaging, destroying, vandalizing, tampering with, *impeding the operation of, disrupting the operation of, or inhibiting the operation of*"
> (2) [insert] "including a facility already in operation and a facility under construction and intended to be operated as such a facility on completion of the construction," before "or attempting".[193]

This would transform Section 60123(b) to read:

> A person knowingly and willfully *damaging, destroying, vandalizing, tampering with, impeding the operation of, disrupting the operation of, or inhibiting the operation of* an interstate gas pipeline facility . . . *including a facility already in operation and a facility under construction and intended to be operated as such a facility on completion of the construction,* or attempting or conspiring to do such

[192] Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/ [https://perma.cc/K322-PJ89].
[193] *Id*. (emphasis added).

> an act, shall be fined . . . imprisoned for not more than 20 years, or both . . . .[194]

Federal charges would apply to anyone who attempts to damage, destroy, tamper with, impede, inhibit, or disrupt the operation of, or even vandalize an interstate pipeline. These charges carry a sentence of up to twenty years. The Pipeline and Hazardous Materials Safety Administration, under the U.S. Department of Transportation, claims that "the proposal isn't intended to prevent lawful protestors from exercising their [F]irst [A]mendment rights."[195] Unlike SB 189 and HB 1123, the Pipelines Act does not currently include provisions that could criminalize agencies or non-profits supporting protestors and facilitating free speech. However, should the Pipelines Act be passed, it will provide ammunition to prosecutors to charge organizations with state *and* federal crimes in both South Dakota and Texas.

V. IV. THE CHILLING OF INDIGENOUS FREE SPEECH BY CRITICAL INFRASTRUCTURE LAWS

A. *These Critical Infrastructure/Anti-Protest Laws Are Unconstitutional on Their Face and In Their Application*

Establishing whether a law violates the First Amendment requires examining the law to determine whether it is vague, overbroad, or both. As per the precedent set post-*Dennis*, if a law is so vaguely defined that free speech cannot be exercised without potential criminalization, then it is unconstitutional. Similarly, if a law is so broadly defined that protected speech is criminalized alongside unprotected speech, it violates the First Amendment. Each of the six laws detailed above are vague, overbroad, or both. They are unconstitutional both on their face and in their application and must be severed or entirely repealed to fully protect Indigenous peoples' right to free speech and assembly.

194 *Id*. (emphasis added). *See also* 49 U.S.C. § 60123(b).
195 Stephen Cunningham & Catherine Traywick, *Pipe Protesters Could Face 20-Year Prison Sentence Under Trump Plan*, BLOOMBERG (June 4, 2019, 11:02AM), https://www.bloomberg.com/news/articles/2019-06-03/pipeline-protesters-could-face-20-year-sentence-under-trump-plan [https://perma.cc/AAX3-7S7M].

1. These Critical Infrastructure/Anti-Protest Laws are Unconstitutionally Vague and Misleading to the Public

Each of the laws provided above have vague or overbroad clauses which result in the chilling of free speech. These clauses can be divided into three distinct forms: the *impeding or impairing* clause, the *advising and encouraging* clause, and the *above- and below-ground* clause, which is discussed further in Part 2 of this section. The first of these clauses, the *impeding or impairing* clause, presents in various forms in four of the six laws listed above, including the federal Pipelines Act. The impeding or impairing clause is unconstitutionally vague, serving only to confuse and mislead the public, and result in each of the four laws it appears in being unconstitutional.

As per the Rules of Construction followed by the Rehnquist Supreme Court, dictionary definitions of terms can be used unless Congress (state or federal) have provided a specific definition.[196] As unless otherwise stated none of the laws we are examining here have provided definitions for the terms they are using, turning to the dictionary provides some sort of guidance as to what kinds of behavior these clauses may be describing. The Merriam-Webster Dictionary defines the verb "impede" as "to interfere with or slow the progress of" something.[197] Similarly, it defines "inhibit" as "to prohibit from doing something" or "to hold in check; restrain" and to "impair" as "to diminish in function, ability, or quality; to weaken or make worse."[198] Finally, "interrupt" is defined as "to stop or hinder by breaking in," "to break the uniformity or continuity of," or "to break in upon an action."[199] These terms, in one form or another, are present in four of the six laws that have been described above: HB 1123 in Oklahoma; SB 2044 in North Dakota; HB 3557 in Texas; and the Pipelines Act as proposed by the Trump

196 *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Rehnquist Court's Canons of Statutory Construction*, 108 HARV. L. REV. 26 (1994) (derived from appendix to "Forward: Law as Equilibrium").
197 Merriam-Webster Dictionary, *Impede,* https://www.merriam-webster.com/dictionary/impede [https://perma.cc/547J-P7Y8].
198 Merriam-Webster Dictionary, *Impair,* merriam-webster.com/dictionary/inhibit; https://www.merriam-webster.com/dictionary/impair [https://perma.cc/HWY4-TGFP].
199 Merriam-Webster Dictionary, *Interrupt,* https://www.merriam-webster.com/dictionary/interrupt [https://perma.cc/K54Z-HFQ2].

administration.[200]

In its first appearance in HB 1123 (presumably the first of any of the critical infrastructure laws), the impeding or impairing clause is added to the establishment of intent of anyone convicted under the statute. Under HB 1123, codified into law at Title 21, Section 1792 of the Oklahoma State Code, "[i]f it is determined the intent of the trespasser [on a critical infrastructure property] is to willfully damage, destroy . . . or *impede or inhibit* operations of the facility . . ." (emphasis added) then that trespasser will be fined not less than $10,000 or given a prison sentence of up to a year.[201] This marks an increase of the fine by ten times its original amount as the original trespass fine, and doubling the potential prison time.[202]

This language is mirrored almost perfectly by the draft bill proposed by ALEC, which has been used by multiple states as a basis for their own laws.[203] This is not surprising, as HB 1123 in Oklahoma was the admitted inspiration for ALEC's draft critical infrastructure bill. ALEC's bill, which also makes use of the impeding and impairing clause, repeats the language of HB 1123 almost exactly, stating:

> Section 2. {Criminal Penalties.}.
> A. Any person who shall willfully or knowingly trespass or enter property containing a critical infrastructure facility . . . shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not less than {dollar figure}, or by imprisonment . . . or by both such fine and imprisonment. If it is

[200] H.B. 1123, 2017 Leg., Reg. Sess. (Okla. 2017); S.B. 2044 66th Leg. Assemb., Reg. Sess. (N.D. 2019); H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019); Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/ [https://perma.cc/K322-PJ89].

[201] H.B. 1123, 2017 Leg., Reg. Sess. (Okla. 2017).

[202] *Id*.

[203] Connor Gibson, *State Bills to Criminalize Peaceful Protest of Oil & Gas "Critical Infrastructure,* POLLUTERWATCH (Feb. 18, 2019) https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines; *see also* American Legislative Exchange Council, *Critical Infrastructure Protection Act*, ALEC, https://www.alec.org/model-policy/critical-infrastructure-protection-act/ [https://perma.cc/VYJ9-QSLG].

> determined the intent of the trespasser is to willfully… *impede or inhibit* operations of the facility, the person shall, upon conviction, be guilty of a felony…[204]

ALEC's bill has been modified and introduced in more than twenty states since it was introduced by the organization.[205]

Like Oklahoma's HB 1123, SB 2044 in North Dakota amended North Dakota Code. The new subsection of 12.1-21-06(1) now includes subsections (d) and (e), which state that "d. . . . impeding, inhibiting, or tampering with the operations of a critical structure facility; or e. Interfering, inhibiting, impeding, or preventing the construction or repair of a critical infrastructure facility" are now a Class C felony, which carries a $10,000 fine, a prison sentence of up to five years, or both.[206] Similarly, HB 3557 in Texas introduces a whole set of subsections, each including the impeding or impairing clause. The language is not matched exactly—the law prohibits impairing or *interruption* of a critical infrastructure facility—but similar enough that it has clearly been drawn from similar intent. Notably:

> 424.052. Offense: Impairing or Interrupting Operation of Critical Infrastructure Facility.
> (a) A person commits an offense if, without the effective consent of the owner, the person enters or remains on or in a critical infrastructure facility and intentionally or knowingly impairs or interrupts the operation of the facility.
> (b) An offense under this section is a state jail felony
>
> 424.054. Offense: Intent to Impair or Interrupt Operation of a Critical Infrastructure Facility.
> (a) A person commits an offense if, without the effective consent of the owner, the person enters or remains on or in a critical infrastructure facility with

[204] American Legislative Exchange Council, *Critical Infrastructure Protection Act*, ALEC, https://www.alec.org/model-policy/critical-infrastructure-protection-act/ [https://perma.cc/F84Y-BLVF].
[205] Complaint, *White Hat et al. v. Landry et al.,* Case No. 3:19-cv-00322, *16 (M.D. La., May 22, 2019).
[206] N.D. CENT. CODE § 12.1-21-06(1) (2019).

> the intent to impair or interrupt the operation of the facility…
>
> 424.055. Punishment for Corporations and Associations. Notwithstanding Section 12.51, Penal Code, a court shall sentence a corporation or association adjudged guilty of an offense under this subchapter to pay a fine not to exceed $500,000.[207]

Beyond the issues with vagueness in how HB 3557 has been constructed, HB 3557 adds additional consequences for any kind of organization found guilty of impairing or interrupting the operation of a critical infrastructure facility, slapping them with a fine of up to five hundred thousand dollars. Critically, this subsection could extend to non-profit and legal groups which advocate and organize any kind of protest or demonstration against the building or existence of a pipeline in the state of Texas, if they fall into the definition of a corporation or association. Organizations such as EarthJustice and the ACLU will be obvious potential victims of this subsection, but some of the loudest voices against the installation and funding of pipelines in Texas have been Indigenous organizations. HB 3557, which transforms interference with critical infrastructure from a misdemeanor to a felony, would have immediate consequences for the Indigenous peoples of southern Texas, particularly the Carrizo Camecrudo of South Texas. The Carrizo Camecrudo have been in long-term opposition to not only the Rio Grande LNG plant but also the possibility of two Kinder Morgan pipelines from the Permian Basin to Brownsville.[208] The construction of these entities would effectively cram the Carrizo Camecrudo between two natural gas pipelines and the proposed southern border wall.[209] The companies do not have any legal obligation to consult with tribal leadership prior to installation, as

[207] H.B. 3557, 86th Leg. Sess., Reg. Sess. (Tex. 2019).
[208] Frank Hopper, *'Kill the bill! Save the land!' Native protectors disrupt Texas legislature*, INDIAN COUNTRY TODAY (May 10, 2019), https://newsmaven.io/indiancountrytoday/news/kill-the-bill-save-the-land-native-protectors-disrupt-texas-legislature-qNlvwX7lPkeLgU5y6wJVpw/ [https://perma.cc/ZXB7-EEJS].
[209] *Id*.

the Carrizo Camecrudo are not federally recognized as a tribe.[210] A demonstration against the bill in the Texas State House of Representatives by the Carrizo Camecrudo and the Society of Native Nations led to a number of people receiving criminal trespass warnings.[211] Should the Carrizo Camecrudo and Society of Native Nations continue to protest the installation and development of pipelines in the state of Texas, they could be found as having impaired or interrupted the function of a critical infrastructure, and fined up to half a million dollars.

Perhaps most critically, this impeding and impairing language is present in the proposed Pipelines Act, which would result in the amendment of Title 49, Section 60123(b) to include the phrase "tampering with, *impeding the operation of,* disrupting the operation of, *or inhibiting the operation of* an interstate gas pipeline facility" (emphasis added).[212] *Impeding* and *inhibiting* the operation of a gas pipeline have critically not been defined in the proposed amendments, despite there being two separate subsections in the act for definitions relating to pipelines and property damage thresholds, respectively.[213] The construction of this clause in the Pipelines Act is critical, as it has perhaps the most extreme punishment of any of the statutes examined in this context. Should an individual be found to be impeding or inhibiting the operation of an interstate gas pipeline under the Pipelines Act, then they could be punished with up to twenty years in prison.[214] Despite these hefty consequences, there are no definitions offered for impeding, disrupting, or inhibiting in the context of the Pipelines Act.[215]

[210] *Id*. *See also* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).
[211] Hopper, *supra* note 208.
[212] Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/ [https://perma.cc/VZ8M-DZHW] (emphasis added).
[213] *Id*.
[214] *Id*. *See also* 49 U.S.C. § 60123(b).
[215] Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/ [https://perma.cc/K322-PJ89].

In fact, none of the above laws, proposed or enacted, have offered any kind of definition for their impeding and impairing clauses. Without proper definition of these terms, there is no way to reasonably determine whether an individual is impeding or impairing the function or installation of pipelines. Not only do these laws lack the requisite notice towards the public regarding criminalized conduct—automatically rendering it unconstitutional—it lacks the narrow scope required by constitutional First Amendment regulation; the clause automatically renders these laws and bills overly vague.[216] In these contexts, *impede* has not been federally defined, and there are no definitions offered in-statute for any of the state or federal proposals. Would it, under HB 3557, be illegal to protest the arrival of a backhoe, two miles away from any pipeline or any pipeline-housing facility? Would standing in the middle of a road qualify as *impairing or interrupting* the operation of a critical infrastructure facility, or impairing the operation of an interstate pipeline under the Pipelines Act? What about preventing cars from entering the property of the facility? Is that disrupting the operation of a pipeline under the Pipelines Act? If they are on or off the property line, does it matter? The egregious lack of specificity and extraordinary level of vagueness in these statutes makes it impossible for any arbiter of justice to effectively and constitutionally apply them, no matter the case. When applying the requisite notice requirement, the impeding and impairing clause alone renders more than half the statutes examined in this paper unconstitutional.

While SB 189 in South Dakota lacks the impeding and impairing clause, as it is more explicitly an anti-protest law rather than a critical infrastructure law, it presents its own unique clause which ensures it is unconstitutionally vague. SB 189—which was constructed in direct and deliberate response to the #NoDAPL protests—ensures that a person (defined to include individuals, non-profits, corporations, and other organizations) is criminalized if:

> [J]ointly and severally with any other person . . . the person:

[216] *Button*, 371 U.S. at 432-33 (stating "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application").

> 1) Participates in any riot and directs, *advises, encourages,* or solicits any other person participating in the riot to acts of force or violence;
> 2) Does not personally participate in any riot but directs*, advises, encourages*, or solicits other persons participating in the riot to acts of force or violence*,* or;
> 3) Upon the direction, *advice, encouragement*, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law . . . .[217]

While "directs" and "solicits" have their own term-of-art definitions, the use of the words "advises" and "encourages" presents its own issues of overbroad language. Again, when no definition is offered in statute, the canons of construction tell us to turn to dictionaries.[218] Merriam-Webster defines "to advise" as "to give someone a recommendation about what should be done; to give advice to"[219] and "to encourage" as, among other definitions, "to inspire with courage, spirit, or hope."[220] In the rapidly transforming era of social media and Internet communities, where Twitter, Snapchat, and Instagram are as much a political platform as *The Hill* or *The New York Times*, *advising* a riot could mean practically anything. Practical examples range from retweeting a livestream of a protest on Twitter, to sharing a Facebook post, to answering a protestor's question on a message board, to a non-profit director sending an email suggesting that an employee remain one more day at a protest action.[221] Without a properly enumerated, specific

[217] S.B. 189, 94th Sess., Leg. Assemb. 2019, § 2(1)-(3) (S.D. 2018) (emphasis added).
[218] *See* William N. Eskridge, Jr. & Phlip P. Frickey, *The Rehnquist Court's Canons of Statutory Construction*, 108 HARV. L. REV. 26 (1994) (derived from appendix to "Forward: Law As Equilibrium").
[219] Merriam-Webster Dictionary, *Advise,* https://www.merriam-webster.com/dictionary/advise [https://perma.cc/CT6F-FWF6].
[220] Merriam-Webster Dictionary, *Encourage,* https://www.merriam-webster.com/dictionary/encourage [https://perma.cc/JEV2-J8F4].
[221] As stated by the ACLU, "[a]ny protest can erupt into a riot—without any intent by by Plaintiffs." Complaint, *Dakota Rural Action et al. v. Noem et al.*, at 16, (W.D. S.D., Mar. 28, 2019). As stated by the ACLU, "[a]ny protest can erupt into a riot—without any intent by by Plaintiffs." Complaint, *Dakota Rural*

definition, , the imagination runs wild, and the consequences equally so.

South Dakota courts can find someone guilty of *advising or encouraging* a riot in South Dakota without that person even being present in-state. Thanks to the phrasing of the bill, both individuals and groups could be found liable for encouraging protestors in any way, regardless of whether or not the encouraging individual actually engages in "riot boosting" themselves.[222] This could result in thousands of people if not hundreds of thousands being subjected to South Dakota's jurisdiction, regardless of their own personal culpability.

Due to their lack of clear definition, these phrases—in both state and federal law, enacted and proposed—ensure that these laws violate the First Amendment of the U.S. Constitution. Their vagueness emulates exactly the type of language described by the Supreme Court in *NAACP v. Button*. *Button* showed that "standards of permissible statutory vagueness are strict in the area of free expression . . . For, in appraising a statute's inhibitory effect upon such rights, this [Supreme] Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar."[223] If a law is so vague as to be used to penalize those who are exercising their constitutional rights to free speech, free association, and protest, then that law is unconstitutional. While it is understandable, as the South Dakota legislature points out, to restrict and criminalize deliberately starting or encouraging a riot, the terms described in this statute are too vague and confusing for a judge to adequately litigate the matter.[224] The solution, as put forward in *Hicks* and *Reno*, is to end enforcement of the entire law so long as one aspect of it remains unconstitutional, and to limit or partially invalidate the construction of each law as to not allow state or federal legislatures to violate the First Amendment rights of advocates.[225] The danger described by Justice Brennan of "the existence of a penal statute susceptible to sweeping and improper

Action et al. v. Kristi Noem et al., Case 5:19-cv-05026-LLP, at *16. (W.D. S.D., Mar. 28, 2019).

[222] S.B. 189, 94th Sess., Leg. Assemb., § 2-3 (S.D. 2019, § 23); S.B. 189, 94th Sess., Leg. Assemb. 2019, § 2-3 (S.D. 2018).

[223] *Button*, 371 U.S. at 432.

[224] S.B. 189, 94th Sess., Leg. Assemb.., § 2-3 (S.D. 2019).S.B. 189, 94th Sess., Leg. Assemb. 2019, § 23 (S.D. 2018).

[225] Reno v. ACLU*,* 521 U.S. 844 (1997); Virginia v. Hicks*,* 539 U.S. 113 (2003).

application" is clearly applicable here.[226] To fulfill the requirements of Supreme Court precedent, this would, by necessity, mean an immediate severing of each of the impeding and impairing clauses of each of these laws, and the advising and encouraging clause in SB 189.

HB 1123, SB 2044, HB 3557, and the Pipelines Act are all unconstitutionally vague. Whether they include the overly vague impeding or impairing clause, or the equally vague advising and encouraging clause, all four of them have been found to be so imprecise as to intrude on the right to free speech of both individuals and organizations. Without the immediate severing and cleansing of these unconstitutional clauses from the texts of these statutes, these four laws will continue to unconstitutionally cut broad swaths out of the First Amendment rights of protestors in the relevant states—and violate Indigenous civil rights.

2. These Critical Infrastructure/Anti-Protest Laws are Unconstitutionally Overbroad

Each of the laws analyzed above are unconstitutional on their face based solely on their overly vague, misleading clauses. However, in one of them—HB 3557 in Texas—there is an additional issue. Termed the *above or below* clause, it is notable not in its presence but in its absence. HB 3557, like HB 727 in Louisiana, lacks a proper definition of what makes a gas or oil pipeline into a critical infrastructure site protected by law. Both these bills—both of which have been codified—do not properly define whether these protected pipelines must be above or below-ground. This results in both HB 3557 in Texas and HB 727 in Louisiana[227] being overbroad and thus blatantly unconstitutional.

Texas bill HB 3557 states:

> 424.001. Definition. In this chapter, "critical infrastructure facility" has the meaning *assigned by Section 423.0045(a)(1-a)* and also includes:
> (1) *any pipeline* transporting oil or gas or the products or constituents of oil or gas; and

[226] *Button*, 371 U.S. at 432-33.
[227] One thing which must be noted about HB 727 is that it does not contain an impeding and impairing clause. Unfortunately, this does not make it constitutional.

> (2) a facility or *pipeline described by this section that is under construction* and all equipment and appurtenances used during that construction . . .[228]

Section 423.0045(a)(1-a)(B)(i)-(vi) includes "any portion of an aboveground [sic] oil, gas, or chemical pipeline" in its definition of critical infrastructure.[229] However, the section also clearly states that pipelines must be "enclosed by a fence or other physical barrier obviously designed to exclude intruders;" they cannot simply be extant along the side of the road in order to be fully protected by the definition of a critical infrastructure site.[230]

Section 424.001, as introduced in HB 3557, does *not* contain this qualifier. HB 3557 includes "any pipeline transporting oil or gas…" in its definition of a critical infrastructure site, as well as a pipeline which is "under construction" and every piece of equipment which can be used during that construction.[231] The use of the term "any pipeline" does not clearly differentiate between above- and below-ground lines. In fact, the construction of Section 424.001(1) seems to *deliberately* encompass both above-and below-ground pipelines, especially when read in conjunction with Section 424.001(2) which extends that protection to any kind of equipment used to install the pipeline.[232]

While the definition of critical infrastructure presents issues of vagueness and unconstitutionality outside of First Amendment doctrine—it could be argued to be void for vagueness under Fifth and Fourteenth Amendment precedent[233]—it is also critical to note that this lack of definition unconstitutionally intrudes on free speech rights of individuals. The state of Texas is currently home to more than 225,000 miles of pipelines, per the Texas Pipeline Awareness Alliance.[234] Most of these pipes have been installed underground,

[228] H.B. 3557, 86th Leg. Sess., Reg. Sess. (Tx. 2019) (emphasis added); H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019) (emphasis added).
[229] TEX. GOV'T CODE § 423.0045(a)(1-a)(B) (2019).
[230] *Id*.
[231] H.B. 3557, 86th Leg. Sess., Reg. Sess. (Tx. 2019); H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019).
[232] *Id*.
[233] *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Johnson v. United States, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983).
[234] Tex. Pipeline Awareness All., *Pipelines: Where Are They?*, https://www.pipeline-safety.org/pipelines-where-they-are/ [https://perma.cc/Z63G-N268].

and have few visible markers.[235] Without adequate notice in-statute of whether below-ground pipelines constitute as critical infrastructure sites under HB 3557, anti-oil protestors anywhere in the state might be trespassing with the intent to "impair or interrupt" the function of the pipeline-- simply by standing on top of a manhole cover.[236] Additionally, HB 3557 neglects to establish what amount of space around the pipeline is considered part of "the pipeline" in legal terms. Would standing near a pipeline constitute as trespassing on it? Would protesting ten feet from a pipeline count as trespass under the statute and thus result in criminal charges? Due to its lack of narrow application, HB 3557 intrudes on constitutionally protected free speech. It is too broad, and results in the potential criminalization of anyone who so much as trods on a sidewalk.

HB 3557 is overbroad even without considering the above- and below-ground clause. By defining a pipeline as not only the completed pipeline itself, but also a pipeline during its construction—including "all equipment and appurtenances used during that construction"—the state of Texas seeks to prevent any form of protest against the construction of new pipelines.[237] This means that protests like those at Mauna Kea in Hawai'i, ongoing as of this writing, would result in criminalization and jail time.[238] The allegory is not perfect—the Mauna Kea protests are against the installation of a telescope on a holy site, not an oil pipeline beneath a reservoir—but a group of Indigenous protestors blocking off a road to prevent access to trucks and bulldozers would certainly qualify as a state jail crime in Texas.

Much like the pipelines in Texas, most of the 125,000 miles of pipeline in the state of Louisiana are not clearly marked.[239] Pipelines are generally below-ground for convenience purposes, but this means that most of the general public have no clue where pipelines—even gas and oil pipelines—actually are. Like HB 3557, HB 727 in Louisiana, codified into law at R.S. 14:61 and 14:61.1, neglects to differentiate between above- and below-ground

[235] *Id*.
[236] *See* H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019).
[237] H.B. 3557, 86th Leg. Sess. Reg. Sess. (Tex. 2019).
[238] *See* Maui News, *Thousand Take to The Streets to Protest TMT*, MAUI NEWS (Aug. 10, 2019 5:17 PM), https://mauinow.com/2019/08/10/thousands-take-to-the-streets-to-protest-tmt/ [https://perma.cc/76HU-9TB4]; *see also* TEX. PENAL CODE § 12.35(a) (2019).
[239] Complaint, *White Hat et al.* v. Jeff Landry et al., at 1-2, (M.D. La., May 22, 2019).

pipelines. The text of the law reads:

> 61. Unauthorized entry of a critical infrastructure.
> B. For the purposes of this Section, the following words shall have the following meanings:
> (1) "Critical infrastructure" means any and all structures, equipment, or other immovable or movable property located upon chemical manufacturing facilities, refineries, electrical power facilities . . . *pipelines . . . or any site where the construction or improvement of any facility or structure referenced in this Section is occurring . . .*
> *(3) Pipeline means flow, transmission, distribution, or gathering lines, regardless of size or length, which transmit and transport oil, gas, petrochemicals, minerals or water in a solid, liquid, or gaseous state.*[240]

Stepping onto ground or a sidewalk which contains or covers a pipeline, knowingly or unknowingly, could at this point result in a guilty sentence of up to five years in prison, with or without labor, as well as monetary fines.[241] In the free speech context, this lack of definition makes HB 727 and its accompanying amendments unconstitutionally overbroad, which is clearly prohibited by *NAACP v. Button*, *Reno*, and *Hicks*.[242] This has already resulted in the arrest of at least six people in Louisiana, some of whom were protesting the installation of the Bayou Bridge Pipeline.[243]

For this reason, both of these laws must be immediately repealed or rewritten to satisfy the requirement for narrow application.[244] As they stand now, they intrude without appropriate cause into territory that is supposed to be protected by the First Amendment right of free speech.

[240] LA. REV. STAT. § 14:61(C) (2018).
[241] *Id.*
[242] *Button*, 371 U.S. at 415; *ACLU,* 521 U.S. at 844; *Hicks,* 539 U.S. at 113.
[243] Complaint, *White Hat et al. v.* Jeff Landry et al., at 23-24, (M.D. La., May 22, 2019) (describing arrests that have occurred since HB 727 was enacted into law).
[244] 539 U.S. at 113.

3. These Critical Infrastructure/Anti-Protest Laws Unconstitutionally Limit Free Speech and Freedom of Association for Legal Organizations in South Dakota and Oklahoma

In addition to their vagueness and overbreadth, two of the six laws described above have an even more insidious impact on First Amendment rights. SB 189 in South Dakota and HB 1123 in Oklahoma unconstitutionally infringe on the freedom of association of both individuals and organizations. This constitutional freedom is enumerated in the First Amendment and protected by Supreme Court precedent; the subsections of each of the above bills and their accompanying codified statutes violates the U.S. Constitution and criminalizes personal and organizational support of Indigenous protest.

As discussed in *Brandenburg v. Ohio*, the likelihood of whether certain speech may incite violence does not automatically remove that speech from the protection of the First Amendment.[245] The intent of the speaker, the likelihood of the speech resulting in violence, and/or the actual imminence of violence occurring because of the speech, must each be considered in determining whether that speech can be legally regulated.[246] The South Dakotan riot boosting statute SB 189 amends does not describe actions which reach that level of regulation.

SB 189, signed into law in March of this year, states that individuals or organizations can be held liable to the state of South Dakota if that person:

> [J]ointly and severally with any other person . . . the person:
> 1) Participates in any riot and directs, *advises, encourages*, or solicits any other person participating in the riot to acts of force or violence;
> 2) *Does not personally participate in any riot* but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence, or;
> 3) Upon the direction, *advice, encouragement*, or

[245] 395 U.S. at 446, 449.
[246] *Id*.

> solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law . . . .[247]

Again, "person" under this act includes not only individuals, but non-profits, LLCs, corporations, partnerships, or any other group.[248] It could even include a tribe under federal Indian law; the definition includes "any group acting as a unit" under its overall definition, and with this leeway judges could interpret a "group" to also mean a "tribe" should that group be involved in setting up a protest.

At this point, without further narrowing of the definition, it is impossible to say whether the law could be used to attack Indigenous tribes and groups for protesting the installation of gas or oil pipelines on or near tribal jurisdiction. What is certain is that this liability extends to anyone who provides any kind of advice or encouragement to individuals participating in a "riot" (three or more persons committing or threatening to commit acts of violence), regardless of whether that person is in the state of South Dakota.[249] Justifiably, organizations which supported the Standing Rock protestors now fear that they can be held liable for the actions of individuals in another state—regardless of whether those individuals have actually rioted, or have merely been exercising their constitutional right to free speech and assembly.

SB 189 also has the distinct characteristic of lacking any kind of required intent to commit an unlawful act in any part of the behavior it criminalizes.[250] There is no *mens rea* in the statute, and thus no way to analyze the intent of the individual or organization charged with riot boosting. By neglecting to provide a required intent in-statute, South Dakota has criminalized the freedom of individuals and organizations to associate with other individuals or organizations, either in or out of the state. A simple conversation

[247] S.B. 189, 94th Sess., Leg. Assemb.., § 2(1)-(3) (S.D. 2019) (emphasis added).S.B. 189, 94th Sess., Leg. Assemb. 2019, § 2(1)-(3) (S.D. 2018) (emphasis added).
[248] S.B. 189, 94th Sess., Leg. Assemb.., § 1(2) (S.D. 2019).S.B. 189, 94th Sess., Leg. Assemb. 2019, § 1(2) (S.D. 2018).
[249] *Id*.
[250] S.B. 189, 94th Sess., Leg. Assemb. (S.D. 2019).S.B. 189, 94th Sess., Leg. Assemb. 2019 (S.D. 2018).

might result in the attribution of criminal charges to a person or organization that had no intent to commit any sort of unlawful act, and which has never even once been in South Dakota.

Unlike what is required by Supreme Court precedent in *Brandenburg*, SB 189 does not consider the intent of the speaker, the likelihood of violence resulting from the speech, or the likelihood of violence actually *occurring* in examining riot boosting.[251] Any protest can become a riot given the right triggers, but that does not necessarily mean what people say or do on social media will force it to occur.[252] Criminalizing people who are not even in the state for encouraging or advising people involved in a massive protest does not follow the terms set forth in *Brandenburg*.[253] By analyzing the speech not only of those people involved in a protest, but those advising or encouraging from the sidelines (or from the other side of the world), SB 189 not only violates the constitutional protection of free speech, but also the constitutional right of freedom of association.[254]

SB 189 also, via its phrasing, violates an organization's right to freedom of association by overtly criminalizing the interaction between an individual and an organization within the context of a lawful protest. The Supreme Court states in *NAACP v. Alabama* that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[255] Similarly, in *Kusper v. Pontikes*, the Supreme Court declared that "a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest."[256] Whether a person chooses to associate with an organization or political party is entirely their own affair, and that right to choose is protected by both the First and Fourteenth Amendments. As per *NAACP v. Button*, the actions of a legal or litigative organization cannot be limited by a state law which infringes on an organization's freedom to associate with individuals

[251] *Id*.; 395 U.S. at 446, 449.
[252] Complaint, *Dakota Rural Action et al. v. Kristi Noem et al*., at 16, (W.D. S.D., Mar. 28, 2019).
[253] S.B. 189, 94th Sess., Leg. Assemb. (S.D. 2019); 395 U.S. at 446, 449.S.B. 189, 94th Sess., Leg. Assemb. 2019 (S.D. 2018); 395 U.S. at 446, 449.
[254] U.S. CONST. amend. I; S.B. 189, 94th Sess., Leg. Assemb. (S.D. 2019). U.S. CONST. amend. I; S.B. 189, 94th Sess., Leg. Assemb. 2019 (S.D. 2018).
[255] 357 U.S. 449, 460 (1958).
[256] 414 U.S. at 59.

who may need their services.[257] Intruding on an organization's freedom of association via overbroad or overly vague language is unconstitutional, particularly regarding issues that involve litigation.[258]

SB 189 impugns the right of legal organizations to freedom of association by criminalizing the solicitation of an individual by an organization "to use force or violence, or [make] any threat to use force or violence."[259] While this sounds positive, in a protest situation, statements of what law enforcement considers "violence" may be nothing more than a protest chant (i.e. "fuck ICE," "*chinga la migra*," "dump Trump," "hey, hey, ho, ho, Kavanaugh has got to go"). In the protest context, force may or may not actually be extant—and as noted in *Brandenburg*, even statements which may appear to advocate the use of force or violence frequently lack the requisite *intent*.[260] Regardless, the criminalization of solicitation of words or actions in a protest context is almost a direct mirror to the kind of legal obfuscation found in *NAACP v. Button*, which the Supreme Court ruled to unconstitutionally violate the First and Fourteenth Amendments.[261]

Unlike South Dakota, Oklahoma does not expressly impute liability to organizations or individuals who did not actively participate in a protest. However, HB 1123 does have a clause which states:

> C. If an organization is found to be a conspirator with persons who are found to have committed any of the crimes described in subsection A or B of this section, the conspiring organization shall be punished by a fine that is ten times the amount of said fine authorized by the appropriate provision of this section.[262]

Subsection A of HB 1123 states that any person who willfully *trespasses or enters* a critical infrastructure facility shall be fined no

[257] 521 U.S. at 844.
[258] *Id*.
[259] *Id*.; S.B. 189, 94th Sess., Leg. Assemb. 2019 (S.D. 2019).
[260] 395 U.S. at 449.
[261] 521 U.S. AT 844: U.S. CONST. amend. I, XIV.
[262] H.B. 1123, 2017 Leg., Reg. Sess. § C (Okla. 2017).

less than a thousand dollars, jailed for up to six months, or both.[263] If that person is found to have meant to damage or tamper with equipment or impede the function of the facility, then they can be fined up to ten thousand dollars and imprisoned for up to a year.[264] Section B decrees that any person who damages or tampers with equipment shall be fined a hundred thousand dollars, imprisoned for not more than ten years, or both.[265]

This obviously presents problems for any organization that is found to have been a "conspirator" with an individual who, under Subsection A of HB 1123, is found to have "impeded or inhibited" the functions of a critical infrastructure facility.[266] The fines and jail time can come to a total of ten thousand dollars—meaning that for an organization found to have conspired with a protestor, the monetary consequences can be up to a hundred thousand dollars, which few non-profit or legal aid organizations can afford. If the protestor has actually done any damage to the site, the fine could be ten times that.[267] Depending on which section the individual has been charged with, this can result in up to a million dollar fine impugned to an organization found to have "conspired" with that individual. For organizations such as the Indigenous Environmental Network, Water Protector Legal Collective, and others, this could mean hefty if not impossible fines owed to South Dakota—and all for something that should not even be attributed to them in the first place.

> As of 2019, Oklahoma statute defines "conspiring" as:
> First, an agreement by two or more persons,
> Second, to commit [the Crime or Conduct Charged].
> Third, the defendant(s) (was/were [a] part[ies] to the agreement at the time it was made)/(knowingly became [a] party(ies) to the agreement at some time after it was made.
> Fourth, an overt act by one or more of the parties performed subsequent to the formation of the

[263] H.B. 1123, 2017 Leg., Reg. Sess. § A (Okla. 2017).
[264] *Id*.
[265] H.B. 1123, 2017 Leg., Reg. Sess. § B (Okla. 2017).
[266] H.B. 1123, 2017 Leg., Reg. Sess. § A (Okla. 2017).
[267] H.B. 1123, 2017 Leg., Reg. Sess. (Okla. 2017).

agreement.[268]

Under this framework, it would be simple to find an organization guilty of conspiracy to organize a protest that, through the intentions of no one involved, devolved into a riot. *NAACP v. Button* clearly illustrates that legal organizations, particularly those involved in litigation, are allowed to associate with individuals that may wind up requiring legal services from them in the future.[269] If the NAACP could actively recommend the use of legal aid organizations via speaking with those who have had their constitutional rights violated, then the Indigenous Environmental Network can speak to Indigenous protestors regarding the destruction of the environment on their reservations. HB 1123, however, creates million-dollar consequences.

Oklahoma's statute has been described as one that is meant to "scare off" non-profits and legal organizations that intend to aid legal protestors against pipelines. A city attorney in Oklahoma City believes it was passed to "intimidate and threaten an organization that might organize a nonviolent, non-disruptive political protest."[270] Proof beyond theories is difficult. However, in the wake of Standing Rock and the many thousands of people, individually and in groups, who provided aid to Indigenous and non-indigenous protestors at the camps, the reason why such a clause might be written into a critical infrastructure statute begins to emerge.

SB 189 and HB 1123 create criminal and financial penalties for individuals and organizations which choose to associate with or even speak to individuals found to have been "riot boosting" or trespassing on critical infrastructure property in their states. In the case of SB 189, individuals and organizations need not even be in-state for the penalties to be levied against them. This is not only a clear violation of First Amendment precedent against vague and overbroad language in the policing of free speech, but also of the First and Fourteenth Amendment's combined protections of the right of freedom of association.[271] As per *Reno* and *Hicks*, the only

[268] Okla. Unif. Jury Instr. CR 2-17 (quoted in United States v. Wartson, 772 Fed. Appx. 751, 756 (10th Cir. 2019)).
[269] *Button,* 371 U.S. at 429.
[270] Staff, *In wake of environmental protests, legislation aims to protect critical infrastructure—2017*, GEO. UNIV.: THE FREE SPEECH PROJECT (Aug. 22, 2017, 12:00AM) http://freespeechproject.georgetown.domains/state-and-local-government/oklahoma-house-bill-1123/.
[271] U.S. CONST. amend. I, XIV.

solution for both South Dakota and Oklahoma is to suspend enforcement of these laws and invalidate the subsections which overtly criminalize free speech and freedom of association.[272] Without doing so, they run the risk of violating the First Amendment rights of not only citizens of their own states, but of citizens all over the U.S.

4. The Protections of the First Amendment in These Critical Infrastructure/Anti-Protest Laws are Insufficient to Make Them Constitutional

Perhaps to their credit, two of the six laws examined above include subsections nominally meant to protect the First Amendment rights of assembly, free speech, and protest. Specifically, SB 2044 in North Dakota and HB 727 in Louisiana deliberately construct space for "lawful assembly and peaceful and orderly petition" within the construction of the statutes.[273] If taken at face-value, these subsections may be used to protect protestors, especially Indigenous protestors, from unfair targeting and criminalization by state governments. However, the unconstitutional breadth and vagueness of each of these statutes render these supposed protections completely toothless. Even if they facially include constitutional protections, the impact of both these laws results in the unconstitutional violation of the First Amendment, rendering their supposedly enumerated protections entirely pointless.

The text of SB 2044 in North Dakota reads,

> This section may not be construed to prevent or prohibit lawful assembly and peaceful and orderly petition for the redress of grievances, including a labor dispute between an employer and its employee.[274]

Similarly, HB 727 has a subsection which reads:

> D. Nothing in this Section shall be construed to apply

[272] 521 U.S. at 844; 539 U.S. at 113.
[273] S.B. 2044, 66th Leg. Assemb. Reg. Sess. (N.D. 2019); H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).
[274] S.B. 2044, 66th Leg. Assemb. Reg. Sess. (N.D. 2019).

> to or prevent the following:
> (1) Lawful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas and views regarding legitimate matters of public interest, including any labor dispute between any employer and its employee or position protected by the United States Constitution or the Constitution of Louisiana.[275]

While these subsections appear to protect First Amendment rights of rights of assembly, free speech, and protest, when read in conjunction with the rest of the associated laws, these protections lack any kind of bite. It is impossible to protect the dearly loved liberties of free speech and freedom of assembly while simultaneously constructing statutes in a manner that is so vague and overbroad that regular behavior becomes criminalized. It is simply unconstitutional to enact criminal penalties for online retweets, encouraging texts, standing beside an unmarked pipeline with a protest sign, or accepting fiduciary support of protestors from organizations such as EarthJustice, the Sierra Club, or the ACLU.[276] The two concepts of free speech and speech restriction do not and cannot line up.

SB 2044 explicitly states in a subsection that it cannot be used to prevent peaceful and orderly protest.[277] Simultaneously, however, the construction of the remainder of the statute is so vague and overbroad that it could ensure the devastation of a right to peaceful protest.[278] The *impeding or impairing* clause in SB 2044 means that any person who does anything that could make any kind of trouble for those installing or monitoring a pipeline could be charged with criminal trespass.[279] Providing a subsection in-statute claiming to offer an opportunity for people to exercise their right to free speech while concurrently ensnaring anyone who comes anywhere near a critical infrastructure facility to exercise their right

[275] H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).
[276] *See id*.; see also Jonathan Parks-Ramage, *Trump's Anti-Environment Agenda Makes 2018 the Perfect Time to Support These Climate Orgs*, VICE (Mar. 6, 2018, 11:30 AM), https://www.vice.com/en_us/article/437mpq/trumps-anti-environment-agenda-makes-2018-the-perfect-time-to-support-these-climate-orgs [https://perma.cc/K45S-5QVP].
[277] *See* S.B. 2044, 66th Leg. Assemb. Reg. Sess. (N.D. 2019).
[278] *See id*.
[279] *See id*.

to free speech is both an absurd logical fallacy and blatantly unconstitutional.

HB 727 is another example of this conundrum. While HB 727 pays lip service to the notion of protecting First Amendment free speech rights, it is simultaneously being used—and was designed to be used—as a tool against the First Amendment. Implementation of HB 727 has already prevented those individuals who choose to protest the installation of oil pipelines from exercising their right to free speech by criminalizing their actions as the endangerment of critical infrastructure.[280] HB 727 attempts to pay some kind of false homage to the First Amendment by specifically carving out space for "lawful assembly and peaceful and orderly petition," but the fact remains that it has not been applied in a way that protects those rights.[281] Within a week of HB 727 being put into effect, Indigenous protestor Anna White Hat, teacher and activist Ramon Mejía, and journalist Karen Savage, had been arrested for standing not on--but near the pipeline.[282] White Hat was arrested after leading a prayer ceremony for "non-violent protest against and monitoring of the pipeline project" in the Atchafalaya Basin.[283] This occurred even though White Hat and her fellow protestors were standing or endeavoring to be "on public waterways and/or property where they had authorization to be," and not on private land.[284] At the time, the Bayou Bridge Pipeline, LLC was illegally clearing and constructing on land they did not have permission to enter.[285] As there "was no legal right of way in existence, and therefore no critical infrastructure," White Hat and others were arrested for simply standing near or observing a pipeline that was being illegally constructed. Due to raising their voices in opposition to the pipeline, White Hat and her comrades were arrested by state and local law enforcement officers that had been hired by the Bayou Bridge Pipeline LLC to act as security.[286]

Both White Hat and Savage currently face up to ten years in

[280] Complaint, *Anna White Hat et al. v. Jeff Landry et al*., at 7-8, (M.D. La., May 22, 2019).
[281] H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).
[282] Complaint, *Anna White Hat et al. v. Jeff Landry et al*., at 7-8, (M.D. La., May 22, 2019).
[283] *Id*. at 7.
[284] *Id*. at 21.
[285] *Id*.
[286] *Id*. at 23, 26.

prison and at least $2000 in fines.[287] All three of them—Anna White Hat, Ramon Mejía, and Karen Savage—were exercising their First Amendment rights at the time of their arrest. The subsection in HB 727 meant to protect free speech was ineffective against the vague and overbroad clauses present in the rest of the statute.

While the state legislatures in North Dakota and Louisiana attempt to hide the blatant unconstitutionality of their critical infrastructure laws behind protective clauses, the reality is that both these laws lack the sort of teeth that could provide any real defense. As noted in previous sections, these laws are both so vague and so overbroad that it would be impossible to truly differentiate constitutionally protected free speech and protest from any kind of criminal trespass or violation of the statutes.[288] Enforcement of these laws must be suspended, as per *Reno*, and the vague and overbroad clauses in each of these statutes must, as per *Hicks*, be limited or invalidated in order to provide true and valid protections of First Amendment rights in both North Dakota and Louisiana.[289] Similarly, once the unconstitutional clauses are severed, sections which protect the First Amendment must also be added to each of the other statutes examined above to fully provide protection for those protesting oil and gas pipeline installation across the United States.

B. *These Critical Infrastructure/Anti-Protest Laws Fulfill A Long Tradition of the Chilling of the Free Speech and Civil Rights of Indigenous Peoples*

Holistically, all six of these laws—HB 1123 in Oklahoma; SB 2044 in North Dakota; SB 189 in South Dakota, HB 3557 in Texas; HB 727 in Louisiana, and the Pipelines Act—put forward by state and federal governments are unconstitutional for a variety of reasons. Either they are too vague to properly limit free speech, they are so overbroad as to criminalize free speech and association, or they are unconstitutionally limiting the use of free speech and freedom of association. Historically, the Supreme Court has closely analyzed restrictions on free speech and freedom of association, and Supreme Court precedent makes each of the laws above

[287] *Id*.
[288] *See infra* Part IV.A.1-3.
[289] *ACLU,* 521 U.S. at 844; *Hicks,* 539 U.S. at 113.

unconstitutional. However, each of these laws also play into a longstanding tradition in the United States of limiting or chilling the civil rights of Indigenous peoples in the U.S.

At first glance, the described laws do not actively target Indigenous peoples. However, the rhetoric around each of these laws plays into stereotypes which have previously been evident in lawmaking trends such as assimilation and termination. In Oklahoma, the sponsor of HB 1123, Representative Scott Biggs, openly admitted that the law had been developed to prevent any protest similar to the one that occurred at Standing Rock from ever happening in the state of Oklahoma.[290] While developing the bill in conjunction with the Oklahoma Oil and Gas Association, Rep. Scott stated on the House floor that "[t]here are a lot of things in Oklahoma right now that are drawing the attention of bad actors," meaning Indigenous and environmental activists.[291] He also claimed that protests such as the one in Standing Rock were "violent" and disruptive, and that it was important to pass HB 1123 in order to prevent similar things from happening in the state of Oklahoma.[292]

During testimony before the South Dakota legislature in support of HB 1123, Governor Noem's lobbyist testified that a catalyst for the Act was the fact that some of the people who participated in the protest at Standing Rock in North Dakota were "professional protestors" from other parts of the country.[293] Similarly, in Louisiana, LMOGA's President and General Counsel, Tyler Gray, who drafted HB 727, stated that he "followed in Oklahoma's steps, liaising with the Oklahoma Oil and Gas Association, adapting their approach to the existing critical infrastructure law in Louisiana."[294] ALEC's drafted critical infrastructure bill closely mirrors the Oklahoma statute as well, and

290 Joe Wertz, *Oklahoma Bill To Protect 'Critical Infrastructure' Could Curb Public Protest, Critics Say*, STATE IMPACT: NAT'L PUB. RADIO (Mar. 2, 2017, 12:09 PM), https://stateimpact.npr.org/oklahoma/2017/03/02/oklahoma-bill-to-protect-critical-infrastructure-could-curb-public-protest-critics-say/ [https://perma.cc/C7FD-RC2G].

291 *Id*.

292 *Id*.

293 Complaint, *Dakota Rural Action et al. v. Kristi Noem et al*., at 8, (W.D. S.D., Mar. 28, 2019).Complaint, *Dakota Rural Action et al. v. Kristi Noem et al.*, Case No. 5:19-cv-5046 (W.D. S.D., Mar. 28, 2019), *8.

294 Complaint, *Anna White Hat et al. v. Jeff Landry et al*., at 17, (M.D. La., May 22, 2019). Complaint, *Anna White Hat et al. v. Jeff Landry et al.*, Case No. 3:19-cv-00322, *17 (M.D. La., May 22, 2019).

shares many of the clauses that were developed in response to those "violent" "bad actors" described by Rep. Biggs.[295] Notably, in Texas, the authors of HB 3557 attended ALEC conferences within the past few years; multiple oil companies in Texas, including the Texas Oil and Gas Association, the Texas Pipeline Association, ExxonMobil, Chevron, Shell, and Enbridge also supported the bill.[296] State legislators are cooperating with oil companies over the First Amendment rights of the residents of their state.

Each of these statements on its own, while troublesome, do not engender much cause for concern. However, when viewed in the context of federal and state legislation against Indigenous peoples throughout American history, these claims take on a new and uncomfortable implication. The history of suppression of Indigenous protest in the United States, both before and after the enshrinement of Indigenous civil rights via the Indian Citizenship Act, were characterized with similar language. The descriptions of "violence" tie into an image of Indigenous peoples which has existed for centuries. Critical infrastructure/anti-protest laws imply the existence of a battle between backwards-looking, "uncivilized" Indigenous peoples and forward-looking, "civilized" oil and gas companies, with the government pushing for Indigenous assimilation to the motives of state legislatures and their accompanying oil and gas lobbyists.[297] Historically, when Indigenous people fought back, they were killed, but as the relocation era ended and allotment began, the punishment changed instead to denial.[298] Indigenous people could not use their own languages, exercise their own cultures, or live in their own historical

[295] Pipeline and Hazardous Materials Safety Admin., Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, (Mar. 5, 2019), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/71476/2019-pipeline-safety-reauthorization_0.pdf [https://perma.cc/4HVC-N3VS]; Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis and Legislative Text, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMIN., (Mar. 5, 2019) https://www.phmsa.dot.gov/news/protecting-our-infrastructure-pipelines-and-enhancing-safety-act-2019-section-section-analysis/[https://perma.cc/KNY4-BUNM].

[296] Candice Bernd, *Pipeline Protesters Could Face 10 Years in Prison Under Bill OK'd by Texas House*, TEX. OBSERVER (May 1, 2019, 1:57 PM), https://www.texasobserver.org/pipeline-protesters-could-face-20-years-in-prison-under-bill-in-texas-house/ [https://perma.cc/UA7T-4PWF].

[297] *See* The Dawes Act of 1887, 25 U.S.C. § 331 (repealed).

[298] *See* DUNBAR-ORTIZ, *supra* note 3, at 112-14, 138-39.

homelands.[299] These critical infrastructure/anti-protest laws and the rhetoric behind them, harken back to an era when Indigenous peoples were described as "childish" by state and federal governments, and their territories were cut up into allotments and sold off to outside peoples.[300] The upsurge of critical infrastructure/anti-protest law echoes a time when the organizations AIM and WARN pushed back against federal and state policies which kept Indigenous peoples in poverty.[301] Even during the rise of Red Power, hundreds of Indigenous peoples were being arrested and charged with criminal actions. The occupation of Wounded Knee alone resulted in more than a thousand arrests and at least 275 criminal charges—though admittedly there were violent clashes between AIM activists and law enforcement prior to the end of the occupation.[302] Now, in an administration which has removed any mention of climate change from government websites and constantly and consistently rolls back environmental protection laws in favor of fossil fuel and fracking companies, the U.S. is gearing up for another massive fight—not just over the environment, but over the civil rights of Indigenous peoples.[303]

Indigenous peoples have used their First Amendment right to religious freedoms to carve out space for Indigenous religious and spiritual practices across the U.S. Now, through the use of mass protest, Indigenous peoples are utilizing their First Amendment rights of free speech and freedom of association to demand indigenized environmental justice, and state and federal legislatures have taken notice. By crafting laws which violate the First Amendment rights not only of Indigenous activists, but journalists and other protestors, each of these states and the federal government

[299] *See generally* DUNBAR-ORTIZ, *supra* note 3.
[300] *See* WILKINSON, *supra* note 76, at 46.
[301] *See* GILIO-WHITAKER, *supra* note 5, at 116-17; *see* Alysa Landry, *Native History: AIM Occupation of Wounded Knee Begins*, INDIAN COUNTRY TODAY (Feb. 27, 2017) https://newsmaven.io/indiancountrytoday/archive/native-history-aim-occupation-of-wounded-knee-begins-8Ub_qxe5Tk-RPjNdSvvYDQ/[https://perma.cc/473J-7SWK];
[302] Alysa Landry, *Native History: AIM Occupation of Wounded Knee Begins*, INDIAN COUNTRY TODAY (Feb. 27, 2017) https://newsmaven.io/indiancountrytoday/archive/native-history-aim-occupation-of-wounded-knee-begins-8Ub_qxe5Tk-RPjNdSvvYDQ/ [https://perma.cc/473J-7SWK].
[303] Nadja Popovich et al., *83 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (updated June 7, 2019), https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html [https://perma.cc/TA7D-5GNU].

continue to perpetuate the chilling of Indigenous free speech and Indigenous civil rights. This repackaged attitude towards Indigenous peoples, particularly Indigenous peoples acting in the political sphere, has reaped the same old consequences.

The withholding of civil rights protections from Indigenous peoples has been essentially the norm for much of U.S. history. Indigenous peoples were subjected to colonization, genocide, termination, and assimilation. Indigenous children have been denied their culture, history, land, sacred sites, and native languages. Now, state and federal lawmakers are attempting to chill Indigenous people's right to free speech and freedom of association. The restriction of Indigenous First Amendment Rights is just another step in a long road of repressing Indigenous civil rights—one that must be reversed as soon as possible.

C. *These Critical Infrastructure/Anti-Protest Laws Have a Disparate Impact on Indigenous Peoples*

Indigenous people are, have been, and will continue to be leaders in the anti-capitalist, anti-imperialist environmental justice movement. From the Keweenaw Bay Band Chippewa and Yakama Nation of the Pacific Northwest, to the Indigenous women of WARN who founded the Camp of Sacred Stones, Indigenous peoples have driven the environmental justice movement to new heights and demanded the defense and preservation of the environment for future generations.[304] This means that there have been, are, and will continue to be extensive conflict between Indigenous peoples of the United States and the U.S. government both at the federal and state levels.

Indigenous peoples have already borne state and federal retaliation against anti-capitalist environmental justice movements. More than four hundred people were arrested at Standing Rock.[305] Not all of them were Indigenous, but a great number of them were, and the few remaining in federal prison or under supervision with

304 *See* GILIO-WHITAKER, *supra* note 5, at 116-17; *see* WILKINSON, *supra* note 76, at 165.

305 Colin Moynihan, *A Murky Legal Mess at Standing Rock*, THE NEW YORKER (Jan. 11, 2017), https://www.newyorker.com/news/news-desk/people-arrested-at-standing-rock-protests-fight-for-their-legal-rights.

criminal charges certainly are.[306] Anna White Hat may be sentenced to up to ten years in prison for taking photos of illegal pipeline construction.[307] It cannot and should not be said that any of these laws were written to deliberately discriminate against Indigenous peoples. The construction of the laws themselves would indicate that they were not. Even if they were developed in response to the #NoDAPL protests at Standing Rock, the laws were constructed to criminalize as many people as possible for protesting gas and oil pipelines. However, the impact of these laws will have a disparate impact on Indigenous peoples, rendering them unconstitutional in their application and thus illegal under the Due Process Clause of the Fourteenth Amendment. As the Trump administration continues to push for the commercialization of public and tribal lands it is likely that that disparate impact will grow.

Precedent set in *Yick Wo v. Hopkins* (1886) and extending on throughout past decades have determined that laws which are race-neutral upon their face but are racially biased in application are unconstitutional.[308] There is no space and no proper place in this paper for a full Fourteenth Amendment racial bias analysis. Without going further into the issue, it is clear that there is a risk of these critical infrastructure laws having a disparate impact on Indigenous peoples.[309] The critical infrastructure/anti-protest laws discussed have been constructed to ensnare those attempting to exercise their First Amendment right to free speech and protest, but as the Indigenous environmental justice movement progresses, the likelihood of Indigenous individuals being criminalized is high. Indeed, Indigenous peoples around the world—including the United States—stand at the forefront of the battle against the ongoing climate crisis. Gilio-Whitaker provides an essential description:

> Indigenous peoples worldwide became more visible as it became apparent that they, along with more vulnerable peoples in the undeveloped, Indigenous, and fourth world, were on the frontlines of climate

[306] *Water Protector Prisoners*, Water Protector Legal Collective, https://waterprotectorlegal.org/water-protector-prisoners/.
[307] Complaint, *Anna White Hat et al. v. Jeff Landry et al*., at 23, 26, (M.D. La., May 22, 2019).Complaint, *Anna White Hat et al. v. Jeff Landry et al.*, Case No. 3:19-cv-00322, *23, *26 (M.D. La., May 22, 2019).
[308] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[309] *See infra* Part IV.

> change, even though they had been excluded from international processes like the Kyoto Protocol. Grassroots movements and organizations emerged from Indigenous communities all over the world, bringing attention to the effects climate change, the fossil fuel industry, and government collusion were having on their communities.[310]

Due to the combination of environmental racism and colonialism, Indigenous peoples have been pushed into the position of being the first responders in the climate crisis. The blend of historical sidelining, colonialist expansion, and environmental racism ensure that any laws constructed to combat any free speech response *to* that climate crisis will by necessity have a disparate impact on Indigenous communities.[311]

VI. "THOSE LAWS THAT AFFECT YOU AFFECTED US FIRST"[312]: HOW SILENCING ONE SILENCES ALL

The Dakota Access Pipeline arcs through North and South Dakota and Iowa before coming to a stop in Illinois. The Keystone XL pipeline, owned by TransCanada, begins near the border between Alberta and Saskatchewan in Canada, gashing through North Dakota, South Dakota, Nebraska, Kansas, and Oklahoma, before coming to a stop in Port Arthur, Texas. An awkward tail of the Keystone XL angles off from Nebraska at Steele City, crosses through Missouri, and ends in Illinois. Pipelines crisscross all over the United States; whether they are above- or below-ground, they are critical in many ways to the day-to-day function of the country. Even as the climate crisis worsens, the water, oil, gas, petroleum, and other chemicals that are transported every day via these pipelines are critical to keep society running smoothly.

At the time of this writing, more than thirty states in the U.S. have drafted and proposed anti-protest bills.[313] Of those thirty states,

310 GILIO-WHITAKER, *supra* note 5, at 118-19.
311 *Id*.
312 Wendsler Nosie Jr., San Carlos Apache, Poor People's Campaign, #40DaysOfAction Washington DC Rally Livestream June 23, 2018 (at 25:57), https://www.facebook.com/anewppc/videos/1735225803240254/.
313 US Protest Law Tracker, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/usprotestlawtracker/ [https://perma.cc/HZE7-5UGN].

eight states enacted critical infrastructure laws.[314] Three more critical infrastructure/anti-protest bills are pending in Ohio, Missouri, and Illinois.[315] As more states craft critical infrastructure/anti-protest bills, more people will be arrested, charged, and convicted under unconstitutional legislation. Further development of critical infrastructure legislation in its current form would likely continue the trend of unconstitutionally infringing on First Amendment rights to free speech and freedom of association should people continue to protest the installation of pipelines, fracking, or other projects involving dangerous fossil fuels.

While Oklahoma's HB 1123, North Dakota's SB 2044, South Dakota's SB 189, Texas's HB 3557, Louisiana's HB 727, and the federal Pipelines Act unconstitutionally target Indigenous peoples in their application, those same laws are facially nondiscriminatory. To be clear: all six of the laws analyzed in this paper are written in a way that chills not only the free speech of Indigenous activists, but of *any* activist. While they are currently being applied most strictly to Indigenous activists, and were created in response to Indigenous environmental activism, they have already been applied to both Indigenous *and* non-indigenous peoples. Karen Savage, a non-indigenous journalist, was arrested at the same time as Anna White Hat.[316] So was Ramon Mejía, a social studies teacher in Biloxi, Mississipi who also protested the Bayou Bridge Pipeline.[317] Hundreds of people were arrested at Standing Rock, Indigenous and non-indigenous alike. As described by Gilio-Whitaker:

> The #NoDAPL protest at Standing Rock was precedent setting on numerous fronts, not the least of which for the degree of collaboration between Native and non-Native people it inspired. For the better part of a year, non-Native Americans poured out their support in social and news media, with financial and other donations . . . and side by side risked their lives with Indian people, braving brutal police attacks,

314 *Id*.
315 *Id*.
316 Complaint, *Anna White Hat et al. v. Jeff Landry et al*., at 8, (M.D. La., May 22, 2019). Complaint, *Anna White Hat et al. v. Jeff Landry et al.*, Case No. 3:19-cv-00322, *8 (M.D. La., May 22, 2019).
317 *Id*. at *8, *23.

harassment, and jail.[318]

Since Standing Rock, and as the climate crisis worsens, more and more people have been protesting against pipelines and for environmental justice. As environmental justice continues to be indigenized, environmental racism continues to be challenged, and critical infrastructure sites continue to be picketed, people from all demographics will be swept under the application of these unconstitutional laws. Combating the climate crisis through the courts will continue to foster opportunities for free speech actions. The highly anticipated case of *Juliana et al. v. United States et al.*, which argues that the U.S. government has long been aware of the danger to the public from fossil fuels and carbon dioxide pollution, could have vast consequences for the future of environmental law and safety in the U.S. It could quite particularly have an impact on Indigenous environmental justice, as one of the main cores of *Juliana*'s argument is that "[the U.S. government] recklessly allow[s] interstate and international transport of fossil fuels" despite the danger it presents to the world.[319] However, as *Juliana* sits in the Ninth Circuit, state and federal legislators continue to wield the oil industry as a weapon against constitutional rights.[320]

Each of the laws discussed in this paper were developed deliberately in response to the #NoDAPL protests at Standing Rock. Standing Rock—a groundbreaking protest not only due to the massive blend of Indigenous and non-indigenous peoples protesting at the site, but also due to the sheer number of Indigenous communities that served as Water Protectors—was a watershed moment in the history of the United States.[321] As the climate crisis worsens and more and more states propose and pass laws which criminalize free speech and protest, that kind of mass political action will likely repeat itself. The risk that is presented by the chilling of Indigenous free speech cannot be overstated. While it has been made clear that these critical infrastructure/anti-protest laws are targeted,

318 GILIO-WHITAKER, *supra* note 5, at 110.
319 First Amended Complaint for Declaratory and Injunctive Relief, *Kelsey Cascadia Rose Juliana et al. v. The United States of America et al.*, at 62, (D. Or., Sept. 10, 2015). First Amended Complaint for Declaratory and Injunctive Relief, *Kelsey Cascadia Rose Juliana et al. v. The United States of America et al.*, Case 6:15-cv-01517-TC, *62 (D. Or., Sept. 10, 2015).
320 Our Children's Trust, *Juliana v. United States,* OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/KED6-ELEY]
321 GILIO-WHITAKER, *supra* note 5, at 110.

not in writing but in practice, at Indigenous peoples and Indigenous activists, the consequences of these laws are absolute. When the voices of one group are silenced, others rapidly follow, as "the first target of government repression is never the last."[322]

VII. MOVING FORWARD: POLICY RECOMMENDATIONS

The Supreme Court precedent is clear. The only solution to the unconstitutionality of these critical infrastructure/anti-protest laws is to suspend enforcement of them until each clause is analyzed and the unconstitutionally overbroad or overly vague clauses are severed from the statutes.[323] Similarly, both state and federal lawmakers must be careful to prevent the use of such vague and overbroad clauses in future. The risk to the First Amendment is too great for laws like the ones described in this paper to remain as they are.

However, the suspension and clause-severing required by *Reno* and *Hicks* will only resolve one issue presented by these laws when they are examined in their overall context. Each of these six laws infringe upon the First Amendment rights of Indigenous peoples in the United States, but in so doing they, and the legislatures that created them, continue a tradition of repressing Indigenous tribes.[324] The framework used by state and federal governments in the U.S. is one which subjugates Indigenous peoples and denies them access to their civil and human rights.[325] If that framework is not changed, those governments will continue to enact laws which repress Indigenous peoples. The framework must be rebuilt, and the structure is already available.

One of the premiere documents regarding the rights (both international and civil) of Indigenous peoples has been UNDRIP.[326] The United States has yet to ratify this declaration, even if it has endorsed it.[327] However, Articles 2, 18, and 32 clearly carve out

322 ACLU, *Freedom of Expression*, https://www.aclu.org/other/freedom-expression [https://perma.cc/7ZX3-YBGV] (using hate speech as an example of indivisible free speech).
323 *ACLU,* 521 U.S. at 844; *Hicks,* 539 U.S. at 113.
324 *See infra* Part II, Part IV.B.
325 *See generally* ECHO-HAWK, *supra* note 80.
326 G.A. 61/295, 2007 Declaration of the Rights of Indigenous Peoples (Oct. 2, 2007).
327 Admin., *US Acts on UN Rights of Indigenous Peoples Declaration*, PINE TREE LEGAL ASSISTANCE (Jul. 26, 2011, 6:56 AM),

space for the U.S. to reshape its current jurisprudence, on both the state and federal level, to end judicial violation of Indigenous civil rights. These Articles state:

> Article 2.
> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin and identity . . . .
> Article 18.
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions . . . .
> Article 19.
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them . . .
> Article 32.
> 1 Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.
> 2 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
> 3 States shall provide effective mechanism for just and fair redress for any such activities, and

https://ptla.org/wabanaki/us-acts-un-rights-indigenous-peoples-declaration [https://perma.cc/YFW8-9VRS].

> appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[328]

At the time of this writing, the U.S. has not ratified UNDRIP into enforceable law. Doing so would require an action by the Senate, which in the current climate seems unlikely.[329] However, should these concepts be folded into U.S. law, laws which would negatively impact Indigenous rights, particularly those laws that impact their land or resources, could not be developed.[330] It would enable, instead, the development of laws that both acknowledge Indigenous civil and human rights—and prevent the violation of their right to free speech.

VIII. CONCLUSION

The history of stifling Indigenous rights in the United States is, effectively, the history *of* the United States. The conquering and systematic, genocidal destruction of the many thousands of Indigenous communities across North America has been termed "the Indian wars," justified through "Manifest Destiny," and continued on in policies of boarding school indoctrination, allotments, and termination. In the current decades, Indigenous activism has pushed forward every aspect of the environmental justice movement and has forced it to confront its own imperialistic and capitalistic roots. It has also resulted in some of the greatest moments of free speech and protest of this generation, with the actions by Water Protectors at Standing Rock, Line 5 in Michigan, the Bayou Bridge in Louisiana, and many other places. As a result, state and federal legislatures and agencies have begun pushing unconstitutional agendas of their own, which not only have the impact of chilling free speech and freedom of association for political advocates and agencies, but particularly—pointedly—of

328 *Id*. at Art. 2, 18, 19, 32.
329 Kate Sullivan et al., *Pelosi calls McConnell 'Moscow Mitch' for blocking legislation*, CNN (Aug. 14, 2019, 9:44 PM), https://www.cnn.com/2019/08/14/politics/moscow-mitch-mcconnell-nancy-pelosi/index.html [https://perma.cc/Y79S-AVK4].
330 *See* Admin., *US Acts on UN Rights of Indigenous Peoples Declaration*, PINE TREE LEGAL ASSISTANCE (Jul. 26, 2011, 6:56 AM), https://ptla.org/wabanaki/us-acts-un-rights-indigenous-peoples-declaration [https://perma.cc/YFW8-9VRS].

Indigenous peoples. These laws are unconstitutional both on their face and in their application. They violate the First Amendment by chilling the rights of free speech and of association and violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment by denying U.S. citizens the liberty to associate with those they choose. Critical infrastructure/anti-protest laws target Indigenous peoples through their application and continue in a long tradition of the stifling or outright robbery of the civil and human rights of Indigenous peoples in the United States. If these laws continue, it will not just be Indigenous people that are impacted by these laws. In fact, these laws are already impacting non-Indigenous people; hundreds of people were arrested at the #NoDAPL protests at Standing Rock, not all of them Indigenous.[331] As these laws expand, more and more people will be arrested for exercising their constitutional rights. Without protections, it could soon be the entire Indigenous environmental rights movement caught up in the crossfire.

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[331] Colin Moynihan, *A Murky Legal Mess at Standing Rock*, THE NEW YORKER (Jan. 11, 2017), https://www.newyorker.com/news/news-desk/people-arrested-at-standing-rock-protests-fight-for-their-legal-rights [https://perma.cc/5E2D-KPHN].