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The Tentative Emergence of Student Power in the United States

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I

From colonial times through mid-twentieth century America, the status of students in colleges and universities within the United States depended substantially upon the sufferance and pleasure of the colleges themselves. While the great majority of public and private universities (with such notable exceptions as Yale) supported some sort of student "government," these governments maintained only a minimum of authority over matters of peripheral institutional importance, operating largely as impotent facsimiles of parliamentary processes. Each might adopt parliamentary resolutions vocalizing student sentiment on institutional policy or matters of national concern, but few were conceded any authority beyond that of memorializing or petitioning. Standards respecting admission to the college, curriculum, faculty composition, capital construction, tuition, salaries, research, honor codes, personal misconduct, alumni relations, government support, and virtually all other matters of substance were reserved ultimately to the disposition of non-student bodies within and without the college. Aside from some institutional practices delegating limited control to student organizations over athletic budgets and student operated campus newspapers, not even the administration of standards directly affecting student campus life itself was generally committed to significant student participation.

Indeed, not until the United States was well into the 1960s did the phrase "student power" acquire sufficient conversational currency even to provide a meaningful or identifiable concept, much less a specific content. Only with the success of civil disobedience as a short-lived instrument of social change in the early 'sixties, developed initially and hesitantly by black students to dramatize community conditions of racial discrimination off campus, did there gradually develop a spillover effect into the campuses themselves.[1] Only then, through

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[1] See Pollitt, "Dime Store Demonstrations: Events and Legal Problems of First Sixty Days," 1960 *Duke L.J.* 315. The passive resistance of the Greensboro, North Carolina, sit-ins of 1960 gave way to more aggressive demonstrations by the civil rights movement and to the adoption of the phrase "Black Power" by militant young Negroes in 1965. At least by 1966, some of the leadership of the National Student Association (with about 370 member colleges and universities out of nearly 4,000 institutions in the United States) borrowed the phrase and popularized demands for "Student Power," and in the

gradually evolving *ad hoc* coalitions of differing student organizations, were extralegal pressures developed to redress what was felt to be an inequitable distribution of institutional authority.

As this symposium is published, moreover, it remains in doubt whether a seemingly endless and frenzied series of student disruptions across the country will culminate in the institutionalizing and regularizing of student power with direct voting representation on major standing committees inclusive of boards of trustees and a substantial participating role in the panoply of university operations; or whether, to the contrary, a manifest public discontentment with the abrasive style of student self-assertiveness (from harrassment in the student press through sit-ins, disruption of classes, the seizure of buildings and some major acts of large-scale intimidation) will peak in the form of trenchant police and legislative action to remove demonstrative groups of students altogether from campuses, retrenching along the lines of an earlier social model when the college stood *in loco parentis* over its student body.[2]

However this may be, it is nonetheless correct to observe that the recent development of student power in the United States has turned almost entirely upon extralegal dynamics and, occasionally at least, the use of illegal tactics. Correspondingly, the piecemeal integration of students into the decision-making structure of most American colleges (although not of all) has developed only recently, gradually, and grudgingly—as a reluctantly accepted alternative to jarring confrontations, and not primarily from an optimism that student participation is likely to enhance the quality of academic administration. American faculties, themselves long subordinate in many institutions to boards of trustees, state legislatures, alumni associations, and principal patrons, have only recently begun to resume a significant role in institutional

ensuing years the more militant Students for a Democratic Society pressed the concept with more vigorous and sometimes coercive and violent techniques. Depending partly on the nature of a given issue, however, it is perfectly clear at the present time that one or another aspect of "Student Power" enjoys substantial support by a very large number of college students. See, e.g., Schwartz, " 'Comment' (on Students and the Law)," 45 *Denver L.J.* 525 (1968); Statement by Nat'l Commn. on the Causes of Violence, *N.Y. Times,* June 10, 1969, p. 30, col. 2.

[2] In addition to the array of state and local criminal statutes already applicable to students (e.g., trespass, injunctions, resisting arrest, failure to obey lawful order, disorderly conduct, breach of peace, malicious mischief, assault, battery, arson, conspiracy, and use of violent action by police and the national guard), the Attorney General of the United States has announced his intention of seeking indictments under the new interstate anti-riot federal statute (Pub. L. 90-284, 82 Stat. 75, 18 U.S.C. §§ 2101-02, (1968) and hearings are currently underway in the House Education Committee and Senate Committee on Government Operations to review the extent of compliance with four federal bills enacted last year to restrict federal aid to disruptive students (see appendix) and to consider additional measures as well. See *N. Y. Times,* June 11, 1969, p. 32, 1-4 cols. The Senate Committee has subpoenaed student records from a number of universities. A variety of punitive measures are currently under consideration in a number of state legislatures.

planning. They seem now to resent new demands for power sharing by students whose transient status, marginal educational expertise, and shorter perspectives appear to provide them with less than wholly attractive qualifications for the job. Nevertheless, the gradual incorporation of student representation in regular university bodies is tentatively emerging as an intermediate response to *ad hoc* demonstrations partly in an effort to defuse the most radical movements through the establishment of more parliamentary means of reconciling competing desires respecting the use of scarce educational resources. Thus the trend in a number of American colleges and universities toward the incorporation and regularization of student power together with the more traditional components of faculty, administrative, alumni, and governmental authority.

An understanding of the essentially extralegal nature of the current drive for student power in American universities requires a brief review of the history of student rights in the United States. That history, in terms of legal models, has evolved up to the present moment largely as a development of student freedom *from* institutional authority rather than as a development of student power *as part of* institutional authority. Approximately, it has been a movement from status (*in loco parentis*) to contract and finally to constitutionalism. Substantially, to repeat, it has been a movement in the direction of individual student freedom from institutional power but in the end, almost as an incidental byproduct, the movement has yielded to students fairly significant means to acquire a share in institutional power. The meaning of this puzzling and seemingly paradoxical statement will become clear in the course of the brief ensuing discussion.

II

Roughly, the evolution of the law of student rights can be sketched in the following manner:

1700's	1900's	1960's	
IN LOCO PARENTIS	CONTRACT	CONSTITUTION	freedom of speech and association procedural due process equal protection privacy
		(private)	
	(small, private, residential, denominational)		

A. In Loco Parentis

The doctrine of *in loco parentis* achieved early recognition in the

common law of pupil–tutor relations in the resolution of torts.[3] In occasional suits brought on behalf of minors seeking money damages from tutors for assault and battery, the common law acknowledged an implied agency in the tutor, granting him an authority to discipline a refractory pupil by means allowed to parents in the disciplining of their youngsters at home. So long as the tutor used no more force than a parent was privileged to use, and so long as its use was related to the maintenance of discipline within the scope of his tutorial authority, the teacher could maintain a defense against a suit for battery on the ground that he was acting *in loco parentis*.

Originally developed in this limited context, the doctrine became more generalized as a legal model against which the overall authority of colleges vis-à-vis students might be judicially reviewed. Thus, the validity of a college rule restricting the way in which students might spend their time or money, places they might go, people with whom they might associate, where they might live, etc., came to be tested by analogy; could a parent have maintained a similar rule in the supervision of his offspring at home? Similarly, the disciplinary procedures of colleges were reviewed by the same narrow standard: did a parent have any enforceable legal obligation to provide his offspring with any sort of hearing before determining his "guilt?" Must a parent publish a set of rules to enforce discipline? Necessarily, in transposing the discretionary privileged authority of parents to colleges acting *in loco parentis,* courts almost uniformly sided with the colleges, and students were largely without legal protection against wide-ranging, unilateral college authority. The early twentieth century reflections of two state supreme courts are reasonably representative of this era:

> College authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rules or regulations for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities, or parents, as the case may be.[4]

. . . .

Note, "Private Government on the Campus—Judicial Review of University Expulsions," 72 *Yale L. J.* 162, 1367-72 (1963); Johnson, *In Loco Parentis* (1962) (N.S.A. Philadelphia).

[4] Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913).

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[3] *See, e.g.,* W. Blackstone, *Commentaries,* I *453; *Restatement of Torts* (Second) §§ 153-54 (1965). The scope of the doctrine is critically reviewed in Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373 (1969); Van Alstyne, "Procedural Due Process and State University Students," 10 *U.C.L.A. L. Rev.* 368, 375-79 (1963); Seavey, "Dismissal of Students: 'Due Process,'" 70 *Harv. L. Rev.* 1406 (1957).

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose. . . . [C]ourts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[5]

In reflecting upon this regime, Professor Henry Steele Commager has observed:

> [In loco parentis] was transferred from Cambridge to America, and caught on here even more strongly for very elementary reasons: College students were, for the most part, very young. A great many boys went up to college in the colonial era at the age of 13, 14, 15. They were, for most practical purposes, what our high school youngsters are now. They did need taking care of, and the tutors were *in loco parentis*. This habit was re-enforced with the coming of education for girls and of coeducation. Ours was not a class society. There was no common body of tradition and habit, connected with membership in an aristocracy or an upper class, which would provide some assurance of conduct.[6]

As further noted by Commager, however, the context of higher education in the United States had so far altered by the mid-twentieth century that the rationale of *in loco parentis* could no longer accurately characterize the position of most American colleges:

> All of this now is changed. Students are 18 when they come up, and we have a long tradition with coeducation from high school on. Students marry at 18 and 19 now and have families. Furthermore, we have adjusted to the classless society and know our way about. Therefore the old tradition of *in loco parentis* is largely irrelevant.[7]

Indeed, there are more than 7½ million students now enrolled in American colleges and universities, and more of these are older than 30 than under the age of 18, the mean age being more than 21, when even a parent's legally enforceable prerogatives of discipline cease. Institutions have become larger, some with more than 30,000 students, with no means of preserving the charm of domestic intimacy or the personalism of parental affection in the administration of their rules. The universities have assumed large research and service components

[5] Stetson University v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1924). See also, People ex rel. Pratt v. Wheaton College, 40 Ill. 186, 187 (1866): "[W]e have no more authority to interfere than we have to control the domestic discipline of a father in his family."

[6] Letter to the author, May 5, 1962.

[7] *Ibid.*

and a heterogeneity of administrative, faculty, and student bodies distinctly unlike the domestic verisimilitude of the early colleges. These modifications in the character and functions of most American universities have correspondingly ended the usefulness of the *in loco parentis* model, and except for its problematical relevance to the dwindling proportion of small, residential, private, denominational colleges, it no longer accurately states the scope of student freedom from institutional authority:

> We agree with the students that the doctrine of *in loco parentis* is no longer tenable in a university community.[8]
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> . . . .
>
> [T]he better approach . . . recognizes that state universities should no longer stand *in loco parentis* in relation to their students.[9]
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> . . . .
>
> The college does not stand, strictly speaking, *in loco parentis* to its students.[10]

B. From Status to Contract

Toward the end of the nineteenth century, first as a complementary perspective to *in loco parentis* and then as an independent legal model (still influenced in interpretations favorable to the colleges, however, by vestiges of *in loco parentis*), the common law of contract was applied to college–student relations. Accordingly the freedom of students became circumscribed by all of the rules that the college maintained at the point of initial matriculation, in addition to all other rules it might subsequently add pursuant to an express or implied reservation of authority. Continued observance of the rules constituted a condition of the college's duty to continue to furnish educational services; the question in each case was largely one simply of deciding whether there was a rule in point and whether the student had observed it (the burden of proof being not uncommonly on the student!). Thus, the Florida Supreme Court opined in 1925, as an alternative view to *in loco parentis* in the same case:

> The relation between a student and an institution of learning . . . is solely contractual in character and there is an implied condition that the student knows and will conform to the rules and regula-

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[8] Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) (dictum).

[9] Goldberg v. Regents of Univ. of Cal., App. 2d 867, 57 Cal. Rptr. 463, 469 (1967) (dictum).

[10] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 729 (M.D. Ala. 1968) (dictum).

> tions of the institution, and for breach of which he may be suspended or expelled.[11]

Similarly, the New York Court of Appeals noted:

> [U]nder ordinary circumstances a person matriculating at a university establishes a contractual relationship under which, upon compliance with all reasonable regulations as to scholastic standing, attendance, deportment, payment of tuition, and otherwise, he is entitled to pursue his selected course to completion.[12]

And as late as 1958, assiduous research into the cases led a student writer to conclude:

> Courts generally agree that the relation between a private university and its students is contractual: As soon as a student has commenced a course of study, the university is bound to provide instruction during the balance of the course and to confer the appropriate credentials signifying completion. The university's duty of performance is conditioned upon compliance by the student with academic and disciplinary standards.[13]

Unsurprisingly, the movement of American society from status to contract did not in this instance, from the students' point of view, work out to be an especially progressive one. In the particular movement toward having their rights determined by contract rather than by status (*in loco parentis*), students gained very little either in terms of personal freedom from institutional control or in terms of student participation in institutional authority. To be sure, colleges might not act against students without having *some* rule, but with adequate assistance by counsel each college was readily able to equip itself with sufficiently flexible rules to which a student impliedly agreed that the practical situation remained substantially unaltered. Lacking continuity on campus and the essentials of cohesiveness to organize at all equivalently to the labor movement for collective bargaining purposes, and equally lacking in individual authority to negotiate personalized contracts of matriculation, students had little choice but to adhere to whatever rules each college might unilaterally impose. Not infrequently, students were obliged by educational need to take what was offered, sometimes learning the ultimate terms of their contracts by belatedly encountering standard-form boilerplate rules in standard-

[11] Stetson University v. Hunt, 88 Fla. 510, 517, 102 So. 637, 640 (1925). See also, Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923); Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S. 2d 410 (1962); University of Miami v. Militana, 184 So.2d 701 (Dist. Ct. App. Fla. 1966).

[12] Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435, 438 (1928).

[13] "Comment, A Student's Right to Hearing on Dismissal from a University," 10 *Stan. L. Rev.* 746 (1958).

form handbooks, impliedly incorporated by reference into standard-form contracts of matriculation.

Thus, Bryn Mawr could successfully rest a defense for expelling a student upon the following clause, upheld in litigation in 1923:

> "[T]he college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable."[14]

And Syracuse University, five years later, could rely defensively upon the following provision in expelling a girl for conduct "unbecoming a typical Syracuse girl":

> [T]he university reserves the right and the student concedes the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.[15]

Accordingly, students were variously expelled from place to place for eating in forbidden restaurants,[16] failing to attend chapel,[17] participating in disfavored (albeit peaceful and lawful) political rallies,[18] writing letters critical of the college administration,[19] or being (legally) married in a civil ceremony[20]—and often with only the faintest semblance of a hearing by the college.

Essentially, then, given parallel catchall provisions in most college handbooks, students lacked even the "indirect" power to influence the scope of institutional authority by voting with their feet. Additionally, the terms of their "contracts" were nonnegotiable, many were vaguely phrased, and unilateral authority respecting their revision, interpretation, and administration was reserved to the college.

This condition, subject only to three qualifications, still may be said essentially to characterize the technical legal relationship of students to many private colleges in the United States where the law of contracts

[14] Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923).

[15] Anthony v. Syracuse University, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

[16] See, Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

[17] See, North v. Board of Trustees, 137 Ill. 296, 27 N.E. 54, (1891).

[18] See, Samson v. Trustees of Columbia University, 101 Misc. 146, 167 N.Y. Supp. 202 (1917); Zarichny v. State Bd. of Agric., *mandamus denied,* Jan. 13, 1949, *rehearing denied,* Feb. 28, 1949, Mich. Sup. Ct. (unreported), *cert. denied,* 338 U.S. 816 (1949), described in 17 *U.S. Law Week* 3374 (1949) (student expelled for arranging meeting in building across street from college campus, at which indicted communist was the principal speaker); People ex. rel. Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y. Supp. 349 (1921) (mandamus denied to student expelled for making "disloyal statements with regard to the United States," and for "radical, socialistic, and seditious utterances and propaganda calculated to injure the standing and reputation of said school"); Robinson v. University of Miami, 100 So.2d 442 (Fla. Ct. App. 1958) (student expelled from school of education partly because of his views on atheism.)

[19] See, Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959).

[20] Carr v. St. John's University, 231 N.Y.S.2d 403 (Sup. Ct. 1962).

holds sway. The three qualifications, in the reverse order of their significance, are these:

(a) the judiciary is just now beginning to apply equitable and legal doctrines of conscionability and interpretation to mitigate the rigor of some college contracts of adhesion—a development surprisingly late in comparison with its emergence in other areas of contract law;[21]

(b) to the extent that a number of private colleges willingly committed some share of the rules' administrative apparatus to student courts, councils, or boards, and some share of rule-making authority to student legislative groups, these inputs softened the character and application of the rules;

(c) the application of overriding constitutional law principles to public universities has coincidentally moved a number of private colleges in the same direction as the public universities—probably not so much from any "marketplace" response that they otherwise could not continue to draw students, as from a combination of embarrassment not to appear less enlightened and of simple inability to explain to their students why they cannot pursue constitutional freedoms open to their public university counterparts.

C. From Contract to Constitutionalism

The majority of American college students today are enrolled in public, rather than private, institutions. Moreover, the percentage of all college students enrolled in public institutions is increasing. Indeed, this year the public institutions again realized a large gain in students even while the private institutions realized an absolute loss in enrollment.[22] This trend is an important one for our purposes, since the public colleges and universities are subject to federal constitutional limitations recently applied to curtail their control over certain aspects of student freedom; after unpromising beginnings in the nineteen

[21] See e.g., Drucker v. New York University, 293 N.Y.S.2d 923 (Civ. Ct. 1968) (prepaid tuition must be refunded to student who withdrew before taking any classes, in spite of incorporated provision which student had not seen in handbook contractually establishing university's right to retain such funds). For analogous developments in commercial contracts, see *Uniform Commercial Code* § 2-302; Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Willard Van Dyke Productions, Inc., v. Eastman Kodak Co., 12 N.Y.S.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963). See also, Meyer, "Contracts of Adhesion and the Doctrine of Fundamental Breach," 50 *Va. L. Rev.* 1178 (1964); Hale, "Bargaining Duress, and Economic Liberty," 43 *Colum. L. Rev.* 603 (1943); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," 43 *Colum. L. Rev.* 629 (1943); Patterson, "Compulsory Contracts in the Crystal Ball," 43 *Colum. L. Rev.* 731 (1943); Llewellyn, Book Review, 52 *Harv. L. Rev.* 700 (1939).

[22] For chart on enrollments between 1945-1968 cf., *N. Y. Times,* January 9, 1969, p. 55, col. 1.

twenties[23] and slight glimmerings through the 'fifties,[24] the due process and equal protection clauses of the fourteenth amendment to the Constitution are now reining in the contractual and *in loco parentis* powers of our public institutions.

The watershed decision appeared in 1961, when a federal court of appeals revived a federal civil rights statute dating from Reconstruction to order the reinstatement of students who had been dismissed from a state college without written specification of charges or hearing.[25] Since then, the protection of procedural due process on campus has been erratically enlarged to buffer students from summary proceedings on campus.[26] Simultaneously, substantive constitutional rights of speech, association, and assembly have been applied in behalf of state college and university students, protecting them from institutional discipline. An advancing line of federal court decisions now shelter students in attendance at public institutions from summary procedures and from rules forbidding peaceful expression on campus,[27] access to controversial outside speakers,[28] critical freedom in the student press[29] —even a hitherto unknown modicum of privacy in their dormitory rooms,[30] and a tentative new freedom of personality in their very manner of dress.[31]

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[23] See, e.g., Hamilton v. Board of Regents, 293 U.S. 245 (1934) (denial of admission upheld against students with religious scruples against compulsory ROTC, partly on the basis that attendance at state university was a privilege). The doctrine of the case was subsequently sharply limited in Tinker v. Des Moines Independent Community School District, 37 *U.S. L. Week* 4121, 4122 n.2 (1969). See also, Waugh v. Board of Trustees, 237 U.S. 389 (1915).

[24] See, e.g., West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute in public schools held to violate first amendment rights of dissenting students).

[25] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

[26] See, e.g., Scoggin v. Lincoln University, 291 F. Supp. 161 (W.D. Mo., 1968); Esteban v. Central Missouri State College, 277 F. Supp. 349 (W.D.Mo. 1967); 290 F. Supp. 622 (W.D.Mo. 1968); Goldberg v. Regents of University of California, 47 Cal. Reptr. 463 (1967); Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968); Soglin v. Kauffman, No. 67-C-141 (W.D.Wis., Dec. 13, 1968); Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968); Stricklin v. Regents of Univ. of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966) (en banc); Woody v. Burns, 188 So.2d 56 (Fla. Ct. App. 1960).

[27] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S. Car. 1967); In re Bacon, 49 Cal. Reptr. 322 (Cal. App. 1966). See also, Pickering v. Board of Education, 391 U.S. 583 (1968).

[28] Brooks v. Auburn University, 296 F. Supp. 188 (M.D. Ala. 1969); Stacy v. Williams, No. WC 6725-K (N.D. Miss. Jan. 14, 1969); Snyder v. Board of Trustees of Univ. of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968); Dickson v. Sitterson, 389 F. Supp. 486 (M.D.N.C. 1968); Student Liberal Action Federation v. La. State Univ., Civ. No. 68-300 (S. Ct. 1962); Danskin v. San Diego Unified School Dist., 171 P.2d 885 (1946).

[29] Dickey v. Alabama State Univ. Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967).

[30] Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968); See also, People v. Overton, 51 Misc. 2d 140, 273 N.Y.S.2d 143 (1966), *rev'd,* 20 N.Y.2d 360, *judgment vacated,* 37 *U.S. L. Week* 3157, *rehearing denied,* 37 *U.S. L. Week* 3210 (1968).

[31] Breen v. Kahl, Case No. 68-C-201 (W.D. Wis., Feb. 20, 1969); Meyers v. Areata

The extent to which freedom of speech and association, procedural due process, equal protection, privacy and other constitutional norms may be extended remains uncertain, just as it remains unclear how far these freedoms may be extended laterally into the private colleges.[32] The abundance of periodical writing detailing current developments in these areas,[33] however, makes it clearly unnecessary to do more than to acknowledge the trend here. It remains for us to note, rather, the manner in which this trend to secure larger areas of student freedom *from* institutional control and supervision may also be seen indirectly to contribute to the current student movement *for* institutional recognition, namely, the movement for student power to participate in institutional decisions on all matters ranging from standards of admission to the investment of endowment funds. The connection is, I think, twofold at least.

First, as a practical matter, the protection for free speech on campus and procedural due process on campus establish a framework within which "lawful agitation" may be pressed in behalf of students seeking a participating role in the institution. The fact that students may not be summarily expelled for raising trenchant questions about the allocation of educational resources, that they may freely associate in political interest groups, tap the resources of community organizers, and continuously call into public question their exclusion from various standing committees on campus, make it everlastingly more difficult for universities to turn their complaints aside than when all such activities could be suppressed on pain of summary suspension or expulsion. The perceived merit of some of these proposals, as well as a predictable attrition among administrators and faculties who will simply find it easier to "switch than fight," are likely to result in a substantial modification of existing arrangements on many American campuses.

Concurrently, the unsatisfactory appeal to students to desist from illegal confrontation tactics when they are otherwise allowed no regularized representation within the university, seems less than wholly convincing. We are met with the legacy of our own academic (classroom) liberalism, and hard pressed to explain why students should be regarded wholly as disfranchised consumers of higher education rather than constituents of university governments. Once the notion of "constituency" has been allowed, moreover, denials of "representation" seem half-heartedly distinguished at best. Different degrees of expert-

Union High School Dis., 1 Civ. 24453 (Cal. App., Feb. 10, 1969); Ferrell v. Dallas Indep. School Dist., 37 *U.S. L. Week,* 3135 (1968) (J. Douglas, dissenting).

[32] See, e.g., Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962); *judgment vacated in part,* 212 F. Supp. 674 (E.D. La. 1962).

[33] For a selected bibliography, see Van Alstyne, "The Student as a University Resident," 45 *Den. L. J.* 582, 612-13.

ness may be acknowledged and fundamental norms of academic freedom insisted upon in behalf of faculty and administration from the impulsiveness of student demands, just as they have always needed recognition and protection against precipitous trustee or legislative power in the past, but neither these nor other appropriate considerations seem fully adequate wholly to screen out direct student participation in college government. If student interest in the doubtful pleasures of college administration perseveres and survives its current excesses, the logical sequel to the responsible use of student freedom may plausibly become the timely and useful contribution of direct student participation.[34]

[34] It is surely premature to prophesy the full extent or character of direct student participation in university governance in the foreseeable future. As the editors of the American Association of University Professors Bulletin noted in a preface to a joint Statement in Government of Colleges and Universities: "(1) The changes now occurring in the status of American students have plainly outdistanced the analysis by the educational community, and an attempt to define the situation without thorough study might prove unfair to student interests, and (2) students do not in fact presently have a significant voice in the government of colleges and universities; it would be unseemly to obscure, by superficial equality of length of statement, what may be a serious lag entitled to separate and full confrontation." 52 *A.A.U.P. Bull.* 375 (1966). See also, "Joint Statement on Rights and Freedom of Students," 53 *A.A.U.P. Bull.* 365, 367 (1967) (vaguely recommending "clearly defined means" for students "to participate in the formulation and application of institutional policy affecting academic and student affairs.") See also, C. Foote, H. Mayer and associates, *The Culture of the University: Governance and Education* (Reports of Study Commission, U. of California at Berkeley, 1968); various position papers available through the U.S. National Student Association; A. Morris, "Student Participation in Law School Decision-Making," mimeo, conf. of Western Law Schools, Ariz. State Univ. College of Law (1969).

The most recent general blueprint has been proposed by the National Commission on the Causes and Prevention of Violence, *Statement on Student Unrest, N.Y. Times,* June 10, 1969, p. 30, col. 6, 7, which contains the following suggestions: "Students have the right to due process and to participate in the making of decisions that directly affect them, but their right of participation should not be so extensive as to paralyze the disciplinary process itself. . . ."

"The university president . . . is the leader of the faculty. Its effectiveness derives as much from campus consensus of faculty and students as it does from the power delegated to him by the Trustees." . . .

"In the American system of education, the faculty plays the primary role in determining the education program and all issues directly relevant to education and faculty research. . . .

"Faculty control of education and research is the best guarantee we have of academic freedom. . . .

"Students should, of course, have a meaningful role in the governance of all noneducational, nonresearch functions. They should serve, too, on committees dealing with educational and related questions, exercising their right to be heard on these subjects, so long as the faculty remains paramount." See also, C. Jencks and D. Reisman, *The Academic Revolution* (New York 1968) pp. 57-58; J. Ridgeway, *The Closed Corporation* (New York, 1968) pp. 215-216, 218-219.

APPENDIX

SOME PROVISIONS ON STUDENT UNREST IN FEDERAL LEGISLATION

Higher Education Amendments of October 16, 1968, Pub.L. 90-575, 82 Stat. 1014, Title V.

Sec. 504(a) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has been convicted by any court of record of any crime which was committed after the date of enactment of this Act and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education to prevent officials or students in such institution from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution with respect to which crime was committed, then the institution which such individual attends, or is employed by, shall deny for a period of two years any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c). If an institution denies an individual assistance under the authority of the preceding sentence of this subsection, then any institution which such individual subsequently attends shall deny for the remainder of the two year period any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c).

(b) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has willfully refused to obey a lawful regulation or order of such institution after the date of enactment of this Act, and that such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny, for a period of two years, any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c).

(c) The programs referred to in subsections (a) and (b) are as follows:

(1) The student loan under title II of the National Defense Education Act of 1958.

(2) The educational opportunity grant program under part A of title IV of the Higher Education Act of 1965.

(3) The student loan insurance program under part B of title IV of the Higher Education Act of 1965.

(4) The college work-study program under part C of title IV of the Higher Education Act of 1965.

(5) Any fellowship program carried on under title II, III, or V of the Higher Education Act of 1965 or title IV or VI of the National Defense Education Act of 1958.

(d) (1) Nothing in this Act, or any Act amended by this Act, shall be construed to prohibit any institution of higher education from refusing to award, continue, or extend any financial assistance under any such Act to any individual be-

cause of any misconduct which in its judgment bears adversely on his fitness for such assistance.

(2) Nothing in this section shall be construed as limiting or prejudicing the rights and prerogatives of any institution of higher education to institute and carry out an independent, disciplinary proceeding pursuant to existing authority, practice, and law.

(3) Nothing in this section shall be construed to limit the freedom of any student to verbal expression of individual views or opinions.

Depts. of Labor and HEW Appropriation Act of Oct. 11, 1968, Pub.L. 90-557, 82 Stat. 969, Title IV.

Sec. 411. No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant who has been convicted by any court of general jurisdiction of any crime which involves the use of or the assistance to others in the use of force, trespass or the seizure of property under control of an institution of higher education to prevent officials or students at such an institution from engaging in their duties or pursuing their studies.

Independent Offices . . . Appropriation Act of Oct. 4, 1968, Pub.L. 90-550, 82 Stat. 937, Title I, *sub. nom* National Science Foundation:

". . . . And provided further, that if an institution of higher education receiving funds hereunder determines after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has, after the date of enactment of this Act, willfully refused to obey a lawful regulation or order of such institution that such refusal was of a serious nature and contributed to the disruption of the administration of such institution, then the institution shall deny any further payment to, or for the benefit of, such individual." [This proviso applies only to funds supplied by the National Science Foundation].

NASA Appropriation Act of July 3, 1968, Pub.L. 90-373, 82 Stat. 280, Sec.1(h).

"No part of the funds appropriated pursuant to subsection (a) of this section may be used for grants to any nonprofit institution of higher learning unless the (NASA) Administrator or his designee determines at the time of the grant that recruiting personnel of any of the Armed Forces of the United States are not being barred from the premises or property of such institution except that this subsection shall not apply if the Administrator or his designee determines at the time of the grant that recruiting personnel of any of the Armed Forces of the United States are not being barred from the premises or property of such institution except that this subsection shall not apply if the Administrator or his designee determines that the grant is a continuation or renewal of a previous grant to such institution which is likely to make a significant contribution to the aeronautical and space activities of the United States. The Secretary of Defense shall furnish to the Administrator or his designee within sixty days after the date of enactment of this Act and each January 30 and June 30 thereafter the names of any nonprofit institutions of higher learning which the Secretary of Defense determines on the date of each such report are barring such recruiting personnel from the premises or property of any such institution."

Dept. of Defense Appropriation Act of Oct. 17, 1968, Pub.L. 90-580, 82 Stat. 1120, Title V.

Sec. 540. No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant who has been convicted by any court of general jurisdiction of any crime which involves the use of force, trespass or the seizure of property under control of an institution of higher education to prevent officials or students at such an institution from engaging in their duties or pursuing their studies.