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Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations†

In the first issue of this Quarterly, the editors declared:

We expect LAW IN TRANSITION QUARTERLY will continue to treat those "constitutional powers of the people"—e.g., equal protection, free speech and assembly, due process of law...—all of which concern everyone interested in the jurisprudential problems of modern democratic society.¹

In keeping with its title, Law In Transition Quarterly also expected to treat these powers in a condition of change. This article is right in line with that expectation. Our purpose is to outline a proposal concerned with the academic freedom of students, and ultimately to suggest that at least certain aspects of that freedom should and shall receive constitutional protection. In the course of the article, however, it will become clear that this is a rough outline, a speculative venture readily subject to challenge. Indeed, even the suggestion that academic freedom may in any form be applicable to students, rather than only to teachers, has recently again been said to make no sense whatever.² Nevertheless, it is time to make a beginning if only to stimulate further reflection on a subject which, as we hope to show, is not without significance to a modern democratic society.

The article is organized as follows. First, a brief review of how courts have treated (or maltreated) student academic freedom. Second, an attempt to demonstrate why the general legal tradition respecting student rights is no longer relevant. Third, a tentative statement of a system of student academic freedom, and an attempt to ground that system in the equal protection clause of the fourteenth amendment.

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†A companion piece concerning the procedure followed in disciplining students appears in 10 U.C.L.A. L. REV. 368 (1963), Procedural Due Process and State University Students.
¹11 LAW IN TRANSITION Q. ii (1964).
1. Suffer the Little Children:

As one surveys the results of earlier attempts by students to secure their legal protection from arbitrary dismissal, he is struck by the expressive unconcern of the courts. This, for instance, is how the Illinois Supreme Court responded in 1891, to a student's claim that his failure to be excused from attending chapel at the state university did not justify his dismissal:

By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; that he shall not visit certain places; his hours of study and recrea-
tion,—in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters. . . .

Here, in a 1917 opinion by a New York Court was the judicial response refusing reinstatement of a student after dismissal from a university for having participated in off campus, non-university political meetings in which he decried World War I as a "dollar war," and in which he opposed the draft:

[N]ot the least important of the functions of a school or college has been to instil and sink deep in the minds of its students the love of truth and the love of country. Is such conduct as that of the plaintiff calculated to make it more difficult for the defendant University to inculcate patriotism in those of its student members—if there be such unfortunates—who are without it? Does language of the sort used by the plaintiff at public meetings—for I assume that he is in substance correctly quoted—make him a real or potential menace to the morale of the defendant's student body and a blot on the good name of the famous and honored University whose degree he seeks?

Universities, as conceived by these and other state courts, were not unique institutions whose special function it is to provide educational opportunities. Rather, they were general function agencies which combined the responsibilities of the church, the civil and criminal law, and the home, in the rearing of the young. They were, in short, surrogate parents and accordingly endowed with vast discretion:

As to the 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. . . .6

*  *  *

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.

. . .7

Acting on this view, and likening a university to a school for girls on the one hand8 and a seminary on the other,9 even a federal court would allow a university student to be dismissed without a hearing and without inquiring into the cause:

The problem of what constitutes an appropriate reason must clearly be left to those authorities charged with the duty of maintaining the standards and discipline of the school. . . . I hold as a matter of law that the defendant is not required to [hold any hearing before dismissing a student].10

It was enough, for instance, that the student was suspended "for the general good and reputation of the institution," even when that determination was made without written charges, confrontation, or cross-examination of witnesses.11 University students were expected to avoid expulsion by consulting "the Golden Rule," rather than a definite list of specific rules.12 They were expected, for instance, to divine what the college catalogue meant when it provided that:

[T]he college reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable.13

7Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913). See also People ex rel. Pratt v. Wheaton College, 40 Ill. 186, 187 (1866): "[S]o long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family."
STUDENT ACADEMIC FREEDOM

To avoid all misunderstanding that a student might misapprehend his tenuous, subordinate, and unenforceable status in the university, the catalogue might bring the point home this way:

[T]he university reserves the right and the student concedes to the university 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.1

Most lawyers would now perceive among these cases (at least those involving state universities) a vast number of constitutional affronts to the fourteenth amendment. To dismiss a student for failure to attend compulsory chapel,15 or for participating in an off-campus political rally,16 for example, would appear to violate substantive due process respecting freedom of speech and the establishment of religion. To dismiss a student without the semblance of a hearing would seem to violate procedural due process.17 To dismiss him without reference to some rule adequately describing proscribed conduct appears to violate substantive and procedural due process.

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alike.\textsuperscript{18} To dismiss him for reasons unrelated to his academic fitness would seem arbitrary, and a denial of equal protection.\textsuperscript{19}

Surprisingly, however, in few of the cases where constitutional protection of student academic freedom might have been found was it even sought.\textsuperscript{20} Typically, the cases were mandamus actions addressed to the discretion of state courts and bottomed on various common law notions of property or contract. The enfeebled protection of the law, and the notable lack of constitutional sensitivity of counsel and courts alike, are appalling. If they cannot be explained and, more than that, if they cannot now be distinguished or discounted, there would be no merit or real hope in any suggestion that the Constitution may be serviceable for the protection of student academic freedom.

II. Law in Transition.

The sorry tradition of legal neglect may be explained, however, and the typical cases to which we have adverted need not be regarded as an infallible index for the future. The explanations and distinctions include the following.

A. The changing character of higher education. During the time when most of these cases were decided, the opportunity to acquire a university education was not widely regarded as a significant


See also discussion in text infra, note 60 et seq.

\textsuperscript{20} Of over fifty cases reviewed, testing the non-academic dismissal of school and university students, eleven gave some consideration to fourteenth amendment issues. Of these, only two involved any discussion of the constitutionality of the substantive standard (as opposed to the procedure) employed by the educational institution. Five of the eleven cases recognizing constitutional issues originated in the federal courts, one in 1949 and the other four since 1960.
opportunity of substantial national importance. As a consequence, the courts could scarcely be expected to become exercised in reviewing the bases employed by colleges to restrict a seemingly unimportant personal privilege. Currently, however, the personal and national significance of university education enjoys unprecedented recognition. We have come to realize that the opportunity to learn in association with an academic community has enormous value for the student as an individual and for the nation as well. The right to enter into and to maintain that association is valued first of all for its intrinsic opportunities: the pursuit of knowledge, individual self-fulfillment, growth, and expression. Brigaded with these are extrinsic opportunities: to acquire useful professional skills indispensable to employment which is itself self-fulfilling and sufficient to provide an income necessary to meet one’s other basic interests in food, shelter, family, and leisure. It is not only that the average college graduate’s life income will exceed that of others by over $100,000, for averages understate even the economics of a college degree. It is increasingly likely that absent college preparation, employment itself becomes a remote, risky, and short-lived prospect. What the Supreme Court observed in the field of primary education a decade ago is equally applicable today at the university level:

In these days, it is doubtful that any [person] may reasonably be expected to succeed in life if he is denied the opportunity of a [college] education.²¹

Beyond the individual, there are of course the incalculable values of university education to society. Our universities provide a principal source of research and development, nearly the entire source of professional talent, a vast number of direct services, and a humanizing influence uniquely capable of reconciling stability with change through civilized means. The political, economic, scientific, and social significance of university education is reflected in the spectacular increase in university enrollment within the last decade, and the commensurate rise of state, local, and private fiscal support. At the national level, the felt importance of adequate education is equally obvious. Federal appropriations for education rose from roughly two hundred million dollars in 1956 to 750 million in 1964, and the President’s message to Congress proposes to double that amount in 1965 alone. The New York Times succinctly summarized the current

²¹ Brown v. Board of Educ., 347 U.S. 483, 493 (1954), where the Court also noted that: “Today, education is perhaps the most important function of state and local governments.”
primacy of education in national policy: "In choosing the cornerstone for his 'Great Society,' the President has said: 'We begin with learning..." 22 I propose," said Mr. Johnson, 'that we declare a national goal of full educational opportunity." 23 The first distinction to be noted, therefore, is the shift of significance respecting interests in higher education. Accordingly, we might also expect our courts to respond by appropriately insuring that interests in higher education are not denied for arbitrary reasons or by arbitrary means.

B. The changing character of academic freedom. As previously noted, earlier cases were fought out by borrowing and stretching traditional notions of property and contract rights. While these rights were regarded as significant, they did not bring any special quality to a student's claim for legal protection. Rather, dismissal of a student was generally regarded simply as raising a question of whether the university had stuck by its bargain— a question usually resolved in favor of the university because its charter and rules generally indicated that it had committed itself to very little, if anything. 24 Here again, the courts were merely reflecting then current attitudes toward student


23Id. at p. 20, col. 1. Compare Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 634 (1819): "That education is an object of national concern... all admit." Meyer v. Nebraska, 262 U.S. 390, 400 (1923); "The American people have always regarded education and acquisition of knowledge as matters of supreme importance..."

rights, for little was said to suggest that a student's educational opportunity, subject only to conditions respecting academic fitness and a mutual respect for the like opportunity of others, might itself state an interest deserving legal protection, an interest in academic freedom. Thus, in 1915, the American Association of University Professors turned its back on the continental tradition of Lernfreiheit and utterly ignored students in its concept of academic freedom. "Academic freedom," announced one of its founders, "is the freedom of the teacher." In prefacing its report, the AAUP declared:

It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher.

More recently, however, overdue recognition that academic freedom equally applies to the freedom to learn has been achieved. Lernfreiheit has been revived both in terms of policy and law. In 1964, for instance, a committee of the AAUP was in the concluding stages of drafting a detailed statement of student academic freedom which begins:

Freedom to teach and freedom to learn are indivisible. Freedom to learn depends upon appropriate conditions and opportunities in the classroom, as well as opportunities to exercise the rights of citizenship on and off the campus. The achievement and continuance of these conditions of freedom require not only a definition of rights but the establishment of procedures for their protection.

Belated recognition of Lernfreiheit by the AAUP parallels recent and earlier statements of policy respecting student academic freedom by the American Civil Liberties Union and the National

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25Lovejoy, Academic Freedom, 1 ENCYC. SOC. SCI. 384 (1930).
27That this recognition is "overdue" is clear as a historical matter from the fact that it was lernfreiheit rather than lehrfreiheit which was more closely identified with the German tradition of academic freedom which we purported to adopt near the turn of the century. See Hofstadter & Metzger, The Development of Academic Freedom in the United States 383-98 (1955). See also the broad definition of academic freedom by Machlup, On Some Misconceptions Concerning Academic Freedom, 41 A.A.U.P. BULL. 753 (1955); Monypenny, Toward a Standard for Student Academic Freedom 28 LAW & CONTEMP. PROB. 625 (1963); Chorley, Academic Freedom in the United Kingdom, 28 LAW & CONTEMP. PROB. 647, 668 (1963); Commager, The University and Freedom: "Lehrfreiheit" and "Lernfreiheit," 34 J. HIGHER EDUC. 361 (1963). And see Williamson, Students' Academic Freedom, EDUCATIONAL RECORD 124 (July, 1963); Williamson, Do Students Have Academic Freedom?, COLLEGE AND UNIV. 466 (1946).
These and similar expressions have moved the National Association of Student Personnel Administrators "to undertake a major national research survey dealing with the rights and responsibilities of students in their out-of-classroom desires to hear, critically examine, and to express viewpoints concerning issues that face the society. This study is the focal point of the contemporary concept of academic freedom for students."

The gradual recognition of academic freedom has slowly made its way into judicial declarations, some of which specifically include an acknowledgment of the right to learn. In Sweezy v. New Hampshire, for instance, the Supreme Court expressly relied upon "academic freedom" as a constitutionally protected interest and further observed:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

The altered perspective on academic freedom has carried over into the states. Thus, in reversing an injunction against the appearance of a communist speaker on the campus of the University of Buffalo, a New York court declared in 1963:

Petitioner contends that allowing avowed communists to preach their ideology at a tax-supported university cloaks their activities with a mantle of academic and intellectual integrity which makes their subversive propaganda more susceptible to impressionable young people, but we believe that the tradition of our great society has been to allow our universities in the name of academic

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30 NASPA COMMISSION VIII DRAFT 1 (mimeo., Dec. 10, 1964). (Emphasis added.)

31 354 U.S. 234, 250 (1957). (Emphasis added.)
freedom to explore and expose their students to controversial issues without government interference.\textsuperscript{32}

Judicial recognition of the importance of a university education is also evident from recent federal court holdings applying procedural due process to protect students from dismissal without an adequate hearing:

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.\textsuperscript{33}

With the upgraded importance of student academic freedom, there has come a downgrading of the earlier notion that, as a mere "privilege," attendance at a public university could be terminated without cause or hearing because — by definition — no "right" to attend was involved. Thus, still another federal district court ordered reinstatement of college students who had been dismissed without an adequate hearing, basing its holding on the due process clause of the fourteenth amendment and overriding the "privilege" argument which would have been a sufficient defense in years gone by:

The defendants' argument that the interest which the plaintiffs have in attending a state university is a mere privilege and not a constitutional right was specifically rejected in the Dixon case, and the Court thinks rightfully so. Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth.\textsuperscript{34}

Moreover, these judicial opinions are not libertarian inventions of subordinate courts. In recent years, the Supreme Court itself has equally rejected identical defenses ineffectually employed to insulate


the arbitrary dismissal of college teachers from constitutional review, the defense, i.e., that their employment was a mere privilege wholly subject to the state's uncircumscribed discretion:

We need not pause to consider whether an abstract right to public employment exists [in a college teacher]. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.35

* * *

To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.36

What is true for teachers and the "privilege" of teaching is, as we have noted, equally true for students and the "privilege" of learning. Rules which would exclude them from the orderly pursuit of knowledge and which are themselves not reasonably related to the protection of the opportunity of others to learn, equally abridge the right or privilege of student academic freedom.

C. The changing character of constitutional liberties.

As the importance of higher education has altered, and as the concept of academic freedom has been extended, so too has the practical content of the fourteenth amendment undergone enormous expansion. It is in the difference between the condition of constitutional liberties of today and fifty years ago that the most adequate explanation may be found for the evident failure of earlier courts to examine the claim of academic freedom under the fourteenth amendment.

In one sense, the difference is as vast as that between the Civil Rights Cases of 1883,37 and the Civil Rights Act of 1964.38 Between these years, the Supreme Court worked an enormous expansion of the constitutional protection of civil liberties. From Patterson v. Colo-

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37109 U.S. 3 (1883).
rado,\textsuperscript{39} in which Mr. Justice Holmes doubted whether the Constitution's protection of speech did more than to incorporate the common law against prior restraint, to \textit{Times v. Sullivan}, and nearly absolute protection of political discourse.\textsuperscript{40} From the \textit{Slaughterhouse Cases} where the Court was of the opinion that equal protection might apply only against racial discrimination\textsuperscript{41} (and even then only against the most outrageous forms), to \textit{Brown v. Board of Educ.}, \textit{Morey v. Doud}, \textit{Griffin v. Illinois}, and \textit{Baker v. Carr}, enveloping equal opportunities in voting, criminal procedure, business, and education.\textsuperscript{42} From Mr. Justice Stone's footnote in \textit{Carolene Products} of 1938, where civil liberties were first passingly acknowledged as preferred constitutional values,\textsuperscript{43} to the point where virtually eighty per cent of the Court's current constitutional caseload involves the protection of these preferred values.\textsuperscript{44} It would unnecessarily labor the point to proliferate examples, but perhaps at least two are in order. In outlining the early judicial response to claims for academic freedom, we briefly quoted from a 1917 New York state court which upheld the dismissal of a university student who conducted himself off campus in a manner inconsistent with the school's supererogatory mission to inculcate patriotism. The constitutional and philosophical bases against such a

\textsuperscript{39}205 U.S. 454, 462 (1907). \textit{But see} Mr. Justice Holmes' subsequent statement in \textit{Abrams v. United States}, 250 U.S. 616, 630 (1919).


\textsuperscript{41}83 U.S. 36, 81 (1873). \textit{See also} Buck v. Bell, 274 U.S. 200, 308 (1927).


\textsuperscript{44}\textit{E.g.}, in the 1963-1964 Term of Court, forty of the fifty decisions accompanied by an opinion and concerned with constitutional questions, were roughly within the "civil rights-civil liberties" field, as reported by the American Jewish Congress.
view first appeared in a judicial opinion two years later, in a dissent by Mr. Justice Holmes who said:

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [our] wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.45

In 1943, this concept of protected free speech was applied to condemn a state statute requiring students to salute the flag "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." Rejecting the pinched view of the New York court of 1917, and in keeping with Holmes' attitude toward freedom of speech the Supreme Court declared:

Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. . . .

The fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.46


Again, contrast the 1891 opinion of the Illinois Supreme Court, reflecting indifference to the separation of church and state and permitting a state university to compel chapel attendance, with the altered significance of the establishment clause in U.S. Supreme Court opinions since 1947:

Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.\textsuperscript{47}

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The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.\textsuperscript{48}

The point to this abridged synopsis of changing concepts of civil liberties and constitutional rights is not to engender agreement or disagreement with the Supreme Court. It is merely to establish that a significant change has occurred, and to indicate that the change necessarily operates to discredit the earlier tradition in which student academic freedom was not a matter of legal or constitutional concern.

D. \textit{Miscellaneous observations}. Beyond the changing conditions we have noted, there are several smaller ones which further illuminate the relative insignificance of the law's earlier disregard of student academic freedom. Included among these is the fact that today a far higher percentage of students are enrolled in public universities than was previously the case. All of these institutions are of course subject to the fourteenth amendment. Private universities are not constitutionally committed to an equal measure of self-restraint, and consequently it is unsurprising that the majority of earlier cases, which most often concerned private institutions, failed to raise constitutional issues. Today, as an increasing number of univer-

\textsuperscript{47}Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

sities participate in government subsidies, they as well as other schools officially established as state universities become amenable to the fourteenth amendment. Correspondingly, the prospect for the protection of student academic freedom through constitutional litigation increases.

Another factor worthy of mention is the expansion of federal jurisdiction which provides students with access to the federal courts to test their claims of academic freedom. Until recently, due process claims generally, could be brought in the federal courts only where the amount in controversy exceeded $3,000 (now $10,000). The requirement was an obvious deterrent to students, since exact monetary loss was difficult to prove and ordinarily the student preferred reinstatement to damages. With the revitalization of 28 U.S.C. § 1343 and 42 U.S.C. § 1983 in Monroe v. Pape in 1961, freer access to federal courts to test fourteenth amendment claims is now available, and prior exhaustion of local administrative and judicial remedies is not required. While it is true that certain cases originating in the state courts have always been appealable to the Supreme Court, the practical opportunity for appeal (and thus for a more adequate testing of the constitutional claim) was very limited; ordinarily, since such cases involved the application of a university rule rather than a state statute, rejection of the constitutional claim in the state court left the student plaintiff only with the privilege of applying for discretionary review by the Supreme Court. And since the state courts astutely tended to attach an adequate and independent local law reason for refusing the student relief, certiorari was very rarely granted. Thus, only since 1961 have student claims of academic freedom based upon the fourteenth amendment really had a fair chance of being adequately reviewed in a federal court.
Finally, there is the factual demise of *in loco parentis* as an adequate basis for relegating university students to a condition of second-class citizenship. In earlier decades, the concept had some superficial appeal, if only because the vast majority of college students were quite young and generally below the age of eighteen.51 Today, in contrast, there are more students between the ages of thirty and thirty-five in our universities than there are of those under eighteen, and the latter group accounts for only 7% of total college enrollment.52 Indeed, when apologia of *in loco parentis* were tentatively

51Additional arguments for and against *in loco parentis* are reviewed in Van Alstyne, Procedural Due Process and State University Students, supra note 50 at 375-78; In Loco Parentis (Nat'l Student Ass'n, Phil., Johnston ed. 1962); Note, Private Government on the Campus — Judicial Review of University Expulsions, 72 YALE L.J. 1362, 1379-81 (1963). It is interesting that Blackstone acknowledged substantial limits to a parent's authority over his child, that a schoolmaster's exercise of *in loco parentis* was based upon a delegation (rather than an assumption) of the parent's prerogatives, and that the schoolmaster's authority was only "as may be necessary to answer the purposes for which he is employed." Moreover, Blackstone noted that "the power of a father, I say, over the persons of his children ceases at the age of twenty-one." BLACKSTONE'S COMMENTARIES 782-84 (8th ed., 1890, Bancroft-Whitney pub.).

Even in cases involving secondary school children, a number of courts have protected students from arbitrary action, notwithstanding an attempted *in loco parentis* defense. See, e.g., Haycraft v. Grigsby, 88 Mo. App. 354 (1901), 94 Mo. App. 74, 67 S.W. 965 (1902); Phillips v. Johns, 12 Tenn. App. 354, 358 (1930) ("Our Supreme Court has held that even an officer is not justified in searching a whiskey runner's car on suspicion. . . . A child in the public schools of the state is entitled to as much protection as a bootlegger."). Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y. Supp. 759 (1926); Lander v. Seaver, 32 Vt. 114 (1859); Clasen v. Pruh's, 69 Neb. 278, 95 N.W. 640 (1903); Geiger v. Milford School Dist., 51 Pa. D. & C. 647 (1944); McClintock v. Lake Forest Univ., 222 Ill. App. 468 (1921). But see State ex rel. Burpee v. Burton, 45 Wis. 150 (1878); State v. Pendergrass, 19 N.C. 365 (1837); Vermillion v. State ex rel. Englehardt, 78 Neb. 107, 110 N.W. 736 (1907); Smith v. Board of Educ., 182 Ill. App. 342 (1913).

offered in defense of university restrictions at Berkeley last year, a hasty retreat was taken when it was pointed out that the overwhelming majority of students were more than twenty-one years of age.

These, then, are the reasons why one need not despair in contemplating the prospects for constitutional protection of student academic freedom. Beyond that, they may also provide a tentative justification for sketching a constitutional prospectus, one which attempts to define student academic freedom and to test the constitutional permissibility of particular university rules according to the extent of their consistency with that freedom.53

III. The Protection of Student Academic Freedom

Statements of student academic freedom ordinarily have laid understandable stress on affirmative, substantive rights. Generally, these statements have agreed that the hard core of student academic freedom is "freedom to learn." From this common point, various degrees of recognition and emphases are then extended to other rights in terms of their dependence upon this central one, e.g., the right to hear, to study, to write, to discuss, to experience, to explore, and to exercise rights of citizenship.54

When one addresses himself to constitutional limitations on the police power of states, these statements of student academic freedom may be extremely useful. They can be employed in formulating sensible substantive due process claims sufficient to check the states from punishing individuals for exercising certain educational prerogatives merely as private citizens. Such was the case in *Meyer v. Nebraska*,55 in which the Supreme Court struck down a state law which made it a criminal offense to teach any subject in any school (including the private school involved there) in any language other than

53In addition, reinstatement following dismissal has sometimes successfully been sought on non-constitutional grounds. See, e.g., Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924), cases cited in note 51 supra, and dicta in Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904); Barnard v. Inhabitants of Shelbourne, 216 Mass. 19, 102 N.E. 1095 (1913); Gleason v. University of Minn., 104 Minn. 359, 116 N.W. 650 (1908); Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y. Supp. 490, aff'd mem., 128 N.Y. 621, 28 N.E. 353 (1891). See also University of Ceylon v. Fernando, 1 Weekly L.R. 223 (1960), reversing 58 N.L.R. 265 (Ceylon, 1956); general discussions in note 1 supra.

54See notes 27-29 supra.

55262 U.S. 390, 399 (1923): "While this court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes . . . the right of the individual . . . to acquire useful knowledge. . . ."
English. Such was the case in *Pierce v. Society of Sisters*,\(^6^6\) in which the Court struck down an Oregon statute effectively making it a misdemeanor for one's children to attend a parochial school of their choice. Such a case, too, is *West Virginia Bd. of Educ. v. Barnette*,\(^6^7\) where the combination of laws actually raised a clear substantive due process issue. The *Barnette* case involved a rule making the flag salute compulsory in school, but something more than mere dismissal was threatened against those who did not comply. A student failing to obey the rule was subject not only to dismissal, but to criminal prosecution as a delinquent. Additionally, his parents were separately subject to criminal prosecution for having contributed to that delinquency, *i.e.*, for having failed to coerce him into saluting the flag and for thereby becoming "responsible" for his dismissal from school.

In each of these cases, the challenged state laws were attempts to force individuals to do something or to abstain from something otherwise within their capacity or inclination, under threat of jail. In each, the regulatory or general police authority of the state was backed by a threat of punishment directed against personal liberty or the deprivation of some incident of property owned by the individuals or groups being regulated.

The problem which concerns us, however, is not immediately of this kind. For our concern is not with state laws which punish the nonconformist by threatening to jail him and thus to take away the liberty he previously enjoyed as a private individual. It is, rather, with public university rules the violation of which results, at worst, "merely" in the withdrawal of an opportunity which the state has otherwise undertaken to provide: rules affecting one's status as a student at a public university, enforceable merely by dismissing the student and not by sending him to jail. Our concern, in short, is with cases more like *Hamilton v. Board of Regents*, where the "privilege" of attending the University of California was made conditional upon the willingness of the student to take courses in military instruction and where violation of the condition meant only that the student could not attend the university.\(^5^8\)
While a number of cases have blurred the distinction,\textsuperscript{50} the difference we have noticed continues to be of considerable significance. In constitutional parlance, our concern is properly one of equal protection rather than one of substantive due process. It is with the reasonableness of conditions which limit educational opportunities which states have chosen to provide through public universities, rather than with things which states may be constitutionally obliged to provide in the first place, or with things which states may not forbid individuals to provide or to do for themselves. We are thus in search of some means to determine whether certain rules which limit the “privilege” to secure an education in a publicly-supported university are arbitrary: whether they arbitrarily eliminate some who are as entitled as others to whatever educational advantages the state provides at the university level.

\textbf{A. Substantive due process, equal protection, and the doctrine of unconstitutional conditions.}

While the problem is essentially one of equal protection, certain elements of substantive due process turn out to be of great significance in determining the minimum content of equal protection. A doctrine which encapsulates the vital connection between due process and equal protection, in testing the reasonableness of conditions which restrict a state-supplied opportunity, is the doctrine of unconstitutional conditions.\textsuperscript{60}

The distinction between “rights” and “privileges” which frequently blocked relief when substantive due process (rather than equal protection) was relied upon finds its most familiar expression in a dictum by Mr. Justice Holmes, McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892): “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Walker v. Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953); State ex rel. Billado v. Control Comm’r, 114 Vt. 350, 45 A.2d 430 (1946); Blackman v. Board of Liquor Control, 95 Ohio App. 177, 113 N.E.2d 893, appeal dismissed, 158 Ohio St. 368, 109 N.E.2d 475 (1952).

\textsuperscript{59} Sherbert v. Verner, 374 U.S. 398, 404 (1963): “Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s ‘right’ but merely a ‘privilege.’ It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege.” See also notes 31-37 supra; note 60 infra.

The doctrine of unconstitutional conditions generally holds that enjoyment of governmental benefits may not be conditioned upon the waiver or relinquishment of significant constitutional rights, in the absence of some compelling social interest which justifies the subordination of those rights under the circumstances. It has been held, for instance, that a state cannot condition the privilege of a foreign corporation to engage in local commerce upon the willingness of the corporation to relinquish its federal right to remove diversity actions to an appropriate federal court. Similarly, it has been held that a state cannot compel a person to surrender substantive due process rights of belief, speech, and association, as a condition of receiving the benefit of property tax exemptions for which he otherwise qualifies. In these and other cases, the state was admittedly free wholly to withhold a benefit it was without constitutional obligation to provide. In electing to provide that benefit, however, the state was not free to do so in a manner which operated to abridge constitutional rights. In each case, the invalid abridgment resulted not from a direct prohibition of the right, but from subjecting the adversely affected party to an unreasonable dilemma — a choice free in law but not in fact — to suffer a loss of constitutional freedom or to forego benefits which those with fewer scruples might enjoy. Understandably, the Supreme Court has taken the position that government may not use its wealth and power ineluctably to erode the constitutional rights of those too weak to resist temptation, too indifferent to their own welfare, or too cynical to care. It has maintained, rather, that any restrictions on the availability of governmental benefits must be independently justified by compelling interests which are substantially connected with such restrictions. Otherwise, these restrictions will be invalidated as arbitrary, i.e., as a denial of equal protection.
The doctrine has considerable relevance to the permissible scope of university rules. As citizens, students are constitutionally free (and protected in that freedom) to engage in a vast variety of activities, or to abstain from such activities, as they choose. They may, for instance, exercise their freedom of speech to ridicule the governor, argue for the admission of Red China to the United Nations, sign a petition urging a general blockade of Cuba, or participate in orderly demonstrations to promote any lawful end. They may exercise their freedom of the press to publish a weekly newspaper or a monthly magazine, as in United Press Int'l v. Reporters' Ass'n, 342 U.S. 599 (1952); to publish a book, as in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); to express ideas in an oral address, as in Cowley v. Louisiana, 85 S.Ct. 453 (1965); or to express ideas in a written address, as in New York Times v. Sullivan, 376 U.S. 254 (1964). They may engage in many other activities, as in the cases of Edwards v. South Carolina, 372 U.S. 229 (1963); *Staub v. Baxley*, 355 U.S. 313 (1958); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Schenck v. United States*, 249 U.S. 47 (1918); *O'Brien v. United States*, 391 U.S. 258 (1968); *Schneider v. New York*, 308 U.S. 147 (1939); *Abington School District v. Schempp*, 374 U.S. 203 (1963).}


religious liberties by subscribing to a church of their own choice or by steadfastly remaining aloof from any religious endeavor.65 They may travel where they choose,66 associate with whom they please,67 listen to whom they like, and read what interests them, all without governmental restrictions not constitutionally valid against citizens in general.

Accordingly, if any of these preferred liberties are to be surrendered or qualified as a condition of remaining in good standing at a public university, it can only be as a result of some compelling societal interest which specially justifies such a restriction under the circumstances of associating with a university.68 Unless the exercise of these liberties can fairly be said substantially to impair the legitimate purposes for which a university is established and maintained, moreover, it cannot readily be seen how a university-imposed restriction upon those liberties can be justified.

Although this statement of the matter might appear to be self-evident, it is of extreme importance because it reiterates at least two propositions generally overlooked by a number of courts and universities. First, it makes clear that a university rule which threatens a student with dismissal for any activity he is constitutionally entitled to pursue as a citizen carries the burden of establishing precisely how that activity would especially interfere with the legitimate business of the university. Thus, a student is under no obligation to demonstrate how all of his general conduct contributes to his education, or how it positively enhances whatever opportunities the university provides, if his conduct relates to matters which the state is not otherwise free to forbid. A student need not, for instance, defend his purchase and reading of Lady Chatterly’s Lover, Tropic of Cancer, American Opinion Magazine (the Birch organ), or his signature on a petition calling for the abolition of the House Committee on UnAmerican Activities, for he is free to pursue these enterprises as a citizen, sheltered from restriction by the state by the First Amendment. In

65See cases and materials supra, notes 15, 46-48, 58.
67For a significant recent discussion, see Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1 (1964).
68See notes 43, 60, 63 supra.
short, the following view of the Illinois Supreme Court of 1891 is, as a
general proposition, absolutely incorrect:

By voluntarily entering the university, [the student] necessarily
surrenders very many of his individual rights. How his time shall
be occupied; what his habits shall be; his general deportment;
that he shall not visit certain places; his hours of study and
recreation,—in all these matters, and many others, he must yield
obedience to those, who for the time being, are his masters. . . .

Rather, by entering the university an individual necessarily surrenders
no constitutionally protected right the qualification of which is not
essential to the lawful business of the university.

Second, not only does the university have the burden to
demonstrate in what manner a given rule is necessary to preserve its
functions, it must of course take care that the functions it assumes and
seeks to protect by that rule are themselves constitutionally legitimate.
It cannot, for instance, promiscuously incorporate within a general
function of "education" a number of objectives constitutionally with-
drawn from the state itself. It may not defend a rule requiring chapel
attendance, or payment of a fee to support a religious affairs center,
by attempting to incorporate direct support of religion as an aspect of
some presumed function of "educating students in good morals." It
may not forbid students from listening to George Lincoln Rockwell, or
from affiliating with the Communist Party (at least off campus and on
their own time) by attempting to incorporate direct support of politi-
cal orthodoxy as an aspect of some presumed function of "educating
students in good citizenship." It may rule against such conduct only to
the extent that some particular manifestation disrupts or detracts from
its legitimate business, as it would were students to demonstrate for
Rockwell by parading through classrooms, or as it would were a
student to declaim noisily in favor of communism in the middle of the
library. Such rules, of course, are aimed at the necessity for order to
enable the university to get on with its lawful business, and to enable
others to take advantage of whatever the university provides. The
impact of these rules on constitutionally protected rights which stu-
dents have as citizens is purely incidental, their thrust is to the
reasonable time, place, and manner of exercising private rights com-

69 North v. Board of Trustees of Univ. of Ill., 137 Ill. 296, 27 N.E. 54, 56
(1891).
70 See, e.g., Poulos v. New Hampshire, 345 U.S. 395 (1953); Breard v.
Alexandria, 341 U.S. 622 (1951); Feiner v. New York, 340 U.S. 315 (1951);
Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569
(1941); Clemons v. Congress of Racial Equality, 201 F. Supp. 737 (E.D. La.
1962); People v. Nahman, 298 N.Y. 95, 81 N.E.2d 36 (1948).
patibly with the university's business, their necessity is clear, and their neutral enforcement is accordingly unobjectionable.

It may still appear that what we have suggested as to the permissible scope of university rules is extremely bold. If so, it is probably because of a general failure to keep touch with the bold development of substantive due process, and not because we would necessarily disagree with the relevance of the doctrine of unconstitutional conditions. We may have assumed, for instance, that Lady Chatterley's Lover or Tropic of Cancer were not protected against state censorship. But the fact is otherwise, and it is correspondingly doubtful whether adult-age students can be barred from reading them on their own time as a condition of matriculating or remaining in good standing at a state university. We may have supposed that membership in the Communist Party is per se subject to criminal punishment, but that again is false. Indeed, it remains doubtful whether a state university can dismiss even a teacher solely because of such an affiliation, since "membership itself may be innocent" and the fact of membership does not itself establish that the teacher has abused his position in the university or acted to bring about an avoidable evil. Much more would probably have to be shown before dismissing a student who has no classroom in which he exercises authority over a captive audience, who does not so significantly participate in institutional government, and who draws no salary from the state.

In fact, however, the doctrine of unconstitutional conditions does not carry us far enough. For all it does is to provide that a student may

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not be dismissed from a public university for engaging in conduct which the state could not punish generally, or for refusing to engage in conduct which the state could not require generally. (And even this is subject to the qualification that where the conduct would especially affect a substantial legitimate concern of the university not shared by the state in general, a rule forbidding or requiring that conduct may be tolerable.)

By negative implication, moreover, it leaves the public university free to dismiss a student for any conduct otherwise subject to general restriction by valid state laws. For a rule which threatens to dismiss any student who violates a valid law does not appear to state a condition which operates to abridge any constitutional right, and thus it can scarcely be described as an unconstitutional condition in the technical sense thus far employed. One has no constitutional right to drive drunkenly, for instance, and he cannot successfully claim that any constitutional prerogative is abridged by a general law which makes drunk driving a punishable offense. Similarly, a university rule which operates merely to withdraw the privilege of attending a state supported college from one who drives drunkenly cannot be said to interfere with a substantive constitutional right. The opportunity to attend a university at state expense is not, in the first instance, such a right nor is the prerogative to drive drunkenly such a right. Conditioning the one upon abstaining from the other consequently is unobjectionable in terms of the narrow doctrine of unconstitutional conditions. The same would be true even when we move from this less serious to more serious examples, e.g., rules threatening to dismiss any student who engages in any unlawful demonstration or who unlawfully disturbs the peace, regardless of where the unlawful conduct takes place. In short, the doctrine of unconstitutional conditions does not per se restrain a public university from indiscriminately providing that “any student who violates any valid federal, state, or local law shall be dismissed.”

See, e.g., Due v. Florida A. & M. Univ., 233 F. Supp. 396, 399 (N.D. Fla. 1963), where the university rule leading to indefinite suspension of students read:

Disciplinary action will be taken against students for: * * *

6. Misconduct while on or off the campus. This includes students who may be convicted by the University officials, or city, county, or Federal police for violation of any of the criminal and/or civil laws.

The concept of equal protection, however, is not exhausted by the doctrine of unconstitutional condition alone. For the equal protection clause does more than to restrain government from limiting state supplied opportunities on various bases which are arbitrary solely because they would require a forfeiture of constitutional rights. Rather, it protects equality of opportunity from arbitrary limitations in general. Indeed, where the opportunity is a significant one, a rule which would operate to forfeit that opportunity may deny equal protection though the conduct to which it is related is otherwise properly forbidden by general laws. For instance, what may be a perfectly appropriate standard for purposes of determining whether a person should be prosecuted under a state antitrust statute may be wholly inappropriate in determining whether he should lose his driver’s license. And it will shortly be seen that even where the reference to unlawful conduct has some relevance to a legitimate policy involved in the granting of the privilege in question, still the indiscriminate use of that reference may be so harsh and inessential as to deny equal protection merely because it is comparatively, and not absolutely, arbitrary.

B. The Broader Concept of Equal Protection.

Equal protection, as we have noted, insulates individuals from arbitrary limitations on opportunities supplied by government as well as from arbitrary limitations on opportunities individuals or groups are otherwise capable of providing for themselves. By far the best known instance of an arbitrary restriction on an opportunity supplied by government is Brown v. Board of Educ. in which the compulsory racial segregation of public school children was condemned. An equally important instance is Griffin v. Illinois, holding that states may not limit the state supplied opportunity to appeal from a criminal conviction according to a rule requiring appellants to pay for a transcript to be used on appeal. The rule was struck down in spite of the fact that the rule had a rational connection with a legitimate

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interest of the state, namely, an interest in holding down the cost of maintaining an appellate process, by requiring appellants to pay for their own transcripts. Moreover, the rule did not operate to require any appellant to surrender any constitutional right as a condition of taking an appeal. The rule was deemed to deny equal protection, therefore, not because it was "absolutely" arbitrary, (i.e., lacking any rational connection with any legitimate purpose) but frankly because it was "comparatively" arbitrary in the sense of being harsh and inessential. It was harsh, because the operative effect of requiring appellants to pay for transcripts was to withdraw from indigent defendants an opportunity of great significance, namely, an opportunity to test the legal sufficiency of their criminal conviction. It was inessential, because as the Court noted there were alternative means available to the state for economizing in the appellate process without so severely disadvantaging indigent appellants.

We can be certain that had the rule in *Griffin* restricted the opportunity to appeal not merely in the interest of holding down the costs of maintaining an appellate process, but in the interest of deterring certain types of criminal offenses, it would also have been held to deny equal protection: a rule, say, which generally allowed appeals to be taken "unless the appellant had previously been convicted of tax fraud, robbery, or disturbing the peace." For admitting that these forms of conduct are punishable, admitting that the opportunity to appeal is just a privilege the state need not make available to anyone, admitting that the rule may even have some deterrent effect on these crimes, still the rule seems too arbitrary to withstand constitutional challenge under the equal protection clause. It denies the opportunity to appeal without regard to the probable merit of the appeal or the pressing need of the defendant, and it only obliquely serves a general law enforcement function which can be adequately accomplished by alternative means. It is, in short, a denial of equal protection because it is harsh, inessential, and comparatively arbitrary.

There emerges from *Griffin* and the developing line of equal protection cases a pattern of analysis or general technique which the Court employs to determine whether any given rule which limits the availability of one or another opportunity denies equal protection. Specifically, the analysis incorporates the following considerations:

1) What is the character and importance of the interests which the state is attempting to protect or promote by the rule in question?
2) What is the character and importance of the interests adversely affected by the rule in question?

3) How substantial is the connection between the particular basis of classification represented by the rule in question and the legitimate purpose(s) it is designed to serve?

4) Are there available to the state alternative means of serving those purposes adequately, without so adversely affecting the significant interests of those who are placed at a disadvantage by the rule in question?

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951). (Emphasis added.)

If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose . . . practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those . . . practices, the regulation cannot be sustained.


Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary and not merely rationally related to the accomplishment of permissible state policy.


In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.


But the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.


Moreover, even if a compelling state interest were shown, the burden remains on the state "* * * to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."


The measure of constitutional review, as we noted previously in notes 43 and 63 supra, is not always as severe as indicated in these cases. We are relying upon the Court's own declared emphasis on the importance of an individual's interest in education in suggesting that the "exceptional" standard of rigorous review is applicable to rules which condition one's vital interest in attending a university. See discussion in text and notes supra, notes 19-37.

Some readers may also note that the quotations are taken from due process, as well as from equal protection, cases. Aside from the persistent threshold
The explicit statement of these questions merely brings to the surface what is otherwise implicit in the cases, namely, that whether a given classification is "arbitrary" or "discriminatory" in a constitutional sense is always a comparative or relative matter. For instance, a law restricting the use of (state supplied) public school auditoriums to those who are not "subversive elements" is not wholly arbitrary, because it does have some tendency to serve a legitimate interest in protecting the state from seditious or treasonous activity by cutting down the likelihood of sedition being brought about by speakers who might otherwise use such auditoriums to inspire members of the audience to take seditious action or to enter into extremely dangerous conspiracies. Nevertheless, the law was held by the California Supreme Court to deny equal protection because (a) it adversely affected extremely significant interests in freedom of speech, (b) it sought to accomplish its objectives by means which denied speaking opportunities to many persons who might not, in the course of using a school auditorium, conduct themselves in such a way as to create any risk of seditious activity, and (c) the state had ample alternative means of safeguarding important security interests without resorting to this type of rule, e.g., it could adopt and enforce specific, uniform criminal statutes to deter dangerous activity of the kind which was only obliquely and clumsily reached by the rule in question. In short, this rule, like the one in Griffin, was condemned primarily because it too was harsh and inessential, and not because it was literally without any rational connection to any interest within the power of state government to protect.

It is, then, in this broader context of equal protection that we may begin again to determine the propriety of university rules which limit the significant interest each student has in maintaining his association with a public university. The question may fairly be raised, for instance, whether there is justification for a rule which threatens to "right-privilege" distinction which tends to control the description of a case as one of due process or one of equal protection, virtually identical considerations frequently are employed. Compare Gideon v. Wainwright, 372 U.S. 335 (1963) with Griffin v. Illinois, 351 U.S. 12 (1956). See Karst, Legislative Facts in Constitutional Litigation, 1960 SUPREME COURT REV. 75.

80 Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). See also De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937): "These rights may be abused by using speech or press or assembly in order to incite violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." Buckley v. Meng, 230 N.Y.S.2d 924 (1962), and other materials cited supra, note 64.
dismiss any student who parks overtime on a city street, regardless of
where the offense takes place. The answer must surely be "no." Such a
rule operates to forfeit a significant opportunity (to maintain one’s
association with a university), it is not essential to protect any special
and pressing interest of the university, it at best scarcely reflects upon
the student in terms of how he uses those things the university
provides, and the city has ample means of policing downtown parking
without resort to this oblique, clumsy device gratuitously employed
by the university. The example is trivial, of course, but it may usefully be
extended to far more serious matters. (By itself, moreover, it tends to
make clear that an omnibus university rule threatening dismissal for
any violation of valid state or local laws would, under certain circum-
stances, deny equal protection). For after more than a moment’s
reflection, it becomes clear that the relationship between appropriate
university rules and appropriate general laws is entirely coincidental,
i.e., the existence (or validity) of one does not establish any principled
basis for the existence or enforcement of the other. Certain
conduct which violates no general statute, such as cheating on exami-
nations, is nevertheless properly forbidden by a university rule be-
cause it attempts to gain an unearned advantage over other students
who are equally entitled to a fair test of their educational achieve-
ment. Conduct which does not reflect an abuse of facilities or opportu-
nities which the university provides, however, or which is amply
policed by valid state laws whose enforcement adequately safeguards
whatever legitimate and incidental interest the university may have, is
arguably not a proper excuse for the maintenance of a university rule
enforceable by dismissal. To paraphrase the Supreme Court, “if
[students] have committed crimes elsewhere, if they have formed or
are engaged in a conspiracy against the public peace and order, they
may be prosecuted for their conspiracy or other violation of valid law.
But it is a different matter when [a university seizes upon that
conduct to dismiss those students under rules which are both harsh
and inessential].” Students who brawl on a Florida beach or who
participate in an unlawful downtown demonstration are subject to the
full penalty which the law may apply to that conduct. In engaging in
that conduct, however, they do not abuse any privilege extended them
by the university and a rule threatening them with dismissal is
comparatively so arbitrary that it ought to be condemned as a denial
of equal protection.

Again, even where the conduct may more directly interfere with the university's lawful interests, a substantial issue of equal protection arises if the punishment indiscriminately threatened by a rule properly forbidding that conduct is unduly harsh and inessential. For instance, smoking in the library or dormitories may appropriately be forbidden in the interest of safety. If that interest may be amply protected by, say, forbidding the offending student from using the library for a time or by requiring him to find lodgings elsewhere, however, the penalty of outright dismissal again seems harsh and inessential. Students who hold unlawful demonstrations on the president's front lawn (to choose Professor Hook's timely illustration) may be punished by state law and might well, in addition, be made to forfeit certain campus social or political advantage for a time. Again, however, it is difficult to see the necessity for a rule carrying an automatic penalty of outright dismissal. The denial of equal protection is not confined to cases where the rule carries no definite penalty and where the particular penalty imposed is manifestly disproportionate to the manner in which the university has previously treated indistinguishable cases. It is present in a rule which itself prescribes a harsh and inessential penalty, to be applied indiscriminately. Indeed, it is this latter situation which is more amenable to judicial review, if only because a court is better qualified to determine the necessity for a general classification than to determine the appropriateness of a particular penalty selected from a range of penalties at the discretion of university authorities. The latter case is more likely to be reviewed only to determine whether the student received a fair degree of procedural due process, unless the aberrational use of an unusually severe penalty is particularly gross and easy to demonstrate.

The point, then, is this. That the opportunity to maintain one's association with a university is undoubtedly protected by the equal protection clause. That whether particular university rules restrict that opportunity in an arbitrary fashion which denies equal protection is a

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function of several variables. That among these are: (1) the legitimacy of the purpose served by the rule; (2) the relative significance of that purpose in discharging the lawful functions of the university; (3) the substantiality of the connection between that purpose and the general or particular conduct forbidden by the rule; (4) the substantiality of the connection between that purpose and the punishment prescribed by the rule; (5) the relative importance to the individual student-citizen of the activity which he is forbidden to pursue; (6) the relative importance of the interest which will be denied him if he violates the rule; (7) the availability of alternative means for protecting the university’s legitimate interests without so adversely affecting the student’s educational opportunities.

There is, in all of this, nothing esoteric and nothing which warps or distorts contemporary concepts of equal protection in the defense of student academic freedom. If it appears to depart from a tradition which registered an almost sanctimonious deference to the autonomous authority of university faculties and administrators, it is only because that tradition was itself a departure from constitutional norms — a departure which is no longer (if it ever was) warranted. In bringing the equal protection clause to bear in the protection of student academic freedom, moreover, we merely reiterate a proposition which was made abundantly clear two decades ago that:

The fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted.83

In calling for the “scrupulous protection”84 of educational opportunities under the equal protection clause, we do no more than to observe that “today, education is perhaps the most important function of state and local governments,” and that it is indeed doubtful whether any “may reasonably be expected to succeed in life if he is denied the opportunity of an education.”85

Epilogue

The character of protection of student academic freedom we have roughly outlined is essentially modest. It is modest because it appeals to a concept of equal protection rather than to one of substantive due process. It does not assert that any state has a

84Ibid.
constitutional duty to establish first-rate universities. It does not prescribe the scope or character of a state university's curriculum (beyond limiting it to permissible methods and objectives), the nature of its auxiliary facilities, or even that free public universities shall be established at all. Neither does it seek to elevate those who happen to be students above their responsibilities as citizens. Most assuredly, it does not suggest that general laws to which others are subject as citizens are any less applicable to students as citizens.

Essentially, it merely postulates a right of equal opportunity to pursuewhatever course of study and whatever other advantages are otherwise lawfully provided by a public university. Necessarily, it does hold that all possessing the same qualifications are equally entitled to those advantages, and that the determination of those qualifications must not be made according to standards which seek to promote purposes which are foreclosed to government. Beyond this, it also holds that none shall subsequently be deprived of those advantages without justification according to the considerations of equal protection we have reviewed. Subject to reasonable qualification, it suggests that students must not be deprived of their academic freedom so long as they pursue their studies well and so long as they respect the right of others equally to enjoy this and all other opportunities provided by the university. In short, it suggests that rules which are enforceable by depriving students of their own academic freedom must find their justification, if at all, in the mutuality of that freedom.