# POLITICAL SPEAKERS AT STATE UNIVERSITIES: SOME CONSTITUTIONAL CONSIDERATIONS

WILLIAM W. VAN ALSTYNE †

Ten years ago, the New York Times, in a survey of political censorship on major university campuses, concluded that: "a subtle, creeping paralysis of freedom of thought and speech is attacking college campuses . . . limiting both students and faculty in the area traditionally reserved for the free exploration of knowledge and truth." [1] Events of the intervening decade have not altered the truth of this observation. Campus censorship in 1962 easily rivaled that of any previous year. From coast to coast, and particularly in the Midwest, student bodies were quarantined from a variety of political heresies.[2] With certain notable exceptions,[3] the prevailing university philosophy rejects the notion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." [4] Many university officials seem to believe that they are obliged, by the responsibility of their offices, to insulate their impressionable wards from error by restricting what they shall hear.

The controversy with which this Article deals does not revolve about the college classroom, but the university auditorium, amphitheatre, or student union—campus places traditionally thought to be proper forums for discussion of heterodox ideas and political issues. This dichotomy is important. It clearly distinguishes the legitimate right of administrators to select their faculties by their own standards from the questionable attempt to apply the same criteria in the choice of casual guest speakers. Universities must of necessity have the right to pass upon the credentials of their teaching staffs. Students enroll

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† Associate Professor of Law, Ohio State University. B.A. 1955, University of Southern California; LL.B. 1958, Stanford University. Member, California Bar.

1 N.Y. Times, May 10, 1951, p. 1, col. 2. See also N.Y. Times, May 11, 1951, p. 29, col. 8; *id.*, p. 26, col. 3. An unpublished study by the Director of the Institute of Public Affairs of the State University of Iowa in September, 1950, indicated that 175 publicly supported institutions—42.36% of all colleges responding to the survey—did not allow use of their facilities by political speakers.

2 See N.Y. COUNTY LAWYERS ASS'N COMM. ON CIVIL RIGHTS, REPORT ON CAMPUS CENSORSHIP (1962); N.Y. Times, May 28, 1962, p. 31, col. 8.

3 Self-acknowledged, active officials of the Communist party were allowed to speak at the Universities of Minnesota, Oregon, and Wisconsin.

4 Abrams v. United States, 250 U.S. 616, 630 (1919).

in particular courses because the university tacitly guarantees that the professor possesses the necessary educational background and intellectual objectivity to qualify as an expert in his assigned field. In addition, by accepting tuition, public institutions impliedly warrant that their teaching staffs are qualified, and will offer a reasonable program of instruction in return. Moreover, attendance in many classes is compulsory. Since students may be compelled at least to listen to an instructor's views, the university must assure the student that the ideas presented are those of a responsible academician. Finally, professors award grades which may be relied upon by third parties. If grades are to reflect fairly the student's mastery of a subject, they must be given by a person who is qualified, in the opinion of the university's trustees, to judge the student's competence impartially.[5]

The justifications for careful screening in the appointment of professors are inapplicable, however, to the selection of guest speakers. Guests who are invited by student groups to speak in available auditoriums or halls do not have the university's imprimatur as experts. The university does not charge admission to the address in exchange for a guarantee of the speaker's qualifications or honesty. Neither does the school require student attendance, nor does it encourage acceptance of the speaker's views by awarding grades. Least of all does the university endorse the speaker's viewpoint. The trustees and administration no more approve the speaker's ideas than does a city council which allows speakers to use city parks. Furthermore, the audience for the guest speaker is not captive. Dissatisfied students are free to stay away, to barb the speaker with questions, and to invite guests of their own with an opposing viewpoint. So long as facilities are not overtaxed by excessive use, and the fundamental curriculum is not upset by endless distractions—conditions not yet reached on any American campus—universities render their best service by not interfering with student access to controversial ideas.

The fact remains, however, that a considerable number of guest lecturers, formally invited to state university campuses by recognized student organizations, have been turned away by members of the administration. It is significant that those to whom the students were forbidden to listen were very often unpopular figures. Judicially enforceable freedom of speech is practically unnecessary for those

[5] These arguments do not, however, justify loyalty oaths or other administrative attempts to stamp a faculty with political orthodoxy. *Cf.* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). On the problem of subversive activities by university faculty members, see generally EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1070-1117 (1958).

espousing the prevailing view; the crucial test comes only when the political deviant is involved. "You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous. . . ." [6] In this critical sense, many institutions of higher learning have not permitted real freedom of speech on their campuses.

Certain organizations, such as the American Civil Liberties Union (ACLU) [7] and the National Students Association (NSA),[8] have strenuously objected to this state of affairs. The ACLU, with substantial support from the American Association of University Professors (AAUP),[9] has insisted that recognized student organizations should be permitted, when facilities are available, to extend an invitation to any guest speaker. "Students should enjoy the same right as other citizens to hear different points of view and draw their own conclusions." [10] Just as the mayor or police cannot prevent a group of citizens from inviting a speaker lawfully to address them in a municipal park, even though those officials view the lecturer as unqualified or subversive,[11] university officials should not be allowed to interfere with similar student organization decisions.

The County Bar Association of New York has recommended essentially just such a student perogative.[12] Referring to a speech by an acknowledged Communist invited by a recognized student organization, President Wilson of the University of Minnesota eloquently stated the case for student freedom:

> We believe it would be a disservice to our students and an insult to our nation's maturity if we were to deny Mr. Davis an opportunity to speak. Over-protected students might at once assume that Davis had something to say which was too strong for our reason and our convictions. The University is the product of a free society. It is neither afraid of freedom, nor can it serve society well if it casts doubts on the

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[6] Rex v. Secretary of State *ex parte* O'Brien, [1923] 2 K.B. 361, 382 (Lord Justice Scrutton); see Gitlow v. New York, 234 N.Y. 132, 158 (dissenting opinion), *aff'd*, 268 U.S. 652 (1925).

[7] See ACLU, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES 7 (Nov. 1961).

[8] See NSA CODIFICATION OF POLICY 28 (1961-62).

[9] The Association has stated that it is "in general agreement with a number of the positions" in the ACLU pamphlet, *supra* note 7. 48 AAUP BULL. 110 (1962).

[10] ACLU, *op. cit. supra* note 7, at 7.

[11] See Hague v. CIO, 307 U.S. 496 (1939); Rockwell v. Morris, 211 N.Y.S.2d 25 (Sup. Ct. 1960), *appeal dismissed*, 9 N.Y.2d 791, 175 N.E.2d 162, 215 N.Y.S.2d 502 (1961). See generally CHAFEE, FREE SPEECH IN THE UNITED STATES 409-31 (1941).

[12] See N.Y. COUNTY LAWYERS ASS'N, *op. cit. supra* note 2, at 5.

> ability of our free institutions to meet the challenge of doctrines foreign to our own.[13]

The arguments of the AAUP and NSA in favor of campus freedom of speech have been based essentially on policy grounds. The Constitution, however, does not guarantee the most enlightened policies;[14] it requires only that governmental action be fundamentally fair.[15] A recent statement of the American Bar Association's Committee on the Bill of Rights, however, is particularly significant because it emanates from an organization professing constitutional expertise. The ABA Committee is of the opinion that "no question of the Bill of Rights is involved" where university officials decide that spokesmen for the Communist party shall be denied access to university facilities ordinarily available for guest speakers.[16] The Committee report is expressly limited to Communists; the text indicates that the same immunity would not necessarily exist when other prospective speakers are involved. Indirectly, the arguments of the AAUP and NSA appear to concede as much, for they have been based essentially on appeals for an enlightened policy rather than on appeals to the Constitution. In a larger sense, however, much of what is urged by these organizations is in fact fully supported by constitutional mandates and is not dependent upon securing the enthusiasm of university trustees or state legislatures.

It is the thesis of this Article that the ABA Committee's position with regard to Communist speakers is wrong. Settled principles of constitutional law require a liberality in state university rules dealing with guest speakers far beyond what that Committee suggests or what currently prevails on many campuses.

## I. Supreme Court Standards and the State University Problem[17]

The first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." This

[13] University of Minnesota Alumni News, June, 1962, p. 20. The AAUP conferred the 1961 Alexander Meiklejohn Award on President Flemming of the University of Oregon for similar action and an equally vigorous statement. See 48 AAUP Bull. 177 (1962).

[14] See, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Rostow, *Japanese-American Cases—A Disaster*, 54 Yale L.J. 489 (1945).

[15] The Supreme Court has often equated due process with fundamental fairness. See Palko v. Connecticut, 302 U.S. 219, 325 (1937); Herbert v. Louisiana, 272 U.S. 312, 316 (1926); Holden v. Hardy, 169 U.S. 366, 389-90 (1898).

[16] N.Y. Times, July 22, 1962, p. 49, col. 2.

[17] I do not intend to discuss speeches of a nonpolitical nature. Such speeches, involving obscenity, group libel, and fighting words, are not part of the present university problem.

constitutional prohibition has been incorporated into the fourteenth amendment so as to apply also to the states as an aspect of substantive due process.[18] The amendment must, therefore, be obeyed by state universities, because they are state agencies and responsible as such.[19]

It is therefore necessary to determine what restrictions on guest speakers imposed by state universities constitute an "abridgement." The critical word, "abridgement", has not, of course, been given its literal dictionary definition—reducing or diminishing even slightly[20]—nor could it be, consistent with maintenance of order and protection of life. In fact, the first amendment has come to mean both more and less than its language literally suggests. Some forms of non-oral expression are protected although, strictly speaking, they are not "speech" or "assembly"; conversely, a great deal of emotionally inciting speech may be restricted.[21] In some circumstances, oral expression may be functionally identical with physical acts which, because they precipitate immediate violence, are clearly punishable. A favorite illustration is the case of an individual who falsely shouts "fire" in a crowded theater.[22] The result is no less pernicious than the panic the shouter would have produced had he kindled a smoke bomb in the theater. It is perfectly clear that the shouter may be criminally punished, notwithstanding that the threat of severe punishment may be viewed as deterring "speech."[23] The point need not be belabored—not all abridgements of speech are unconstitutional under the first amendment.[24]

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[18] Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[19] See Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); see also *Ex Parte* Virginia, 100 U.S. 339 (1879). All of these cases arose under the equal protection clause. There is no reason, however, to distinguish between that clause and due process, since both require state action. One court, in dictum, has suggested that the fourteenth amendment may also be applicable to so-called private universities. See Guillory v. Tulane University, 203 F. Supp. 855, 858 (E.D. La. 1962).

[20] 1 WEBSTER, NEW INTERNATIONAL DICTIONARY 7 (2d ed. 1956).

[21] Picketing and parades are protected under certain circumstances. Group and criminal libel and fighting words are not. See, *e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

[22] The illustration is that of Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919). See also MEIKLEJOHN, POLITICAL FREEDOM 39-43 (1960); CHAFEE, FREE SPEECH IN THE UNITED STATES 15, 129-30 (1941).

[23] Courts are reluctant to find sufficient danger to justify suppression in anticipation of delivery of a speech. See, *e.g.*, Staub v. Baxley, 355 U.S. 313 (1958); Thomas v. Collins, 323 U.S. 516 (1945). They will, however, sustain post-utterance punishment under similar circumstances. See Feiner v. New York, 340 U.S. 315 (1951).

[24] I do not mean to take issue with those who have argued that the first amendment is absolute, at least with respect to certain subjects. See Meiklejohn, *The First Amendment is an Absolute*, 1961 SUPREME COURT REVIEW 245; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). I have tried only to describe the current state of the law. However, the absolutists may be vulnerable on historical grounds. See LEVY, LEGACY OF SUPPRESSION (1960). They, like Mr. Justice Black, have done a good deal of "balancing" in defining beforehand what is absolutely protected.

Rarely do speeches by university guest lecturers, however, sufficiently resemble the "fire" case to justify suppression on that ground.

Traditionally, the standard applied by the Supreme Court in judging the constitutionality of restraints on speech has taken the following form: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent." [25] Recently, the Court modified the clear and present danger test in this respect: "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [26] By substituting probability of grave evil for clear and present danger, the Court has partially eliminated the requirement that the state prove the danger imminent. If a grave substantive evil is likely to result from a speech, the speaker may be restrained even though the evil will occur tomorrow rather than today.[27] Moreover, the necessary quantum of danger varies inversely with the gravity of the evil. With certain minor embellishments,[28] this accurately describes the present test applied by the Court.

Universities have experienced difficulty with both parts of the test. They have improperly identified the kinds of evils that are constitutionally within their power to prevent, and have failed to develop conclusive standards by which to isolate speakers whose presence on campus will probably incite violence.

Maximally, the evils which justify restraints of speech are coterminous with substantive legislative power.[29] A state, for example,

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[25] Schenck v. United States, 249 U.S. 47, 52 (1919); *accord*, Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

[26] Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting Judge Hand in the lower court, 183 F.2d 201, 212 (2d Cir. 1950)). In certain instances of statutory construction, the test in the *Dennis* case has been made more stringent. See Yates v. United States, 354 U.S. 298 (1957); Hellman v. United States, 298 F.2d 810 (9th Cir. 1961).

[27] The change introduced by the *Dennis* rule tends to place emphasis on silence as the means of avoiding substantive evils rather than on countervailing discussion. See Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis J., concurring); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1428 (1962).

[28] It has been argued that even the *Dennis* test does not apply when the repressive effect of legislation restricting speech is incidental to the primary purpose of the legislature. See Frantz, *supra* note 27, at 1428-30. The cases cited by Frantz, however, would not affect the application of the *Dennis* test to university guest speakers. See Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167 (1961).

[29] The word maximally is used advisedly. Justice Brandeis wrote, in Whitney v. California, 274 U.S. 357, 377-78 (1927):

> [E]ven imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a rela-

clearly can punish persons who assault the governor or who sabotage city hall. Speech which would make such action highly probable may, therefore, also be punished. On the other hand, the state cannot punish those who vote against the governor, or who vote to sell the city hall at public auction. It would accordingly be unconstitutional for the legislature to prescribe punishment for those who advocate, urge, or incite the public to vote in such a fashion, no matter how great the probability that, as a result, the governor will lose the next election or city hall will be sold. No matter how strongly the legislature detests these prospects or suspects the motives of their advocates, it cannot constitutionally prevent their advocacy.

Although the distinction is obvious, it is pathetically ignored. Many of those prevented from speaking on state university campuses would have advocated lawful conduct only. They would have encouraged acts which, no matter how disagreeable or evil to the university administration, could not legally be proscribed.[30] Repeal of the McCarran Act or disbanding of the House Committee on Un-American Activities by vote of Congress could not be punished. Speeches which urge their elimination by any and all constitutional means are, therefore, equally inviolate. The same is true of talks urging recognition of Communist China, impeachment of the Chief Justice, cessation of nuclear testing by executive order, or desegregation by legislative action. Since the type of action urged is not censurable, neither can the prevailing majority, in order to insulate itself from change, censor speech designed to bring about such action. With regard to the commonplace ban against Communists, supported by the Bar Association Committee, even expression designed to produce a communist state is protected if the means being advocated are themselves lawful.

The American Bar Association Committee might, of course, point to the congressional finding, accepted by the Supreme Court,[31] that the

> tively trivial harm to society. . . . Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression.

See generally, CHAFEE, THE BLESSINGS OF LIBERTY 102-16 (1956); MEIKLEJOHN, POLITICAL FREEDOM 45-50 (1960). *But see* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[30] See Fiske v. Kansas, 274 U.S. 380 (1927); DeJonge v. Oregon, 299 U.S. 353 (1937) (dictum). The *Fiske* case is discussed in CHAFEE, FREE SPEECH IN THE UNITED STATES 351-52 (1941).

[31] Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

world Communist movement intends to overthrow our government unlawfully—by force and violence. If this were actually attempted, it would clearly be punishable. Speeches, therefore, which are likely to incite violent revolution may also be punished or restrained.[32]

What this point of view overlooks, however, is that not all action urged by Communists can be punished.[33] Communists on occasion advocate legislative nationalization of industry, or executive recognition of Communist China. Speeches urging these objectives cannot be prevented merely because they are delivered by individuals who also harbor the view—but not then expressed—that violent revolution is desirable. A flat ban on Communist speakers is constitutionally defective precisely because it is unlimited. It fails to distinguish between the kinds of substantive change advocated. A ban directed at the speaker rather than at the course of conduct urged on a particular occasion goes too far. It ignores not only the nature of the action to be urged, but also the "probability" requirement of the Supreme Court test. Even if a proposed speech would urge unlawful action, circumstances may be such that the audience is highly unlikely to respond favorably. A remote tendency to incite unlawful action is not enough to justify suppression.[34] To illustrate the foregoing proposition, suppose a recognized student group were to invite the Soviet Ambassador to address them on "The Meaning of the Treaty of Antarctica in Soviet-American Relations." Unless it could be demonstrated that the Ambassador would depart from the chosen subject to move his audience to unlawful action, which is highly unlikely, a state university could not bar him from its campus consistently with any current interpretation of the fourteenth amendment. We may assume that the Ambassador is a member of the Communist Party and an agent of a hostile foreign power. Among his other views, he may favor violent overthrow of our government. He may not be barred on this occasion, however, because the particular speech he proposes to make will not incite violence. For this very reason, the Supreme Court of California invalidated a state law which banned "subversive elements" from public school auditoriums.[35] The California court quoted the United States Supreme Court in *DeJonge v. Oregon*:[36]

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[32] Scales v. United States, *supra* note 31; Dennis v. United States, 341 U.S. 494 (1951).

[33] See Cramp v. Board of Pub. Instruction, 368 U.S. 278, 286-88 (1961); Hellman v. United States, 298 F.2d 810 (9th Cir. 1961); note 30 *supra*.

[34] See Yates v. United States, 354 U.S. 298 (1957). See also Rockwell v. Morris, 211 N.Y.S.2d (Sup. Ct. 1960), *appeal dismissed*, 9 N.Y.2d 791, 175 N.E.2d 162, 215 N.Y.S.2d 502 (1961).

[35] Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946). See also ACLU v. Board of Educ., 359 P.2d 45, 10 Cal. Rptr. 647 (Sup. Ct. 1961).

[36] 299 U.S. 353 (1937).

> The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling 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 laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.[37]

Thus it is clear that the decision to bar a prospective guest speaker from campus must be based on the text of the proposed speech and its probable effect, rather than on the affiliation of the speaker.[38] To the extent that the ABA Committee Report adopts a contrary position, it is in error.

There is one other aspect of the problem which should be noted before returning to the broader questions. A number of universities may have banned controversial speakers without any apprehension that those favorable to the speaker would riot in support of the ideas urged. Instead, they may have feared that those opposed to the speaker would precipitate violence. Superficially, this reactive form of violence seems equally to justify suppression, inasmuch as there would be a substantial probability of physical disorder. "[I]t is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker." [39] But this proposition is valid only to a very limited extent. Unless the exception is extremely limited, it will invite those who would suppress free speech to manufacture the evil needed to justify official restraint. For this reason, the threat of disorder in opposition to the speaker must clearly "rise far above public inconvenience, annoyance, or unrest," [40] for "constitutional rights . . . are not to be sacrificed or yielded to . . . violence and disorder . . . ." [41] In the area of

[37] *Id.* at 365-66.

[38] See Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Thomas v. Collins, 323 U.S. 516 (1945); DeJonge v. Oregon, 299 U.S. 353 (1937); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); Buckley v. Meng, 230 N.Y.S.2d 924 (Sup. Ct. 1962). See also Buckley v. Meng, 224 N.Y.S.2d 136 (Sup. Ct. 1962).

[39] Niemotko v. Maryland, 340 U.S. 268, 289 (1951) (concurring opinion). See also Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Kasper v. Brittain, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).

[40] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[41] Cooper v. Aaron, 358 U.S. 1, 16 (1958).

segregation, also a fourteenth amendment problem, the Supreme Court has held that the maintenance of public tranquility must yield to the guarantee of equal protection.[42] "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." [43] Even the narrow exception is forfeited if opposition to the speaker is encouraged by the inflammatory statements of state officials. Under such circumstances, not even a material disturbance of the public order will justify suppression.[44] This formulation is eminently sensible. It is based on the proposition that those who are alarmed by what they believe to be false and misleading opinions should exercise their own freedom of speech in rebuttal; they cannot so structure the market place of ideas that only sentiments agreeable to them can be heard.

## II. Equal Protection and Free Speech

This is not to suggest that a state university must necessarily make its facilities available to all speakers or even to the large majority who would not incite unlawful action. Granting that freedom of speech occupies a preferred position in the hierarchy of constitutional values,[45] it does not follow that it may be exercised at any time, in any manner, on any state property, without regard to the primary use to which the property has been dedicated. The corridors of a state office building may be closed altogether to political speakers, lest such use of them effectively impair their essential function as passageways. Public streets have traditionally been used for parades and demonstrations, but modest, nondiscriminatory licensing has been sustained to preserve their primary utility as thoroughfares.[46] Restrictions upon the time, place, and manner of speaking necessarily reduce the absolute-

[42] Cooper v. Aaron, *supra* note 41.

[43] Buchanan v. Warely, 245 U.S. 60, 81 (1917); *cf.* Kunz v. New York, 340 U.S. 290 (1951); Hague v. CIO, 307 U.S. 496 (1939); Rockwell v. Morris, 211 N.Y.S.2d 25 (Sup. Ct. 1960), *appeal dismissed*, 9 N.Y.2d 791, 175 N.E.2d 162, 215 N.Y.S.2d 502 (1961). The same principle was involved in Schneider v. State, 308 U.S. 147 (1939). The Court there held that the likelihood that the recipients of handbills would litter the streets was insufficient justification for restraining the distributor. See also Feiner v. New York, 340 U.S. 315, 327 n.9 (1951) (dissenting opinion); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U.L. Rev. 489 (1951); Note, *Problem of the Hostile Audience*, 49 Colum. L. Rev. 1118 (1949).

[44] Cooper v. Aaron, 358 U.S. 1 (1958).

[45] See Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 102 (1943); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). See also Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945). *But see* Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (concurring opinion).

[46] Cox v. New Hampshire, 312 U.S. 569 (1941). *Cf.* Feiner v. New York, 340 U.S. 315 (1951); Clemmons v. Congress of Racial Equality, 201 F. Supp. 737 (E.D. La. 1962).

ness of freedom of speech, but some accommodation of competing interests which also merit protection is obviously required.[47] In this regard, a college campus is constitutionally distinguishable from a public park in which no form of prior restraint of political assemblies is sustainable.[48] But in regulating the use of its facilities, a state university may not discriminate among speakers on the bases either of their affiliation, or the controversial or allegedly disreputable nature of their opinions. The problem is, at heart, more a function of the equal protection clause than of substantive due process.[49]

Application of these general considerations to state universities, however, is difficult. The federal courts have never had occasion to determine the proper accommodation of the competing interests in this particular context. What constitutes the primary function of university facilities remains a matter of opinion. Offices and corridors, of course, may be closed to speakers altogether. But auditoriums, unused classrooms, malls, and amphitheatres are structually suited and largely designed for assemblies of one sort or another. Since they are especially suitable speaking places, a university might reasonably be required to open them to any person or organization when space is available and the applicant is willing to meet the costs generated by his appearance.

Two state courts, while requiring nondiscriminatory standards once public school facilities had been opened to some speakers, have suggested that school property need not have been made available to outsiders in the first instance.[50] A complete ban on guest speakers would, according to those courts, be a reasonable means of reserving the premises for their primary educational function. Such dicta, even if correct, are of limited applicability to the state university problem, since most of these institutions already permit at least some outside speakers to use their facilities. Once this is done, the equal protection argument, which was sustained by the two courts, governs.

The dicta are, in any case, of questionable validity. A state is under no constitutional duty to establish municipal parks or other convenient public meeting places. But once it does, the state may not then

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[47] See Poulos v. New Hampshire, 345 U.S. 395 (1953); Breard v. Alexandria, 341 U.S. 622 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); People v. Nahman, 298 N.Y. 95 (1948); EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 797-801 (1958).

[48] See Rockwell v. Morris, 211 N.Y.S.2d 25 (Sup. Ct. 1960), *appeal dismissed*, 9 N.Y.2d 791, 175 N.E.2d 162, 215 N.Y.S.2d 502 (1961); *cf.* CHAFEE, FREE SPEECH IN THE UNITED STATES 418-30 (1941).

[49] See cases cited note 38 *supra*.

[50] Buckley v. Meng, 230 N.Y.S.2d 924, 933 (Sup. Ct. 1962); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946). See also Ellis v. Dixon, 118 N.Y.S.2d 815 (Sup. Ct. 1953); Annot., 86 A.L.R. 1175 (1933).

close the parks to public assembly. To paraphrase the Supreme Court, "the question here is not of a duty of the State to supply [speaking facilities], . . . but of its duty when it provides such [facilities] to furnish [them] to the residents of the State upon the basis of an equality of right." [51] Moreover, a definition of "primary educational purpose" that excludes the use of schools by outsiders for political controversy may be too parochial to have constitutional standing in a democratic society.

Even if it is assumed that uninvited speakers do not conform to a university's primary use because they have nothing of educational value to say, discrimination against lecturers specifically invited by recognized student organizations or regular faculty members is still indefensible as a matter of policy, and as a matter of law as well. It would be extremely farfetched to assert that a university's educational purpose is totally circumscribed by its curriculum, so that even invited speakers do not contribute to its primary function.

## III. The Doctrine of Reasonable Time, Place, and Manner

Up to this point it has been assumed that the "primary purpose test" requires that a speaker can be barred upon a showing that his appearance would not affirmatively contribute to the educational goals of the university whose premises he uses. This formulation is, however, entirely too narrow, and tends dangerously to frustrate the protective purpose of the clear and present danger test. The mere irrelevance of proposed speech to the primary use of state owned property is not enough to justify restraint. Municipal officials cannot prevent assembly in a public park because the proposed gathering will not affirmatively contribute to the park's primary function as a place of recreation or refreshment. A similar argument by a state university to excuse the withholding of its speaking facilities should also be rejected. The correct test is not whether the proposed use will affirmatively contribute to the primary use, but whether it will intolerably burden the school's facilities.[52] State universities may deny guest speakers access to premises structurally suited for addresses in only two situations—when the proposed speech is likely to detract substantially from the rest of the educational program, or when it is not otherwise constitutionally

[51] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938); see Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Dixon v. Alabama, 294 F.2d 150, 156 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961); Banks v. Housing Authority, 120 Cal. App. 2d 1, 16-17, 260 P.2d 668, 677 (1953), *cert. denied*, 347 U.S. 974 (1954); Miller, *An Affirmative Thrust to Due Process of Law*, 30 Geo. Wash. L. Rev. 399 (1962).

[52] See note 43 *supra*.

protected because of the evil it will probably produce.[53] Furthermore, the interference with the educational program must be direct, fully equivalent to the disruption of traffic caused by a parade. It is not enough that some offended taxpayers or legislators may retroactively "harm" the university because it has loaned its premises to an "undesirable" speaker. Such a situation is indistinguishable from that of a school board which must desegregate even in the face of legislative threats of punitive measures.

The correct standard, therefore, must take into consideration the reasonableness of the time, place, and manner of the proposed speech. A university may properly subordinate requests for the use of its facilities by guest speakers to all of its regularly scheduled activities. Reasonable men may differ as to whether a particular address will actually contribute more to the educational program than would a conflicting university-sponsored activity. Courts, however, are extremely unlikely to second-guess this aspect of administrative discretion;[54] a showing of good faith is the most that would be required. In addition, a rule limiting the use of college premises to speakers invited by recognized student organizations, faculty members, or administrative personnel may be valid as a reasonable precaution against frivolous outside use.[55] It is doubtless true that certain unsponsored uses have as much educative value as a sponsored lecture. But regard for administrative difficulties in making ad hoc judgments of this kind, however, may justify the broader rule as a reasonable regulation. Of course, student and faculty invitations themselves may be disapproved by the university administration—even though the proposed speech would not incite unlawful action—if there is substantial reason to believe that the proposed assembly will materially disrupt the regular educational program.

This final principle may appear to grant the university part of the same authority claimed for it by the American Bar Association Committee Report. An administrator might, for example, cancel an invitation to a Communist, not on the basis of his affiliation or opinion, but because the speaker's presence would disrupt the regular educa-

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[53] See note 17 *supra* and accompanying text.

[54] In various circumstances, courts have deferred to discretionary decisions made by university administrators. See Webb v. State Univ. of New York, 125 F. Supp. 910 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954); Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952); *cf.* Hamilton v. Regents of Univ. of Calif., 293 U.S. 245 (1934); Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); Anthony v. Syracuse Univ., 130 Misc. 249, 223 N.Y. Supp. 796 (Sup. Ct.), *rev'd*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

[55] See note 50 *supra* and accompanying text. This would only be true, however, if the university did not discriminate in recognizing student groups.

tional program. If the university unarbitrarily applied clear and specific rules, and if there was substantial evidence to support the decision, the result might indeed be the same as under the Bar Association opinion. But the very qualifications listed show that the two approaches are fundamentally different. Moreover, as the decision may constitute a prior restraint, it will be subject to "more exacting judicial scrutiny" than virtually any other problem of constitutional law.[56] The standard applied must not be "so vague as to invite discrimination" or so broad as to rest on the "untrammelled discretion" of the decision maker.[57] Finally, even if the university's rules are carefully drawn, the particular decision will be invalid unless consistent with previous university conduct.[58]

The disruptions which justify restrictions on guest speakers are extremely limited. Outside community harassment or the known propensity of taxpayers to retaliate through the ballot are insufficient; otherwise, no public forum for the exchange of ideas would long remain open to any political minority. Rather, the disruption must physically interfere with the regular college program. Some examples are a speech so scheduled as to encourage students to be absent from class in substantial numbers; one which would compete with a regularly scheduled university function being held on another part of campus; or an assembly conducted in so raucous a manner as to disturb library, office, or classroom work. However, modest inconveniences of the

[56] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). See also cases cited note 45 *supra*; Saia v. New York, 334 U.S. 558 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940); Lovell v. Griffin, 303 U.S. 444 (1938); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951); McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959); Note, *Prior Restraint*, 49 COLUM. L. REV. 1001 (1949).

[57] Buckley v. Meng, 230 N.Y.S.2d 924, 928 (Sup. Ct. 1962). See also Thomas v. Collins, 323 U.S. 516 (1945); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939). Very often, the doctrine of constitutional vagueness turns on the lack of adequate notice as to what is forbidden. See Winters v. New York, 333 U.S. 507, 515 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939). Because a speaker, in applying for a permit, is advised in advance of what is proscribed, the absence of notice as an element of vagueness may be missing and the doctrine therefore inapplicable. See Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957); Note, 62 HARV. L. REV. 77, 79 (1948). *But see* A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925); Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).

Nevertheless, there are at least three objections to vagueness of rules for licensing of political discussion. (1) It inadvertently encourages arbitrary decisions by the administrator who lacks sufficient standards to guide his judgment. This may result in an unreasonable burden on applicants to seek judicial clarification. (2) It provides inadequate standards for court review of administrators' decisions. See Watkins v. United States, 354 U.S. 178, 204-05 (1957). (3) The apparent breadth of the licensing rules may discourage the exercise of rights which may be constitutionally protected. The applicant may choose to forego his rights rather than submit to the expense and burden of litigation. See Smith v. California, 361 U.S. 147 (1959); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 197 (1955); 23 OHIO ST. L.J. 355 (1962).

[58] See Buckley v. Meng, *supra* note 57.

latter type are insufficient justification for disapproval of a speaker. A useful analogy may be made to assemblies or peaceful picketing on public walks which may not be restrained unless traffic will be substantially impeded.

## IV. Conclusion

Universities would render a far greater service by abandoning substantive limitations on guest speakers altogether. Any other policy necessarily expresses a skepticism of student intelligence and fear of the appeal of today's social critics. Both inferences are contrary to the categorical imperatives of a free society. All that ought to be required of any student organization or faculty member wishing to invite a guest speaker should be adequate notice of the time and place of the proposed address, so as to make certain that speaking facilities will be physically available and that the event will not cause undue congestion.

Even though some may find these propositions unacceptable as a matter of policy, it remains true that the power to impose more stringent conditions is sharply circumscribed by the requirements of the Constitution. With respect to speeches of a political character and speakers invited by members of a university community, the Constitution permits a state to ban only those who would exhort their audience to unlawful action, it being reasonably clear that they would succeed in their attempt if allowed to appear. Although a state university may also require that speeches be scheduled for a reasonable time and place and be conducted in a peaceful manner, so as not to disrupt other university activities, surely only a few invitations will be disqualified on this basis. Here, as in matters of race relations and religious toleration, the Constitution may exact a greater measure of generosity than would otherwise be acknowledged; it is probably well that it does.