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**CONSTITUTIONALLY INTERPRETING
THE FSM CONTROVERSY**

Robert Post

A glance at the FSM controversy of 1964 illustrates the remarkable rhetorical and cultural power of First Amendment freedoms. Struggles over these freedoms tend to assume a characteristic narrative form, with those seeking to liberate communication claiming the high ground of progress and emancipation against the retreating forces of conservative authority and censorship. Retrospective accounts of the FSM controversy display the customary earmarks of this narrative, pitting courageous students against a retrograde administration. But reconciling the First Amendment values expressed by this stark narrative to the domain of a public university is genuinely puzzling, for it is clear that universities legitimately and necessarily exercise the most pervasive discipline of communication.

Admission to universities, for example, typically requires evaluation of the written submissions of applicants. After admission, classroom discussion is strictly controlled: students must ordinarily restrict their comments to particular topics; they must express

themselves in a civil manner; they must not speak unless recognized; they must obey severe time constraints.

Student grades will largely depend upon an assessment of their writing. They will be penalized for poor grammar, illogical thinking, insufficient comprehension, or outlandish ideas; they will be rewarded for clarity, elegance, innovation, or intellectual mastery.

Faculty expression is also extensively regulated. Faculty are hired after close scrutiny of their writing. Their eventual tenure will turn on judgments concerning the professional competence of their scholarship, as will their advancement within the ranks and steps of the professorate. University distribution of grants, research support and other discretionary resources ordinarily entails close review of faculty expression. Faculty teaching is tightly controlled as to its subject matter, and it is carefully reviewed for its effects on students.

It is impossible to dismiss these regulations of speech as involving merely constraints of time, place, and manner. They instead entail judgments that are both content- and viewpoint-based. Faculty hired to teach astrophysics who insist instead upon teaching astrology are subject to discipline. Students required to write an examination about the behavior of whales risk failure if

they insist instead upon discussing the aesthetic structure of Moby Dick. Historians who advocate the view that the Holocaust never happened are unlikely to receive tenure. Chemistry students seeking to explain physical phenomena on the basis of phlogiston theory will assuredly suffer academic reversals.¹

These examples illustrate only the most commonplace and routine instances of what must be regarded as a dense and comprehensive web of communicative regulation. It is clear both that such regulation is necessary for the continued existence of universities, at least as we know them, and that the state would be constitutionally barred from imposing analogous regulation upon speech generally. Yet public universities, like Berkeley, are subject to the First Amendment,² which explicitly prohibits "abridging the freedom of speech." Applying this prohibition to the daily functioning of a public university poses a real enigma, an enigma that official pronouncements of the FSM era leave largely unelucidated.

¹ On viewpoint discrimination within universities, see Robert C. Post, "Subsidized Speech," 106 Yale Law Journal 151, 165-67 (1996).

² See Healy v. James, 408 U.S. 169, 180 (1972) ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.").

Consider, for example, the famous resolution of the Berkeley Faculty Senate on December 8, 1964, to the effect "That the content of speech or advocacy should not be restricted by the University."³ Or consider the position in the FSM Platform that "Civil liberties and political freedoms which are constitutionally protected off-campus must be equally protected on campus for all persons. . . . The Administration may not regulate the content of speech and political content."⁴ Taken literally, neither position is compatible with the maintenance of a university.

The tendency to imagine that the First Amendment must mean the same thing on campus as it means off campus remains prevalent to this day. In recent times it has been invoked by conservative forces seeking to prevent the regulation of racist speech by "politically correct" university officials. This was the purpose of the so-called Leonard Law, passed by the California Legislature in 1992, which prohibits private universities from making or enforcing "any rule subjecting any student to disciplinary sanctions solely on the basis of . . . communication that,

³ Quoted in The California Monthly, "Chronology of Events: Three Months of Crisis," in Seymour Martin Lipset and Sheldon S. Wolin, The Berkeley Student Revolt: Facts and Interpretations 181 (New York: Anchor Books 1965).

⁴ FSM Platform, The Daily Californian, Vol. 186, No. 44, November 13, 1964.

when engaged in outside the campus . . . is protected from governmental restriction by the First Amendment.”⁵

On its face the law sets forth a rule that is absurd. If a citizen cannot constitutionally be penalized for advocating astrological determinism in the pages of The New York Times, does the California Legislature mean to say that a physics student cannot be penalized for advocating this same view in the pages of her astronomy examination? Or that the student cannot be disciplined for disrupting classroom discussion by repeatedly advocating this view during a course on the history of the French revolution?

Of course it is highly unlikely that either participants in the FSM controversy or the California Legislature meant for their words to be taken literally. Most probably they had in mind a more or less implicit picture of how universities distinctively regulate speech. In fact if we closely examine the constitutional debates that were so vigorously pressed during the FSM affair, it becomes clear that they were more immediately concerned with the changing nature of this implicit picture than with any specifically legal analysis of the First Amendment. We

⁵ California Education Code § 94367(a). The law was used to strike down Stanford's effort to prohibit racist speech on campus. See Corry v. The Leland Stanford Junior University, Cal. Supr. Court, Feb. 27, 1995, Case No. 740309.

can apprehend why this might be so if we somewhat sharpen our analysis of exactly how the First Amendment applies to state universities.

State universities are public organizations. Modern democratic states use public organizations to accomplish ends determined by democratic self-governance. A primary function of the First Amendment is to subject governmental ends to the perennial revision of a free and unconstrained public opinion. But public organizations could not function if their goals were ceaselessly unsettled in this way.

Within government organizations, therefore, objectives are taken as given; resources and persons are managed in order to achieve these objectives. The management of persons necessarily entails the management of their speech. For this reason the First Amendment has consistently been interpreted to permit the regulation of speech within state organizations where necessary to achieve legitimate organizational ends.⁶ That is why the First Amendment does not prohibit the state from regulating communication within the military to preserve the national defense;⁷ speech

⁶ For a general explication of this account of the relationship between the First Amendment and state organizations, see Robert Post, Constitutional Domains: Democracy, Community, Management (Harvard University Press 1995).

⁷ Brown v. Glines, 444 U.S. 348, 354 (1980).

within the judicial system to attain the ends of justice;⁸ employee speech within government bureaucracies to promote "the efficiency of the public services [the government] performs through its employees";⁹ and so forth.¹⁰

First Amendment analysis of restrictions of speech within public universities follows this general logic. Public universities can regulate speech as is necessary to accomplish their goals. Of course universities have distinct and complex missions. One objective is the advancement of knowledge, which explains why the competence and achievements of faculty can constitutionally be assessed by reference to the professional standards of the scholarly disciplines that define knowledge. On this account, "the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance."¹¹

⁸ See Robert Post, "The Management of Speech: Discretion and Rights," 1984 Supreme Court Review 169, 196-206.

⁹ Connick v. Myers, 261 U.S. 138, 142 (1983).

¹⁰ For a full discussion, see Robert Post, "Between Management and Governance: The History and Theory of the Public Forum," 34 UCLA L. Rev. 1713 (1987).

¹¹ Thomas L.Haskell, "Justifying the Rights of Academic Freedom in the Era of Power/Knowledge," in Louis Menand, ed., The Future of Academic Freedom 54 (Chicago: University of Chicago Press 1996). See, e.g. Academic Personnel Manual of the University of California, § 005.

With respect to students, however, the paramount goal of universities is clearly education. The Supreme Court has thus held that because "a university's mission is education," the First Amendment does not prevent a university from imposing "reasonable regulations compatible with that mission upon the use of its campus and facilities."¹²

First Amendment assessments of university regulations of student speech accordingly always depend upon an account of university objectives in educating students. If university education is understood to aim at processes of socialization and cultural reproduction, so that "college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils,"¹³ then student speech may be regulated as necessary to serve the end of ethical inculcation.¹⁴ Some public universities have recently attempted to stress their role in the cultural

¹² Widmar v. Vincent, 454 U.S. 263, 267 n.5, 268-69 (1981); Cf. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1987) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school."). For a discussion of First Amendment rights within the context of a university, see Robert Post, "Racist Speech, Democracy, and the First Amendment," 32 William and Mary Law Review 267, 317-25 (1990).

¹³ Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913); see John B. Stetson University v. Hunt, 102 S. 637, 640 (Fla. 1924).

¹⁴ For a modern statement of this position, see Papish v. University of Missouri Curators, 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting).

reproduction of community norms to justify restrictions on hate speech.¹⁵ By contrast, if university education is understood to be directed at the creation of autonomous and independent citizens prepared to engage in "our vigorous and free society,"¹⁶ the First Amendment will impose quite different restrictions on campus regulations of speech.¹⁷

Interpreting the constitutional struggles of the FSM controversy, therefore, requires us carefully to attend to implicit disagreements about the educational mission of the university. We can see the outlines of such disagreement in Mario Savio's observation after the decisive faculty meeting of December 8 that the Academic Senate vote was a "direct attack on the doctrine of *in loco parentis*."¹⁸ And we can see it in Jacobus tenBroek's defense of the Senate's vote on the grounds that the educational mission of the university entailed encouraging "students' commitment to the action and passion of our time."¹⁹ This view of the role of university education is also implicit in FSM pronouncements:

¹⁵ See Post, *supra* note 12, at 319-21.

¹⁶ Healy v. James 408 U.S. 169, 194 (1972).

¹⁷ See Post, *supra* note 12, at 321-23.

¹⁸ Quoted in The Daily Californian, Vol. 186, No. 60, December 9, 1964.

¹⁹ Quoted in The Daily Californian, Vol. 186, No. 65, December 16, 1964.

Why do we teach history? Kerr would answer that the only reason we teach history is for "intellectual experience." NONSENSE! One important reason we teach history is to learn from the experience of the past what to do for the present. Learning is not only for its own sake and thus as Chancellor Strong has said, "The University is no ivory tower shut away from the world and from the needs and problems of society."²⁰

This account of university education differs sharply from that which had been offered by university administrators. In the university's official statement on academic freedom, originally articulated by President Sproul in 1934, but officially promulgated by him as University Regulation # 5 in 1944, we read:

The function of the university is to seek and to transmit knowledge and to train students in the processes whereby truth is to be made known. To convert, or to make converts, is alien and hostile to this dispassionate duty. Where it becomes necessary, in performing this function of a university, to consider political, social, or sectarian movements, they are dissected and examined—not taught, and the conclusion left, with no tipping of the scales, to the logic of the facts.

The University is founded upon faith in intelligence and knowledge and it must defend their free operation. . . . Its obligation is to see that the conditions under which questions are examined are those which give play to intellect rather than to passion. . . .

Its high function . . . the University will steadily continue to fulfill, serving the people by providing facilities for investigation and teaching free from domination by parties, sects, or selfish interests. The University expects the State, in return, and to its own great gain, to protect this indispensable freedom, a freedom like the freedom of

²⁰ Free Speech Now, pamphlet, no date, on file in the FSM collection of the Bancroft Library.

the press, that is the heritage and the right of a free people.²¹

In contrast to tenBroek and the FSM, Sproul conceptualized education as a matter of analysis rather than action, "intellect rather than . . . passion." He therefore understood the educational process as requiring vigilant protection from the "domination" of political interests. University rules governing student speech reflected this view of educational mission. In 1938, for example, Sproul prohibited the "use of University buildings . . . for the holding of partisan political . . . exercises. . . . The University of California is a State

²¹ On file in the FSM collection of the Bancroft Library. Sproul's statement remains the authoritative pronouncement of the University of California with regard to academic freedom. See Academic Personnel Manual, § 010. On the stormy context of its original articulation in 1934, see C. Michael Otten, University Authority and the Student: The Berkeley Experience 108-119 (Berkeley: University of California Press: 1970); Robert Cohen, When The Old Left Was Young 118-33 (New York: Oxford University Press 1993). In addressing the Academic Senate, Sproul began:

Day by day in these troubled times the position of university administrative officers grows more difficult as they face questions involving academic freedom or the right of free speech. Both radicals and reactionaries would use the University as an agency of propaganda and each group attacks bitterly those who strive to preserve its integrity as an institution for the discovery and dissemination of knowledge. It seems to me desirable, therefore, to announce to this Senate and to the public the principles which guide the President in these matters and which may be said to be, in a certain sense, the policy of the University.

Minutes of the Academic Senate, August 27, 1934, on file at the Bancroft Library.

educational institution and therefore cannot provide meeting places for these purposes."²²

By 1964, immediately before the FSM controversy, these rules had at the Berkeley campus evolved into a complicated and messy set of regulations,²³ which were summarized on September 21 of that year by Dean of Students Katherine Towle in the following way:

Briefly, these policies reserve the use of campus areas to registered students and staff of the Berkeley campus, prohibit solicitation of funds (including donations) "to aid projects not directly connected with some authorized activity of the University," specify the conditions for the appearance of speakers on campus, and for the distribution of handbills, pamphlets, circulars, and other forms of non-commercial literature.

With respect to the latter, it is permissible to distribute materials presenting points of view for or against a proposition, a candidate, or with respect to a social or political issue. It is not permissible in materials distributed on University property to urge a specific vote, call for direct social or political action, or to seek to recruit individuals for such action.²⁴

The FSM controversy erupted when the campus administration sought to apply these rules to a 26 foot strip of brick walkway at the entry to the campus at the

²² Orders of the President No. 17, February 10, 1938, on file in the FSM collection of the Bancroft Library.

²³ They may be found in the pamphlet published by the Office of the Dean of Students, Information for Student Organizations: 1964-1965, which is on file in the FSM collection of the Bancroft Library.

²⁴ Katherine A. Towle, "Use of Campus Facilities, Including Entrance at Bancroft Way and Telegraph Avenue, and 'Hyde Park' Areas," September 21, 1964, on file in the FSM collection of the Bancroft Library.

intersection of Bancroft Way and Telegraph Avenue. For years this strip of sidewalk had been understood to belong to the City of Berkeley; students had accordingly used it to exercise normal First Amendment rights of partisan solicitation, recruitment, and advocacy. But in the fall of 1964 it was apparently discovered that this land actually belonged to the university, and Chancellor Edward W. Strong sought to terminate the exercise of these First Amendment rights by subordinating speech within the area to the university's educational mission as defined by its campus regulations. The yawning disparity between freedom of speech as enjoyed by citizens, and freedom of speech as defined within the institutional confines of the university, was thus starkly exposed.

The university's regulations were of course rendered instantly controversial. The university was pressed to explain why rights of partisan solicitation, recruitment, and advocacy were inconsistent with the achievement of its educational mission. One justification, which was implicit in Sproul's initial formulation of the issue, was that the university was responsible for inculcating the intellectual virtues of dispassion and disinterest, which could be

accomplished only if students were insulated from the "domination" of partisan advocacy.

This justification was ultimately rooted in the tradition of *in loco parentis*; it assumed that the moral and intellectual development of students required their isolation from the contamination of the passion of political and social "movements." But by 1964 this justification carried little if any persuasive force. This was not because the distinction between intellectual engagement and partisan advocacy had lost its bite; in 1964, as today, the distinction could be used to evaluate the scholarly work of both students and faculty. Although some, like tenBroek and the FSM, sought to justify freedom of political advocacy by merging scholarship with activism, and thus bringing partisan advocacy within the umbrella of academic freedom,²⁵ most took the opposite tack, arguing that political action was simply irrelevant to scholarship. Thus Carl Schorske:

The primary task of the University of California has always been and must always be teaching, learning, and research—not political activity. Our students, however, are citizens, and should enjoy the right to political expression and activity on the campus. That is all that the faculty resolution wishes to establish. Such is the proper division of authority

²⁵ See Jacobus Ten Broek, Norman Jacobson, and Sheldon S. Wolin, "Academic Freedom and Student Political Activity," in Seymour Martin Lipset and Sheldon S. Wolin, *supra* note 3, at 443-48.

for a university in a democratic society, whose youth are both students and citizens.²⁶

By 1964 even Clark Kerr could explicitly acknowledge that "the current generation of students is well characterized as activist."²⁷ Students could and did engage in partisan activity just outside the boundaries of the campus, so that university regulations could not in fact isolate students from political action. The notion that the university could assume responsibility for the comprehensive moral and intellectual supervision of its students accordingly became less and less plausible.

Concomitantly with these developments, "the legal status of students in postsecondary institutions changed dramatically in the 1960s."²⁸ College students began to be seen more as adults and less as minors subject to the moral guardianship of a university—a trend exemplified by the ratification of the Twenty-Sixth Amendment to the Constitution in 1971, which lowered the voting age to 18.

²⁶ "A Message on the Proposed Solution to the Free Speech Controversy: Nine Distinguished Members of the Faculty State Their Views," no date, on file in the FSM collection of the Bancroft Library.

²⁷ Clark Kerr, "A Message to Alumni from President Kerr," California Monthly, Vol LXXV, No. 5, February 1965.

²⁸ William A. Kaplin, The Law of Higher Education: Legal Implications of Administrative Decision Making 175-76 (San Francisco: Jossey-Bass Publishers 1978).

Perhaps as a result of these developments, campus administrators in the fall of 1964 were not prepared to defend university restrictions on partisan activism as necessary in order to ensure the full moral and intellectual development of their students. Instead they articulated a quite different rationale. Sproul's original statement on academic freedom had postulated a bargain between the university and the state, in which the university would provide "facilities for investigation and teaching free from domination by parties, sects, or selfish interests" and the state, in return, would respect the academic freedom and independence of the university. University officials defended prohibitions on partisan activism on the grounds that they were necessary for the university to fulfill its obligations under this bargain.

Kerr had endorsed this position during the Spring of 1964, in his Charter Day Address of May 5. Ironically, Kerr wished to use the university's bargain to defend against conservative demands that students convicted of illegal actions during off-campus civil rights demonstrations be disciplined by the university.²⁹ Kerr argued that "the activities of students acting as private

²⁹ Clark Kerr, "The University: Civil rights and Civic Responsibilities," May 5, 1964, on file in the FSM collection of the Bancroft Library.

citizens off-campus on non-University matters are outside the sphere of the University." Such activities were the concern of the state, which governed students in their capacities as citizens. They did not involve the university, whose jurisdiction extended only to "areas of direct University concern."

Kerr thus postulated a categorical distinction between the role of citizen and the role of student, and he employed the geographical boundaries of the campus as a criterion to separate one from the other. It followed from this argument, however, that individuals while on campus would have to forsake their roles as citizens and fully adopt the role of students, for which, as Sproul had suggested, partisan activism was irrelevant:

Just as the University cannot and should not follow the student into . . . his activities as a citizen off the campus, so also the students, individually or collectively, should not and cannot take the name of the University with them as they move into . . . political or other non-University activities; nor should they or can they use University facilities in connection with such affairs. The University has resisted and will continued to resist such efforts by students, just as it has resisted and will continue to resist the suggestions of others that the University take on some of the functions of the state. The University is an independent educational institution. It is not a partisan political . . . institution; nor is it an enforcement arm of the state. It will not accede to pressures for either form of exploitation of its name, its facilities, its authority. The

University will not allow students or others connected with it to use it to further their non-University political or social . . . causes nor will it allow those outside the University to use it for non-University purposes. The University will remain what it always has been—a University devoted to instruction, research and public service wherever knowledge can serve society.

Chancellor Strong embraced this same justification in defending university restrictions on partisan activism. On September 27th he had been presented with an ASUC Senate petition seeking, in Strong's words, the freedom, in specific geographical areas of the campus, "1) to solicit political party membership, 2) to mount political and social action on the campus, 3) to solicit funds on campus for such action, and 4) to receive funds to aid projects not directly concerned with an authorized activity of the University."³⁰ Strong was uncompromising in his response:

³⁰ Strong, "Chancellor's Remarks, University Meeting, Monday, September 28, 1964, on file in the FSM collection of the Bancroft Library. The petition actually sought:

- 1) Permission to distribute printed material advocating student participation in political and social action.
- 2) Permission to distribute printed material soliciting political party membership, or supporting or opposing partisan candidates or propositions in local or national elections.
- 3) Permission to receive funds to aid projects not directly concerned with an authorized activity of our University.

The Daily Californian, Vol 186, No. 10, September 28, 1964. It is noteworthy that the students did not request the freedom "to mount political and social action," a peculiar locution that took on increasing importance as the FSM controversy developed. The petition did address the central premise of the Kerr position, stating: "I believe . . . that the granting of these same requests in no way

"University facilities are not to be used for any of these four purposes."³¹

Strong justified his conclusion by reasserting Kerr's position that the university needed to distinguish between the status of persons as citizens and their status as students.³² Like Kerr, Strong used the geographical boundaries of the campus to mark this distinction. Citing

sacrifices the administration of our University's affairs to any political and sectarian influence." Id.

³¹ "Any student or group of students seeking to recruit members for social or political action, or to solicit funds for such action, is free to do so off-campus, but is prohibited from doing so on campus." Strong, "Chancellor's Remarks, University Meeting, Monday, September 28, 1964, on file in the FSM collection of the Bancroft Library. Interestingly, The Daily Californian reported Strong's remarks as representing a "substantial concession" because it permitted the distribution of "campaign literature advocating 'yes' and 'no' votes on propositions and candidates, and campaign buttons and bumper strips" at designated campus locations, including the Bancroft-Telegraph entrance. Id. at Vol 186, No. 11, September 29, 1964.

³² Like Kerr, Strong used this distinction to defend against calls to discipline students involved in illegal off-campus political activity.

The University prohibits the mounting of social and political action on campus by reason of the following considerations. If the University permitted its facilities to be used to recruit membership in political parties and to promote social or political demonstrations in a surrounding community, the University could then no longer hold fast to a fundamental position on which it has insisted. The University respects the right of each student as a citizen to participate as he sees fit in off-campus, non-University courses of action. When an individual, in so participating, acts in a disorderly way or is in violation of the law, he is answerable to the civil authorities for his conduct. Some citizens demand further that the individual as a student also be disciplined by the University, that is, that he be censured, suspended, or expelled. We answer such demand by pointing out that we respect the right of our students to act in their capacity as citizens in the public domain.

Strong, "Chancellor's Remarks, University Meeting, Monday, September 28, 1964, on file in the FSM collection of the Bancroft Library.

Sproul's reference to the bargain between the state and the university, Strong argued that the quid pro quo for university independence was that persons on campus lay aside their status as citizens and as a consequence abandon rights of partisan activism:

On the one side, an individual as a student is held responsible by the University for compliance with rules and regulations. On the other side, when a student goes off-campus to participate in some social or political action, he does so on his own responsibility as a citizen. He has no right, acting as a citizen, to involve the University, either by using its name or by using any of its facilities, to further such an action. For, were the University to become involved, the consequence is clear. We ask and expect from the State an indispensable freedom residing in independence - independence that rests on fulfillment of a public trust, namely, that the University will never allow itself to be dominated by, nor used by parties, sects, or selfish interests. By honoring this public trust steadfastly, the University is enabled also to honor and defend the rights of its members to act freely in the public domain in their capacity as citizens. The consequence of defaulting on this public trust would be the erosion of the independence of the university and the destruction of the position maintained by the university respecting the responsibilities of an individual as a student in the university and respecting his rights and responsibilities as a citizen of the state.

The Kerr-Strong position deserves close analysis. A public university certainly does hold a "public trust," which can be compromised only on pain of losing its legitimacy as a public institution. Implicit in this trust are a variety of obligations that include, for example,

requirements of neutrality. A public university would lose its legitimacy were it to become partisan, a supporter of one or another political party.³³ But although the Kerr-Strong position invokes the concept of the university's public trust, it does not ultimately express a vision of that trust.

The closest Kerr and Strong come to such a vision is to intimate that allowing partisan solicitation, recruitment, and advocacy on campus would be inconsistent with proper university neutrality, because it could be understood as official endorsement of partisan activism. But this intimation is implausible, for the university no more endorses the content of all the speech on its premises than it endorses the content of all the books in its

³³ Thus we read in the Report of the President's Commission on Campus Unrest (U.S. Govt. Printing Office 1970):

[T]he frequent assumption of political positions by universities as institutions reduces their ability to pursue their central missions. As Professor Kenneth Keniston has stated:

The main task of the university is to maintain a climate in which, among other things, the critical spirit can flourish. If individual universities as organizations were to align themselves officially with specifically political positions, their ability to defend the critical function would be undermined. Acting as a lobby or pressure group for some particular judgment or proposal, a university in effect closes its doors to those whose critical sense leads them to disagree.

Id. at 190. The Report goes on to observe that "political involvement of the *members* of universities is quite another matter, of course. Students, faculty members, and administrators may participate as individuals in the full range of peaceful political activities." Id.

library. At the beginning of the 1964 school year, for example, Towle had explicitly stated that "it is permissible to distribute materials presenting points of view for or against a proposition, a candidate, or with respect to a social or political issue."³⁴ The university could scarcely authorize such speech if authorization were understood to imply endorsement.

If the Kerr-Strong position does not ultimately rest on an account of the public trust, neither does it express a theory of educational mission. The premise of the position is that geography determines status. This premise seems clearly false. Crimes committed by students on campus are subject to civil prosecution by the state, so that students cannot shed their status as citizens while within the geographical boundaries of the university. Similarly, students do not automatically lose their status as students when they leave the campus. If a student were systematically to intimidate fellow students or professors while off-campus, university discipline would surely be appropriate. A serious theory of the university's educational mission, therefore, would not turn solely on the single parameter of geography.

³⁴ Katherine A. Towle, *supra* note 24.

In fact the Kerr-Strong position appears to rest on the notion that prohibitions of on campus partisan solicitation, recruitment, and advocacy were necessary in order to placate politicians who might otherwise undermine the independence of the university.³⁵ Kerr and Strong evidently believed that allowing on-campus calls for political action risked provoking state suppression of the academic freedom necessary for the university to pursue its mission. Political action was to be prohibited based upon a political calculation about the effects of such activism on the reputation and standing of the university. It is this calculation, and nothing else, that explains the otherwise strange distinction drawn by Towle between "materials presenting points of view for or against a . . . social or political issue" and "materials distributed on University property to . . . call for direct social or political action."³⁶

The suppression of First Amendment rights on the basis of a political calculation of this kind is certainly suspect. Although sometimes warranted by extraordinary

³⁵ See, e.g., "Strong's Statement, The Daily Californian, Col 186, No. 13, October 1, 1964 ("Some students demand on-campus solicitation of funds and planning and recruitment of off-campus social and political action. The University cannot allow its facilities to be so used without endangering its future as an independent educational institution.").

³⁶ Towle, note 24 supra.

circumstances, it is presumptively impermissible to deny First Amendment rights on the basis of anticipated adverse reactions.³⁷ More importantly, however, the university's interest in fostering political support for its legitimate mission does not stand on the same constitutional footing as does its interest in the exercise of its legitimate mission. Whereas the latter unproblematically supports restrictions on speech that would not be permissible in the larger society, the former does not. It would almost certainly be unconstitutional for the university to seek to protect its political interests by suppressing the off-campus organization and speech of students who were effectively opposing a bond initiative legitimately and urgently needed by the university.³⁸ It is not clear why it would be any more justified for the university to protect these same political interests by suppressing the identical organization and speech on campus.

Because the Kerr-Strong position did not articulate a principled vision of university mission, but instead advanced a political judgment about potentially adverse

³⁷ See, e.g., Forsyth County, GA. v. Nationalist Movement, 505 U.S. 123 (1992); Terminiello v. Chicago, 337 U.S. 1 (1949). Compare Feiner v. New York, 340 U.S. 315 (1951).

³⁸ See, e.g., Pickering v. Board of Education, 391 U.S. 563 (1968).

political consequences, its authority depended, at least in part, upon student perceptions of its good faith and wisdom.³⁹ It requires a fair degree of trust for persons to refrain from doing what they would otherwise have a right to do on the basis of a political calculation of this kind, which no doubt contributed to the way in which the FSM conflict later became so intensely personalized. And the accuracy of the judgment underlying the Kerr-Strong was always open to question.⁴⁰ Certainly it is pertinent to

³⁹ It is clear that some on campus were persuaded by the Kerr-Strong position. So, for example, the editor and managing editor of The Daily Californian authored an editorial arguing:

For decades the University has preserved its integrity and academic excellence by remaining as politically aloof as possible from the surrounding environment.

To allow the University to become a political instrument would be to invite those forces in the public arena to begin to dabble in the administration of the University and bring to an end this era of independence. . . .

The Free Speech Movement . . . fails to realize that those individuals transporting political and social activity from this campus to the surrounding communities will not be treading on one-way streets, but rather two-way streets. Coming in the opposite direction, sooner or later, will be state legislators, law enforcement agencies, and the public itself.

Editorial, "An Appeal to the Regents, The Daily Californian, Vol. 186, No. 60, December 9, 1964.

⁴⁰ As Philip Selznick observed at the time:

It is interesting that the 'realist' defense of the original policy, as necessary to the protection of the university from conservative criticism, was given small weight by the administration when the need to abandon untenable distinctions became apparent. This suggests that the basic policy never had any good reason for being, even as a defensive tactic, and was a needless affront to the sensibilities of the students.

Philip Selznick, "Reply to Glazer," in in Seymour Martin Lipset and Sheldon S. Wolin, *supra* note 3, at 304.

observe that history has proved it demonstrably incorrect. Partisan solicitation, recruitment, and advocacy are now permitted on campus, but the independence of the university has not for this reason been compromised. We have not been forced to purchase our academic freedom at the price of a monastic asceticism.

Finally, and most importantly, it is also relevant in assessing the Kerr-Strong position that it directly challenged the FSM to inaugurate a spiral of increasingly chaotic political instability. This is because practical political calculations like those advanced by Kerr and Strong are always sensitive to the costs of alternative courses of action. The FSM thus had every incentive to use its political strength to alter the terms of the administration's political calculus. By implacably increasing the price of maintaining restrictions on partisan activism, the FSM could seek to change the context of the administration's judgments, and in this way to force the administration to reconsider its political reckoning. Strong might with reason complain that this tactic constituted "defamation of authority duly exercised," which "undermines respect for high offices and demoralizes a

society,"⁴¹ but the logic of the tactic was dictated by the form of the justification offered by the administration.

In fact, FSM tactics proved highly effective. As the costs of repressing speech mounted, university officials were forced to re-evaluate their assessment of relative risks. They consequently began to offer concessions.⁴² By November 20, the Regents, at Kerr's urging, changed university policy to permit "certain campus facilities, carefully selected and properly regulated," to be "used by students and staff for planning, implementing, raising funds or recruiting participants for lawful off-campus action, not for unlawful off-campus action."⁴³ The new policy, said Kerr, met the demands pressed by the ASUC

⁴¹ Address of Edward W. Strong to the Town and Gown Club, November 2, 1964, quoted in "Chronology of Events: Three Months of Crisis," in Seymour Martin Lipset and Sheldon S. Wolin, *supra* note 3, at 136.

⁴² See, e.g., Motion of Frank Kidner, dean of educational relations, in the Committee on Campus Political Activity, November 5, 1964: "We [the administration representatives to the committee] would vote for a language which would recommend to the Chancellor, and then to the President or the Regents, the text of a regulation which would in no way inhibit on the campus of the University of California advocacy of off-campus political action and social action, including recruiting for off-campus political and social action, and including raising funds for off-campus political and social action, provided that we can discover language which makes it explicit and public that no one has any intention at any time of undertaking unlawful action." Committee on Campus Political Activity, Minutes of Meeting, November 5, 1964, on file in the FSM collection of the Bancroft Library.

⁴³ Jim Branson, "Regents Decide on Regulations," The Daily Californian, Vol. 186, No. 50, November 23, 1964.

Senate back in September.⁴⁴ Strong announced to the Academic Senate that "students now do have maximum political freedom."⁴⁵

But the spiral of confrontation, once initiated, could not be so easily quelled. University officials chose to distinguish on-campus advocacy of legal off-campus action from on-campus advocacy of illegal off-campus action. They strenuously insisted that the latter be prohibited.⁴⁶ This distinction, however, was never rooted in any careful articulation of the educational mission of the university, and it therefore appeared to reassert the same kind of political judgment as that underlying the university's original prohibitions of partisan activism.

A student who advocates on campus that the off-campus homes of minority students be torched so as to drive them from the campus merits university discipline because he directly interferes with the educational objectives of the university. But these same objectives are not impaired by

⁴⁴ Clark Kerr, "Statement: To the Campus," November 24, 1964, on file in the FSM collection of the Bancroft Library.

⁴⁵ Edward W. Strong to the Academic Senate, November 24, 1964, on file in the FSM collection of the Bancroft Library.

⁴⁶ "The demand of the FSM that the University permit the mounting of unlawful action on the campus without any penalty by the University cannot and will not be granted." Statement of Edward W. Strong, November 22, 1964, on file in the FSM collection of the Bancroft Library.

the speech of a student who on campus advocates in favor of illegal demonstrations in Mississippi to protest segregation (or, for that matter, by the speech of a student who advocates on campus in favor of illegal demonstrations in Boston in opposition to school desegregation). By refusing to distinguish between these two quite distinct circumstances, administration officials invited the FSM to read their adamant proscription of all advocacy of illegal off-campus conduct as based upon an undifferentiated fear of provoking a political backlash against the university.

Faced with yet another political calculation, the FSM continued to press the administration to recalibrate its assessment of political risks by increasing the costs of maintaining the ban on advocacy of illegal off-campus action. Moreover the FSM had by this time become so distrustful of university officials as to embrace the position that all university control over the content of speech on campus ought to be abolished.⁴⁷ This is clear from the "FSM Platform," which was published in The Daily Californian on November 13:

⁴⁷ FSM distrust of university officials was fueled by a number of factors, including administration insistence on imposing discipline on students who violated university rules.

Civil liberties and political freedoms which are constitutionally protected off-campus must be equally protected on campus for all persons. Similarly, illegal speech or conduct should receive no greater protection on campus than off-campus. The Administration may not regulate the content of speech and political conduct, and must leave solely to the appropriate civil authorities the right of punishment for transgressions of the law. Regulations governing the time, place, and manner of exercising constitutional rights are necessary for the maintenance and proper operation of University functions, but they must not, either directly or indirectly, interfere with the rights of speech or the content of speech.⁴⁸

The platform takes the extreme position that, with the exception of content-neutral time, place and manner regulations,⁴⁹ speech that is legal off the campus ought not to be regulated by the university. This position is quite extravagant because, as we have already seen, no university could function under such a rule. Although it is probable that the FSM did not mean the literal import of its words, it is nevertheless significant that the FSM failed to acknowledge the myriad of ways in which universities pervasively and necessarily discipline the content of otherwise perfectly legal speech, as for example in the evaluation of scholarship and student work.

⁴⁸ The Daily Californian, Vol. 186, no. 44, November 13, 1964.

⁴⁹ On the requirement that time, place and manner regulations be content-neutral, see Robert Post, "Recuperating First Amendment Doctrine," 47 Stanford Law Review 1249 (1995).

The very reasons which justify such discipline are also relevant to the assessment of university controls on partisan advocacy within specific campus geographical "Hyde Parks," like the Bancroft-Telegraph entrance to the campus, which the FSM most certainly did have in mind.

Universities have strong and legitimate interests in regulating "political" advocacy specifically designed to interfere with their educational objectives. From the perspective of both the First Amendment and common sense, a university ought to be able to discipline a student who advocates the rape of female students, whether or not as a matter of technical First Amendment doctrine the advocacy can be punished by the criminal law.⁵⁰

Not content with severely constricting the kinds of speech that a university ought to be able to regulate, the FSM Platform goes further and proposes the extraordinary proposition that the university "must leave solely to the appropriate civil authorities the right of punishment for

⁵⁰ On the constitutional test for whether the advocacy of illegal conduct may be subject to criminal punishment, see Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), which provides that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

transgressions of the law."⁵¹ Evidently, the FSM believed that the university ought not to discipline even those minimal forms of communication that the FSM was prepared to concede might rightfully be punished by the state. This conclusion was justified on the grounds that "The FSM believes that the University is not a competent body to decide questions of civil liberties, especially since it is subject to strong political pressure. Because students' rights have great political impact as well as legal significance, the courts should be the only body to decide upon them."⁵² The intense personalization of the

⁵¹ The executive committee of the FSM proposed the following rule during the deliberations of the Committee on Campus Political Activity: "In the area of first amendment rights and civil liberties the University may impose no disciplinary action against members of the University community and organizations. In this area members of the University Community and organizations are subject only to the civil authorities." Minutes of the Committee on Campus Political Activity, November 7, 1964, remarks of Bettina Aptheker, on file in the FSM collection of the Bancroft Library.

⁵² "FSM Statement," The Daily Californian, Vol. 187, No. 40, November 9, 1964. Occasionally the FSM justified the proposition on the grounds that discipline by the University, when added to prosecution in the courts, would constitute double jeopardy. See, e.g., FSM Press Release November 17 (P.M.), 1964, on file in the FSM collection of the Bancroft Library; FSM, "Why the Committee Deadlocked," Leaflet on file in the FSM collection of the Bancroft Library ("For the University which is an arm of the state to punish the same act that the courts punish is, in fact, double jeopardy."). As a matter of positive constitutional law, this argument from double jeopardy is without merit. See, e.g., Helvering v. Mitchell, 303 U.S. 391 (1938). The argument fares no better from the perspective of common sense. For the university to expel a student convicted of assaulting a fellow student would no more constitute double jeopardy than would a decision by the San Francisco police force to fire a patrolman convicted of assaulting civilians. Ironically, it was Clark Kerr who first introduced the concept of double jeopardy in his May 5, 1964 Charter Day Address. Kerr sought to use the concept to protect students from calls for university discipline based upon illegal off-campus activities: "The punishment,

controversy is evident from this justification, which does not so much invoke a defensible account of the university's educational mission, as express a fundamental mistrust of university officials.⁵³

Taken as a whole, therefore, the explicit provisions of the FSM Platform sought to prohibit virtually all university regulation of communication, thereby disabling the university from articulating and enforcing the special disciplinary rules that would define and construct the university's own distinct, educational mission. It thus constituted a basic assault on the university's position as an independent organization holding interests different from those of the general public.⁵⁴ No organization could

for students and citizens, should fit the crime. One punishment, not two, should fit one crime. A citizen because he is a student should not be penalized more than his fellow citizen who is not a student." Kerr, supra note 29.

⁵³ The FSM position essentially amounted to denying to the university an interest in enforcing the general laws of the state. This is not plausible, however, because any state institution holding jurisdiction over a discrete geographical area has a strong interest in enforcing such laws. A university can legitimately prevent and discipline assaults on its own campus by members of the university community. The case would not seem to be any different with regard to criminal communications on its own campus by university members. This would indicate that the FSM position was better interpreted as aimed at the particular university administrators with whom they were in conflict, than as expressing any careful account of a university. This interpretation is reinforced by the obvious point that any generic concern with "strong political pressure" would seem more appropriately directed at the politicians who direct the application of the criminal law than at university officials.

⁵⁴ Professor Sanford Kadish articulated this point quite clearly during the internal debates of the Committee on Campus Political Activity: "In a case where a student comes through my office window at night and

accept such an ultimatum without dismantling itself, which no doubt in part explains Strong's unequivocal response to the FSM demand: "Activities of students in disobedience of the laws of the state and community are punishable in their courts. The University maintains jurisdiction over violations of its rules including those which prohibit use of university facilities for planning and recruiting for actions found to be unlawful by the courts."⁵⁵

The FSM and the administration thus faced each other over a seemingly impassable divide. As the administration continued to insist that its judgments about the best interests of the university be respected, the FSM grew increasingly determined to strip the university of any distinctive role with respect to the regulation of speech. The stand-off was broken by the faculty at its famous meeting of December 8. By a resounding vote of 824 to 115, the faculty voted to uphold the FSM position, urging:

- (2) That the time, place and manner of conducting political activity on the campus shall be subject

swipes examination questions, that is burglary. I think the University is entitled to take disciplinary action. It is indispensable that any community have the means at its disposal to maintain itself as an organization." Minutes of the Committee on Campus Political Activity, November 7, 1964, on file in the FSM collection of the Bancroft Library.

⁵⁵ Edward W. Strong, "To the Campus," The Daily Californian, Vol. 186, No. 51, November 24, 1964.

to reasonable regulation to prevent interference with the normal functions of the University; . . .

- (3) That the content of speech or advocacy should not be restricted by the University. Off-campus student political activities shall not be subject to University regulation. On-campus advocacy or organization of such activities shall be subject only to such limitations as may be imposed under section 2.⁵⁶

The faculty resolutions were of sweeping effect. Like Clark Kerr in his Charter Day Address, they used the geographical boundaries of the campus as a categorical measure of the university's educational mission; they essentially denied that any off-campus student "political activities" could interfere with that mission. Like the FSM Platform, the faculty resolutions sought flatly to prohibit university control over the content of speech. They would thus prohibit university discipline even of on-campus advocacy that could constitutionally be subject to criminal prosecution,⁵⁷ as for example student advocacy of the imminent and likely destruction of university property.

Like the FSM Platform, the faculty resolutions refused to acknowledge the relevance of any distinct university objectives in regulating political speech. Even if the

⁵⁶ Minutes of the Academic Senate of the University of California, Berkeley Division, December 8, 1964, on file in the FSM collection of the Bancroft Library.

⁵⁷ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

faculty resolutions are not read literally, but interpreted as applying only to designated "Hyde Park" areas on campus, they are best understood as premised on the view, best expressed by Joseph Tussman, that there was no need for the university to impose "more restrictions on its students in the area of political activity than exists in the community-at-large."⁵⁸

For the reasons I have already articulated, however, it is not plausible to regard the university as an institution without specific interests in the regulation of communication and of its content that are distinct from those of the public-at-large. This is also true with regard to potentially "political" communication. The university stands in a different relationship to students advocating the intimidation of fellow-students than does the public-at-large.

Because the faculty resolutions fundamentally denied the relevance of distinctive university objectives, and because such a denial is not in the long run compatible with the maintenance of a university, the resolutions are perhaps most charitably interpreted as a political intervention designed to end the escalating spiral of

⁵⁸ Joseph Tussman, quoted in Barry Bishin, "Regents Decide Next Week," The Daily Californian, Vol. 186, No. 60, December 9, 1964..

confrontation between the FSM and the administration. The faculty prefaced its resolutions with the hope that they would "end the present crisis" and "establish the confidence and trust essential to the restoration of normal University life,"⁵⁹ and the resolutions were successful in achieving these goals. In effect the faculty purchased peace by handing the FSM what the latter rightly regarded as "an unprecedented victory."⁶⁰

It is fair to conclude, therefore, that all sides to the FSM controversy ultimately staked out positions on freedom of speech that were motivated more by the political exigencies of the crisis than by any focused account of the intersection between First Amendment rights and the institutional mission of the university. It is thus not surprising that the cogency of these positions has diminished as the exigencies of that time have faded. The distinction so tenaciously insisted upon by the administration between the advocacy of legal and the advocacy of illegal off-campus action, for example, has long since entirely disappeared from the university's

⁵⁹ Minutes of the Academic Senate of the University of California, Berkeley Division, December 8, 1964, on file in the FSM collection of the Bancroft Library.

⁶⁰ FSM, "Happiness is an Academic Senate Meeting," quoted in "Chronology of Events: Three Months of Crisis," *supra* note 3, at 182.

regulations. The distinction has vanished because it never truly expressed a defensible account of the distinct institutional objectives of the university.

The FSM's urgent demand that the University not enforce its own rules regarding speech has also disappeared as a live political question. Contemporary university policy explicitly provides that "violation of University policies or campus regulations may subject a person to possible legal penalties; if the person is a student, faculty member, or staff member of the University, that person may also be subject to disciplinary action."⁶¹ These disciplinary sanctions apply to the numerous university regulations that regulate communication.⁶² Demands that the university repudiate its jurisdiction to enforce these regulations have entirely vanished, probably because it is recognized that such jurisdiction reflects basic prerogatives of self-definition and self-protection that necessarily attach to any competent organization.⁶³

⁶¹ University of California Policies Applying to Campus Activities, Organizations, and Students, § 40.20, August 15, 1994.

⁶² Examples are listed in note 64 *infra*.

⁶³ I should add that, contrary to the FSM's position, contemporary university regulations also assert the university's interest and competence in enforcing the general laws of the state. They provide that "University properties shall be used only in accordance with Federal, State, and local laws, and shall not be used for the purpose of organizing or carrying out unlawful activity." University of California Policies Applying to Campus Activities, Organizations, and

Finally, the central thrust of the faculty resolutions, embodied in their flat prohibition of content-based regulation and in their categorical determination that off-campus "political activities" be insulated from university discipline, has also lapsed as a pressing constitutional concern. University regulations do not today prohibit the university from restricting the content of speech, and in fact many contemporary disciplinary rules require a determination of communicative content.⁶⁴ These rules apply not only to communication that occurs on university property, but also potentially to political activity⁶⁵ that does not occur on university property, if jurisdiction over the latter is deemed necessary to serve "the mission of the university."⁶⁶

Students, § 40.10, August 15, 1994. Speech that is illegal is thus also rendered an infraction of university regulations.

⁶⁴ For example, the Berkeley Campus Code of Student Conduct (July 1998) prohibits "forgery" (§ III(A)(1)), "verbal abuse, threats, intimidation, harassment" (§ III(A)(10)), "plagiarism" (§ III(B)(2)), "furnishing false information in the context of an academic assignment" (§ III(B)(3)), and the "theft or damage of intellectual property." (§ III(B)(6)).

⁶⁵ The Berkeley Campus Code of Student Conduct prohibits the "obstruction or disruption of teaching, research, administration, student disciplinary procedures or other University activity." *Id.* at § III(A)(7).

⁶⁶ University disciplinary regulations "apply to students while on University property or in connection with official University functions. If specified in implementing campus regulations, these standards of conduct may apply to conduct which occurs off campus and which would violate student conduct and discipline policies or regulations if the conduct occurred on campus." University of California Policies Applying to Campus Activities, Organizations, and

In the long run, therefore, the university's disciplinary policies with regard to communication have uncontroversially gravitated toward a more realistic and defensible protection of the university's educational objectives. This is true even if we focus precisely on the university's current controls over political speech within the open "Hyde Park" areas of the campus. Berkeley's regulations presently provide:

The University has a special obligation to protect free inquiry and free expression. On University grounds open to the public generally, all persons may exercise the constitutionally protected rights of free expression, speech and assembly. Such activities must not, however, interfere with the right of the University to conduct its affairs in an orderly manner and to maintain its property, nor may they interfere with the University's obligation to protect the rights of all to teach, study, and freely exchange ideas. These regulations purport to assure the right of free expression and advocacy on the Berkeley campus, to minimize conflict between the form of exercise of that right and the rights of others in the effective use of University facilities, and to minimize possible interference with the University's responsibilities as an educational institution.⁶⁷

Students, § 101.00 August 15, 1994. The Berkeley Campus Code of Student Conduct specifically applies to off-campus conduct "where it 1) adversely affects the health, safety, or security of any member of the university community, or the mission of the university, or 2) involves academic work or any records, or documents of the University." The Berkeley Campus Code of Student Conduct (July 1998) at § II(F).

⁶⁷ Id. at § 311. Section 211 of the Code provides: "The purpose of these regulations is to facilitate the effective use and enjoyment of the facilities and services of the Berkeley campus as an educational institution."

Although these regulations are hardly a model of clarity, they can fairly be interpreted to stress that First Amendment rights are precious and protected except when overridden by the compelling imperative of the University to fulfill its "responsibilities as an educational institution." It is true that the regulations do not offer much in the way of specific guidance about how this imperative is to be defined or to be reconciled with First Amendment rights, but at least the regulations accurately articulate the conflicting values that require resolution in this difficult area of the law. They are in this regard a significant advance over the competing formulations of the FSM era.

What must be kept firmly in mind, however, is that Berkeley's contemporary regulations have evolved from a remarkable history of contest and confrontation. Our current regulations would have been inconceivable under Sproul's image of the university as an isolated and ascetic community, susceptible to disabling contamination from politics and passion. They would also have been inconceivable under the Faustian bargain which Clark Kerr and Edward Strong were prepared to strike with the state, in which university personnel accepted a technocratic and

monastic withdrawal from politics in return for academic freedom and independence.

The perceptions of the university's role advanced by administrative officials during the FSM crisis now seem like quaint and ancient history. But they were abandoned only reluctantly, and only as a direct result of the courage and persistence of the FSM. The legendary struggle of 1964 fundamentally altered the concept of the university, and such political freedoms as we now enjoy derive from that transformation. Even if contemporary university regulations of speech have assumed forms entirely inconsistent from those demanded by the FSM, we are nevertheless deeply in its debt.