COMMENT

AID TO EDUCATION, STUDENT UNREST, AND
CUTOFF LEGISLATION: AN OVERVIEW

Several years ago students in colleges and universities began to protest with increasing frequency the ills of their institutions and society. While campus protests had once been peaceful, in 1968 violent disruption became commonplace, threatening the quality of higher education. Causes of the unrest were diffuse, the issues proclaimed by the placards and shouts of bewildering variety, but often government itself was the prime target. Students castigated government as the perpetrator of an immoral war, a grim reaper of youth, and a silent partner in bigotry and repression.

In the face of rising disruption, the federal and state governments attempted to restore order on campus by enacting many types of legislation. One of the most common removes public financial aid from students involved in campus unrest.1 These cutoff statutes were passed despite warnings by several independent sources. The National Commission on the Causes and Prevention of Violence (the Eisenhower Commission), appointed by President Johnson, was the first to caution against enacting financial cutoff statutes:

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Existing laws already withdraw financial aid from students who engage in disruptive acts. Additional laws along the same lines would not accomplish any useful purpose.

We believe that the urge to enact additional legislation should be turned into a channel that could assist the universities themselves to deal more effectively with the tactics of obstruction.²

The Eisenhower Commission specifically recommended

that the American people do not let their understandable resentment for the few students who foment and engage in campus disorders lead them to support legislation or executive action which would withhold financial aid from students or universities.³

The American Bar Association Commission on Campus Government and Student Dissent echoed ⁴ the concern of the Eisenhower Commission and elaborated on one common failing of the statutes—lack of a hearing meeting due process requirements before financial aid is terminated.⁵ Detailing a number of other deleterious effects of aid-cutoff statutes—vagueness, coercion of schools to take disciplinary action, and discrimination against needy and, possibly, less culpable students⁶—the ABA Commission stated that it viewed "with deep concern . . . statutes and proposals for terminating financial aid to


The Eisenhower Commission went on to say:

There is a need for statutes authorizing universities, along with other affected persons, to obtain court injunctions against willful private acts of physical obstruction that prevent other persons from exercising their First Amendment rights of speech, peaceable assembly, and petition for the redress of grievances. Such laws would not be aimed at students exclusively, but at any willful interference with First Amendment rights, on or off the campus, by students or by non-students. They would also be available to uphold the First Amendment rights of students as well as other citizens.

Id.


³ Eisenhower Commission Report, supra note 2, at 281.


⁵ Id. 34.

⁶ Id. 33-35.
students who engage in disruptive activities and to the universities which they attend.\footnote{Id. 34.}

Finally, the President's Commission on Campus Unrest (the Scranton Commission) concurred in the conclusions of both the Eisenhower and ABA Commissions, unequivocally opposing further financial cutoff legislation. In language equally applicable to much state legislation, the Scranton Commission recommended:

New laws requiring termination of federally funded financial aid to those involved in campus disruption should not be enacted; similar provisions in existing federal law should be repealed or allowed to expire.\footnote{President's Commission on Campus Unrest, Report 221 (1970) [hereinafter cited as Scranton Commission Report].}

Financial cutoff legislation reversed a significant feature of federal and state aid to higher education since World War II—program administration by recipient institutions without federal or state intrusion. Often involving universities in the process of aid denial, the new cutoff legislation altered the relationship between students and their institutions.

It is the thesis of this Comment that the cutoff statutes are infirm on a number of grounds: the legislation was ambiguously drafted, based on erroneous assumptions and therefore generally ineffective, and constitutionally unsound in many instances. Legislatures should now repeal those statutes which are permanent in nature and allow temporary legislation to expire; in the event legislatures allow the statutes to remain, the courts should subject them to close scrutiny—as indeed it appears they have begun to do. As a general expression of society's distaste for violence, this legislation was an unfortunate choice. Now that perspective is possible, these measures should be stricken from the codes.

I. BRIEF HISTORY OF GOVERNMENTAL AID TO EDUCATION

the Cold War years. The programs provided funds to institutions for buildings, equipment, and teachers to accommodate the influx of students—as well as providing grants and loans to students.

The Higher Education Act of 1965, another important program, revealed important changes in the federal government's conception of aid to higher education. Instead of extending aid only to those who had served or would serve the country in a relatively direct manner, the Act recognized education as an essential opportunity which should be available to all. Because mere access to college, even with financial assistance, was inadequate absent effective preparatory schooling, the Act also offered assistance to lower-level schools through programs like Head Start. As with predecessor federal programs, and unlike later legislation, the Higher Education Act of 1965 left primary responsibility for administering the programs with the individual educational institutions.

The turning point in the federal view of higher education assistance occurred in 1968. The Higher Education Amendments of 1968 (the 1968 Act), incorporating an aid cutoff provision, carried the first congressional response to the rising tide of campus disturbances—a qualification which would continue throughout the next few years. As a prototype of federal and state financial aid withdrawal legislation, section 504 of the 1968 Act contained important and problematical language, which will be extensively analyzed below:

(a) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has been convicted by any court of record of any crime which was committed after [October 16, 1968] and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education to prevent officials or students in such institution from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution with respect to which such crime was committed, then the institution which such individual attends, or is employed by, shall deny for a period of two years any further payment to, or for the direct benefit

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13 Higher Education, supra note 9, at 113-14.

of, such individual under any of the programs specified in subsection (c) of this subsection. If an institution denies an individual assistance under the authority of the preceding sentence of this subsection, then any institution which such individual subsequently attends shall deny for the remainder of the two-year period any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this subsection.

(b) If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has willfully refused to obey a lawful regulation or order of such institution after [October 16, 1960], and that such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny, for a period of two years, any further payment to, or for the direct benefit of, such individual under any of the programs specified in subsection (c) of this subsection.

The last few words of subsections (a) and (b), by incorporating the program reference list in subsection (c), imposed their standards of conduct on virtually every substantial federal aid program for students at American higher education institutions.

States have also made substantial contributions to higher education, matching in amount federal monetary contributions to institutions of higher learning. And as campus unrest has increased, state legislatures too have moved towards greater involvement in disciplining students. Thirty-four of the forty states with legislative sessions in

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15 20 U.S.C. §§ 1060(a), (b) (Supp. V, 1970). A proviso adds that the section is not to be construed to limit student free expression. Id. § 1060(d) (3).

16 Id. § 1060(c) stipulated the programs affected by the new eligibility requirement: the student loan program under title II of the National Defense Education Act of 1958, the fellowship program under titles IV and VI of the same act, and all of the programs applicable to colleges under the Higher Education Act of 1965. Cf. Complaint at 6-10, United States Nat'l Student Ass'n v. Finch, Civil No. 970-69 (D.D.C., filed Apr. 16, 1969).

17 JOINT ECONOMIC COMMITTEE, 91ST CONG., 1ST SESS., THE ECONOMICS AND FINANCING OF HIGHER EDUCATION IN THE UNITED STATES 17 (Jt. Comm. Print 1969). In the years 1965-1966, for example, state, local, and federal governments contributed over $6.1 billion or 47.8% of the total income for all institutions of higher education. State and local governments contributed 55% of the total governmental aid. The major differentiation between federal and state contributions is thus not in volume of expenditure but in the type of institution assisted. Federal funds divide almost evenly between public and private institutions, but 97.4% of state and local aid goes to public institutions. See id. In more recent years, state and local governments have increased their contributions faster than the federal government. In fiscal 1967, the state and local governments gave 64.8% of the total, 63.2% including construction funds. By fiscal 1969, the state and local share had risen to 66.1%, 68.1% with construction included. See Wyman v. James, 400 U.S. 309, 336 (1971) (appendix I).
1969 and 1970 enacted campus unrest legislation, usually in the form of criminal-trespass, breach-of-the-peace, or disorderly-conduct statutes, or weapons-control acts.18 At least eleven states have specifically chosen to use the sanction of withdrawing financial aid from students or higher educational institutions.19 Since both state and federal enactments provide extensive financial aid to higher education, potential loss of assistance from either source may have a significant impact upon student and college finances. Because state provisions are too numerous for individual treatment, they will generally be treated here in the context of problems raised by analogous federal legislation.

It is questionable whether the federal legislation, and even more so whether certain state legislation, is constitutional. But it seems clear that the legislation is undesirable, even if the statutory weaknesses do not rise to constitutional dimensions. Vagueness, for example, has a constitutional aspect which may invalidate statutory language, but short of that limit vagueness may lead to administrative difficulties which should independently influence legislative policy. The next two sections will treat the wisdom of financial cutoff legislation from two perspectives; the final section will analyze the legislation's constitutional ramifications.

II. AMBIGUOUS AND UNADMINISTRABLE STATUTES

A. Comprehensive Cutoff Statutes

1. Ambiguous Trigger Mechanisms

Initially, it is striking that conviction of a crime is so often used to trigger aid withdrawal. The most recurrent crimes in a demonstration situation are probably trespass and disorderly conduct, or their local equivalents. Although use of criminal conviction provides a definite event to trigger aid termination, qualifications upon the type of crime, as in section 504(a), introduce a large degree of uncertainty into the determination of when aid withdrawal is required.

Assuming knowledge of a criminal conviction, under section 504(a) a university must determine whether the crime "involved the use of . . . force, disruption, or the seizure of [school] property . . . , was of a serious nature and contributed to a substantial disruption . . . ."20 The court of conviction may have made none of

18 See note 1 infra.
these determinations. The university that must make these separate findings is probably less able to ascertain the meanings of critical statutory language than a court accustomed to construing the law. The term "disruption" may encompass a broad range of activity—for example, mere inconvenience of administering a college classroom or office. Moreover, the offense must involve the "use of disruption" as well as contribute to a "substantial disruption."

On the state level, equally vague definitions of misconduct pervade both those statutes that require conviction before aid removal and those that do not. Florida has one of the most general definitions: participation "in disruptive activities," with no further explanation. It appears that participation in a fraternity prank qualifies. Washington has a broad definition with little elaboration. Illinois revokes assistance for participation "in any disorderly disturbance or course of conduct directed against the administration or policies" of the educational institution but excludes constitutionally protected acts. California and two almost identical Wisconsin sections attempt the most ex-

21 Fla. Stat. Ann. § 239.581(2) (Supp. 1970) (emphasis added): After it has been determined that a student or employee of a state institution of higher learning has participated in disruptive activities, the following penalties may be imposed against such a person:

(a) Immediate termination of contract of such employee . . .

(b) Immediate expulsion of such student from the institution of higher learning for a minimum of two years.

Actual aid termination after expulsion would result from a school recommendation to terminate. Id. § 239.50.


23 Wash. Rev. Code Ann. § 28B.10.281 (1970): Any student who organizes and/or participates in any demonstration, riot or other activity of which the effect is to interfere with or disrupt the normal educational process at such institution shall not be eligible for such aid.


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Any recipient of such state financial aid who, on the campus of the university, college, or other institution of higher education, willfully and knowingly commits any act likely to disrupt the peaceful conduct of the activities of such campus, and is arrested and convicted of a public offense arising from such act, may be determined to be ineligible for any such state financial aid for a period not to exceed the ensuing two academic years.

Any recipient of such state financial aid who, after a hearing, is found to have willfully and knowingly disrupted the orderly operation of the campus, but has not been arrested and convicted, may be determined to be ineligible for any state financial aid for such period as the hearing board may determine, not to exceed the ensuing two academic years.


(1) Definitions. For the purposes of this section:

(a) "Campus misconduct" means a crime or offense involving the use of or assistance to others in the use of force, disruption, or the seizure of property under control of any state or private institution of higher education with intent to prevent students or employes [sic] at the institution from engaging in their duties or pursuing their studies, where such offense was of a serious nature and contributed to a substantial disruption of the adminis-
tensive definition of misconduct. All three contain the significant requirement of intent, absent from other statutes.\textsuperscript{27} Ohio defines prohibited conduct in a unique manner by incorporating numerous sections of the Ohio Code,\textsuperscript{28} including a section passed contemporaneously which created the crime of disruption.\textsuperscript{29}

The consequent interpretive problems are aggravated when, as required by section 504(a), the crime effectuated by disruption must be “of a serious nature,”\textsuperscript{30} clearly another difficult determination. In deciding whether a crime is serious, should the institution view the particular acts from a societal context or in connection with the particular incident at the university? An occurrence of vital importance to an institution may be relatively insignificant to society. Or, perhaps, “of a serious nature” is simply meant to modify “crime.” Under this interpretation the university must determine where the offense in question ranks in the hierarchy of criminal law.

2. Breach of University Rules as a Trigger

Section 504(b) does not suffer from some of the ambiguities and potential problems which afflict section 504(a) and similar state statutes. Under section 504(b), the problem of institutional responsibility for receiving information from courts or students is diminished because the standard of conduct is violation of a university regulation. Although this removes some of the factfinding difficulties resulting from vague statutory terms, interpretive problems remain. The omnipresent term—disruption—is used, and its limits are no more sharply defined in the context of section 504(b) than they were under section 504(a). And, again, the disruption must be of a serious nature.

An additional grave danger of section 504(b) is that, by incorporating university rules, federal aid removal adds a penalty to university regulations not necessarily designed to entail such serious conse-


\textsuperscript{28} OHIO REV. CODE ANN. § 3345.23 (Page Supp. 1970).

\textsuperscript{29} Id. § 2923.61.

The step of removing aid should not be taken for violation of certain minor regulations. Universities might have a variety of regulations covering the most puerile offenses. Common are broad catch-all rules for "conduct unbecoming a student." Combining such rules with university authorities' possible opinion that any rule violation should be considered serious or disruptive manifests an obvious danger. This possibility is even more troublesome because the determination of violation under section 504(b) is made by the same party who formulated the rule, who presumably has an interest in rule enforcement, and who may even feel public and political pressure to punish student disrupters to avoid publicity and financial reprisal. Fortunately, the pressure of federal and state bills keyed to university regulations, court insistence on greater clarity of substantive rules and procedures, and student-faculty awareness of the need for fairness in university discipline have prompted numerous reforms in university and college conduct rules and disciplinary procedures. Even the most enlightened reform has, however, an additional dysfunction: where new regulations are enacted, the danger exists that commission of offenses not contemplated by Congress will result in loss of aid.

The problems raised by section 504(b) carry over to a number of state statutes. Although most states require at least conviction before financial aid is terminated, Florida, Washington, and Illinois require no court action at all. Violation of institutional rules


33 An HEW survey published in 1969, Office of Educ., U.S. Dept of Health, Educ. & Welfare, Survey (1969), indicates either a predisposition by universities to act under their own regulations, or possibly an inability to assimilate the new federal standards. The survey results may also be indicative of a more authoritarian attitude by universities in cases of rule violations. Cf. Complaint at 10, United States Nat'l Student Ass'n v. Finch, Civil No. 970-69 (D.D.C., filed Apr. 16, 1969).


30 Fla. Stat. Ann. § 239.581 (Supp. 1970), quoted in part in note 21 supra. Though an expulsion statute, it was enacted during the flood of cutoff provisions, and, since expulsion results in aid removal, id. § 239.50, it will be treated as a cutoff statute.


triggers four provisions\(^{39}\) that are also triggered by conviction. The California and Ohio provisions require eventual conviction, but permit suspension upon arrest.\(^{40}\)

3. Institutional Obligations to Seek and Disseminate Information

Cutoff legislation is often ambiguous in delineating the degree to which the university must seek and disseminate information regarding student misconduct. For example, under section 504(a), the institution must first discover that the student has been convicted of an appropriate crime. The Ohio cutoff statute facilitates discovery by requiring police officials and courts to notify educational institutions of court actions.\(^{41}\) But section 504(a), and some state statutes that require conviction to terminate aid, are silent as to how the university receives notice of a criminal conviction. Equally uncertain is whether the institution has an affirmative duty to seek such information from courts or the students themselves.

The extent of the university’s obligation to report student misconduct is also obscure. Only certain statutes clearly require reports to governmental agencies.\(^{42}\) This is significant because many statutes, including section 504(a), require that institutions where a student enrolls subsequent to aid termination at a previous institution must also deny aid. Without an effective reporting system, enforcement of this provision may be haphazard.

Those statutes that do require reporting raise a different problem. Reports to outsiders alter the nature of the student-institution relationship. The school can no longer guarantee the student confidentiality and therefore loses some of the basis for its claim to student confidence.

4. Institutional Penalties

Although enacted federal legislation on campus unrest may create informational and administrative difficulties for institutions, none previously discussed here have exacted financial penalties from the institutions themselves. Of the bills proposed in the Ninety-first Congress, however, the largest group made this extension of federal financial retraction. The bills generally would have eliminated federal aid to


\(^{41}\) OHIO REV. CODE ANN. §§ 3345.22(B) (Page Supp. 1970).

educational institutions which failed to discipline students under existing federal statutes within a reasonable time. Of this group of twenty-one proposals, eleven specified that disruptive teachers would also be denied federal assistance. Four bills conditioned federal aid upon maintenance of a particular program, such as ROTC or defense-related research.\textsuperscript{43} One recent law, the 1971 Military Procurement Authorization Act, did withhold funds from:

Any institution of higher learning if the Secretary of Defense . . . determines that at the time of expenditure of the funds . . . recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution from [its] premises [with special exceptions for critical research].\textsuperscript{44}

A more ominous sign was the report of the House Armed Services Committee on the bill, in which the Committee warned it would suggest more restrictive legislation “unless the Secretary of Defense can implement a procedure by which defense research funds are denied to [disrupted universities].”\textsuperscript{45}

On the state level, a New York statute requires colleges under state supervision or charter to formulate rules of student conduct and file them with the state within ninety days and denies state assistance to any institution that does not comply.\textsuperscript{46} A similar statute in California, requiring the Board of Regents (which governs that state’s colleges) to formulate rules, does not penalize the educational institution.\textsuperscript{47} The existence of student codes gives clearer notice of offensive conduct and its consequences and should be commended as a stimulus for productive reform of university discipline.\textsuperscript{48} Student codes do assist the creation of—as the California legislature sought—“a coherent, fair, and uniform system of discipline.”\textsuperscript{49} The sanction of the New York provision is, however, unnecessarily severe. Failure to file rules or report action may indicate only inability to create rules quickly or may merely reflect the general administrative tardiness of higher educational institutions.\textsuperscript{50}


\textsuperscript{46} N.Y. EDUC. LAW § 6450 (McKinney Supp. 1970).

\textsuperscript{47} CAL. EDUC. CODE § 22635 (West Supp. 1971).

\textsuperscript{48} SCRANTON COMMISSION REPORT, supra note 8, at 128; see text accompanying notes 32-35 supra.


\textsuperscript{50} An example of counterproductive use of the New York statute is the criminal prosecution of Hobart College which filed regulations as required. On June 5, 1970, a police raid led by an alleged police undercover agent who had spent much time on campus so angered students that a crowd vandalized police cars, imprisoning
B. Since 1968: Appropriation and Authorization Riders

Despite its significance as prototype legislation, the 1968 Act was ineffective in stemming campus unrest. Disruption was neither deterred nor abated.\(^{51}\) The Act itself was applied to few students. In the academic year of 1968-1969 only eleven institutions terminated any federal aid under the Act: those proceedings affected sixty-three students under section 504(a) and twenty-six students under section 504(b). Yet, nearly seventy institutions, under their own regulations, cut off aid from 586 students.\(^{62}\) While Congressmen may be correct in suggesting that institutions simply would not apply the statutes out of weakness\(^{53}\) and were aided in noncompliance by confused HEW interpretations that permitted evasion,\(^{54}\) an equally plausible explanation is that the institutions, rather, could not assimilate the novel and bewildering standards. If federal standards of conduct do not or cannot work, Congress itself must accept partial blame. Perhaps the failure is best indicated by the later enactment of additional federal and state legislation.

The recurrent phenomenon of campus unrest had become alarming, a source of growing public concern. Insistent constituents or Congressmen's own alarm may explain why Congress has acted repeatedly since 1968 to stem campus disorder by threatening to cut federal aid, legislating in a way that has only compounded the problems already present in the 1968 Act.

policemen until arrested students were released. The college was prosecuted for first degree coercion, N.Y. PENAL LAW §135.65 (McKinney 1967), the offense of inducing an official to "[v]iolate his duty as a public servant." \(^{1d}\) Since the college was prosecuted on a theory that its officials accepted students' demands and urged police to comply, the college's own regulations were introduced by the prosecution as evidence that the college was ignoring its own rules against student disorder. N.Y. Times, Feb. 4, 1971, at 15, col. 3.


\(^{54}\) Id. The Department of Health, Education and Welfare initially indicated that institutions had discretion to proceed with determinations under the statute. Office of Educ., U.S. Dep't of Health, Educ. & Welfare, Higher Education Reports, Jan. 28, 1969, at 3. Later this interpretation was reversed and institutions were required to initiate aid cutoff determinations within the bounds of good faith on their own part. Bureau of Higher Educ., Memorandum XII, June 20, 1969, at 1. This interpretation, however, misconstrued testimony by then Secretary Finch. Hearings on Campus Unrest Before the Special Subcomm. of the House Comm. on Educ. & Labor, 91st Cong., 1st Sess. 534 (1969) (statement of Robert H. Finch, Sec'y of Health, Educ. & Welfare); see Note, Federal Aid to Education: Campus-Unrest Riders, 22 STAN. L. REV. 1094, 1097 n.17 (1970) [hereinafter cited as Federal Aid]. Secretary Finch's distinction between §504(a) as mandatory and §504(b) as discretionary, Hearings on Campus Unrest Before the Special Subcomm. of the House Comm. on Educ. & Labor, 91st Cong., 1st Sess. 534-35 (1969), has, however, no support in the language of those sections. Educational institution confusion in the face of such shifting interpretation of already vague statutory language, see text accompanying notes 20-42 supra, seems understandable.
The initial error was the type of subsequent legislation Congress chose to use.\textsuperscript{55} Whatever the defects of the 1968 Act, its measures represented long-term legislation operating under standards which eventually could be assimilated through constant application. By contrast, seven of the nine federal student unrest provisions enacted since the Higher Education Act of 1965, and two state unrest laws, have been riders to appropriation bills. Several significant consequences result from this departure from comprehensive legislation. Appropriation acts expire within one year, but riders attached to them are effective until all the money appropriated is spent.\textsuperscript{56} Hence, regardless of the substantive provisions of the riders, the administration of them is a definite problem. Before it can make the appropriate factual determinations, a university must trace the source of funds involved in an individual student's case to the particular program and then to the correct appropriation bill. Even if tracing can be accomplished, any program administered under successive appropriations encounters absurdly complex administrative difficulties whenever the language of successive riders differs in any material fashion. Consider the following illustration:

[T]he 1969 appropriation Act for the Department of Health, Education, and Welfare (HEW), which contains an unrest rider, section 411, funds higher educational programs primarily for the period from July 1, 1968, through June 30, 1969. To fund the same programs for the next fiscal year, Congress passed another appropriation Act containing a different unrest rider, section 407. But the passage of the new act and rider does not cancel the operation of the previous unrest rider, section 411. If after June 30, 1969, the expiration date of the 1969 appropriation Act, a university were still spending moneys funded under the 1969 Act, section 411 should still apply.\textsuperscript{57}

The only possible escape from this analytical maze is to spend money as quickly as it is appropriated.

These cumbersome federal riders can be classified into three broad categories: those which permit administration by the school; those which appear to be self-executing, that is, which operate automatically upon conviction of a crime; and those which are independent because they set up a distinct standard for aid termination.\textsuperscript{58} Despite language differences among the individual riders or among the suggested groups, the administrative burdens of all three must be borne primarily by the

\textsuperscript{56} Federal Aid, supra note 54, at 1096.
\textsuperscript{57} Id. (citations omitted).
\textsuperscript{58} Id. 1096-101.
educational institutions. A corresponding monitoring burden arises in the executive departments which disburse the appropriations to their respective programs. In short, classification cannot be made so neatly when the practical administrative effects, as distinguished from semantic variations, of the riders are adequately considered. Nevertheless, the suggested groupings are useful for discussion.

Two provisions in the school-administered group 69 adopted the entire language of section 504 of the 1968 Act 60 and two adopted the language of section 504(b) only. 61 This group suffers from the same problems already discussed under the 1968 Act.

Three measures form the self-executing group. 62 Their riders provide that:

No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant who has been convicted by any court of general jurisdiction of any crime which involves the use of or the assistance to others in the use of force, trespass or the seizure of property under control of an institution of higher education to prevent officials or students at such an institution from engaging in their duties or pursuing their studies. 63

As under section 504(a), punishment is triggered by conviction of a crime meeting additional statutory criteria. 64 A major difference from section 504(a) is that the caveats of "a serious nature" and "substantial disruption" have been omitted from the description of the offense. Instead, there is a more detailed description of proscribed behavior. And, unlike section 504(a), the statutory language of the self-executing group makes no provision for notice of charges or opportunity for hearing. The failure to provide a specific time limit on disability is not


64 See text accompanying note 15 supra.
too serious since riders expire when all appropriated money has been expended, but this time-uncertainty is the core of an administrative maze noted earlier. What appears to distinguish the self-executing group, and provides the name, is that the force of statutory language and the absence of any reference to educational institutions' administrative capacity implies executive department supervision. But the agencies themselves have rejected this role, thus placing the burden on the school. It is also unclear whether universities have solicitation and reporting functions apart from the determination whether to remove aid. One possible interpretation is that while the executive agencies delegate the factfinding to the institutions, the executive departments will not require reporting among institutions that a particular student has been denied aid. Since the executive department has responsibility for disbursing funds, it might require only one-way reporting. As each institution removed aid from a student under a particular rider, that action would be reported to the agency. The agency would then have responsibility for either refusing funds under that or any similar rider to an institution where the student subsequently enrolled or notifying all institutions receiving restricted funds of the identity of all disqualified students. Certainly the self-executing group encounters as many difficulties as the 1968 Act or the school-administered group.

The final group of federal riders contains two enactments, both for fiscal 1970. Both provide that funds shall not be given to one who has engaged in conduct on or after August 1, 1969, which involves the use of (or the assistance to others in the use of) force or the threat of force or the seizure of property under the control of an institution of higher education, to require or prevent the availability of certain curriculum, or to require or prevent the faculty, administrative officials or students in such institution from engaging in their duties or pursuing studies at such institution. . . .

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65 See text accompanying notes 56-57 supra.
66 Federal Aid, supra note 54, at 1098-99.
69 Id. There is a proviso that:
[s]uch limitation upon the use of money appropriated in this Act shall not apply to a particular individual until the appropriate institution of higher education at which such conduct occurred shall have had an opportunity to initiate or has completed such proceedings as it deems appropriate but which are not dilatory in order to determine whether the provisions of this limitation upon the use of appropriated funds shall apply . . . .

Id.
In defining prohibited activity, the third group appears to reach the same activity as the other two groups despite slightly different language on threats and preventing curriculum availability. While this language initially differs from the first and second group in only minor respects, the third group is termed independent because its riders define prohibited conduct without regard to any external standard such as conviction of a crime or violation of a university rule. As long as these other standards exist in separate, applicable statutes, this approach merely adds another determination that must be made, and increases the institution's burden in administering possibly overlapping statutes.

This multiplicity of standards, which riders compound, is a final weakness of cutoff legislation. It is possible for a student to receive aid simultaneously under various federal and state programs. The number of different statutes applicable in a given case, when combined with the problems of ambiguity and the number of institutions involved, poses a real danger of varying enforcement of a given statute by different institutions.

III. ERRONEOUS ASSUMPTIONS

Thus far, we have focused on the ambiguities and administrative burdens created by cutoff statutes. A complementary nonconstitutional criterion by which this legislation should be tested is whether it deals effectively with the target evil—campus disruption. The judgment whether a statute is to be enacted or retained should be reached by balancing the costs to society of administering it against the benefits it produces.

Whether cutoff legislation deals effectively with campus disruption can be gauged in two ways. First, one can attempt to ascertain the causes of unrest and judge whether existing legislation is likely to eradicate them, and so prevent future disruptions. Second, without examining causes, one can review empirical data to ascertain whether unrest has declined as a result of previous enactments and attempt to predict from this data the likelihood of such effects in the future.

Stating the causes of unrest is, of course, a complex task— one not undertaken here. What can be said about financial cutoff legislation is that the sanction is inappropriate in view of the explanation of campus unrest most commonly expressed by legislators. The ostensible targets of the legislation are those students who instigate and participate in campus disorders. The frequently articulated premise of legislators is that disorders are directly traceable to the activities of a small minority of activists. Usually these activists are assumed to be students at the particular educational institution. Characterizations of them are sometimes rather harsh: "professional troublemakers with Communist affiliations."
If the leader theory is valid, then the effectiveness of financial cut-off legislation is doubtful. The Scranton Commission found a positive correlation between wealth and political activism:

The college students among whom the youth culture and campus unrest emerged were principally those from affluent families, whose parents were [liberal and educated].

Therefore, the radical activists identified as the essential problem are the students least likely to be receiving federal or state assistance. The implications of this finding for legislatures considering remedial legislation were pointed out by Dr. Bruno Bettelheim. Testifying before Congress, using statistics compiled from the San Francisco State College disturbances in 1969, Dr. Bettelheim stressed that:

even to cut out subsidies would not help, because very few of those of the radical left who are the leaders really receive subsidies; they are subsidized by their families.

The purpose of the legislation discussed here is to prohibit financial assistance to radical troublemakers. But the coalescence of the leader theory of campus disorders with the positive correlation between affluence and activism implies that the desired targets of the legislation are the people least likely to be affected by it. If the leader theory is valid, the legislation misses its mark so frequently as to make unwarranted the cost of punishing less-involved students.

A variation of the leader theory is that the leaders are not really students at all, or at least not students at the particular university. This theory often emphasizes the role of identifiable, ostensibly revolutionary groups. But the legislation is aimed at students at the institution, and outsiders are, by definition, not affected. Legislators seriously advocating the outsider theory may really intend to discipline the radicals, but their legislation punishes only resident students who have followed along.

These theories of campus unrest articulated by legislators, thus, can hardly support financial cutoff statutes. A third theory of campus unrest expressed by legislators, and supported by the Commission, holds that the radical activists are simply students who are following the dictates of their leaders, and that the true troublemakers are those outside the university, who are beyond the influence of the institution.

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72 SCRANTON COMMISSION REPORT, supra note 8, at 71 (emphasis added).


74 Representative Clark has stated:
[T]here are about 80 to 120 SDS's [sic] that are going from one end of the country to the other . . . .
These are the ones who are the crux of the whole situation that we find in our universities today.

75 Conceivably, outsiders who were students could be disciplined by their own educational institution. But that institution's rules or regulations would have to encompass activity away from the campus, an unlikely and possibly overbroad position.
unrest, however, based on the participation of large numbers of relatively moderate students, provides at least a superficially rational basis for such legislation. Although a small group may organize and lead some demonstrations, only massive student movements can support protests of such size as the tremendous upswellings of sentiment that closed one-third of the nation's higher educational institutions in the spring of 1970. Large demonstrations, such as those at Berkeley in 1964, and Columbia in 1968 and 1970, could not occur without the support of many moderate students. This moderate student group, willing to join on occasion with extremist tactics or issues, usually contains a significant segment of the college student population. One study has estimated that forty percent of all college students may constitute a so-called "involved minority," sensitive to social problems and approving civil disobedience but not violence. Since this group is large and diverse, many of its members are likely to be receiving financial aid, and cutoff legislation might be an effective deterrent to disruptive activities.

The Scranton Commission concluded, however, that neither the moderate-student nor the leader theory was sufficient to explain all campus protests. Opponents of the legislation have even suggested that cutoff legislation may radicalize the moderate elements of university student bodies—a theme echoed by three separate commissions.

If the moderate-student theory does account for a significant part of campus disorder, then financial cutoff legislation may find its mark. The fact that the culprit is punished, however, does not establish the wisdom of the punishment. Given the existence of feasible alternatives, such as leaving all disciplinary matters to the discretion of the institution, unfairness and ineffectiveness make financial cutoff statutes undesirable.

Financial cutoff statutes are unfair and ineffective because the punishment fits, not the crime, but the wealth of the offender. In some cases the statute is unduly severe and in other cases unduly lax. Although direct responsibility for disruption seemingly should produce a proportionate penalty in the form of appropriately severe aid termination, instead a wealthy student encounters no financial penalty since he probably receives no aid anyway. Even if a wealthy student did receive some aid, the size of his loss is likely to be less; and even if it is the same in absolute terms, the loss will bear less heavily upon him. And

78 Scranton Commission Report, supra note 8, at 27, 53-54.
79 E.g., 115 Cong. Rec. 21,640-41 (1969) (remarks of Representative Railsback); id. 21,641 (remarks of Representative Frey); id. 21,648-49 (remarks of Representative Steiger).
80 See text accompanying notes 2-8 supra.
a wealthier student completely cut off from governmental aid usually has greater access to financial help from relatives or lending institutions.

By contrast, for the disadvantaged student, denial of federal or state financial aid may be a critical determination, completely precluding further education. Punishment by financial cutoff is harsher upon precisely those whom the legislation has attempted to assist: the poor student and the minority group student. This shift in educational policy has been decried by a few legislators and condemned by the Scranton Commission.

That large numbers of students are involved in disorders suggests that legislators should concern themselves with the rehabilitative implications of the type of punishment chosen. An arsonist or a bomber may properly be both expelled from school and convicted of a felony. But when sufficiently large numbers of students are involved in less serious offenses, society should, in addition to devising some punishment, attempt to solve the causes of the unrest, in order to benefit itself. Cutting off financial aid may terminate a student's education and render him a less productive citizen.

This result is particularly unattractive since there are less damaging alternatives available. If aid cutoff for misbehavior is left to institutional discretion, where some maintain it belongs, it is at least theoretically possible for the institution to distinguish those students who will benefit from a second chance from those who are likely to misbehave again. Under many cutoff statutes, termination is mandatory. The arbitrariness of such a procedure seems unwise, and may only encourage evasion of the statutes by concerned institutions.

The second test of cutoff legislation suggested above is to examine available data to determine whether potential aid loss has, in fact, stemmed disruption. It is probably too early to pass judgment on the legislation's ultimate effectiveness, but present evidence and forecasts suggest it has had little effect. First, there has been no showing that either federal or state financial cutoff statutes affect campus unrest, although the shortness of time may be the reason for this failure. Secondly, numerous authorities have warned that financial cutoff legislation accelerates disruption by creating another issue of governmental suppression and university collusion against which students will demonstrate, possibly with ranks swelled by moderates. Thirdly, the greatest disruptions, those in the spring of 1970, came after most state and federal cutoff legislation had been enacted. While the intensity of these protests may be attributable to the unusual emotive appeal of the

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82 See text accompanying notes 9-13 supra.
84 SCRANTON COMMISSION REPORT, supra note 8, at 11, 91-116.
86 Cf. text accompanying notes 2-8 supra.
87 See note 88 infra.
events of that year,\textsuperscript{88} they do suggest that cutoff legislation will not have its desired effect upon violent protest.

\section*{IV. Constitutional Issues}

The faults outlined above have understandably led to litigation attacking financial cutoff provisions.\textsuperscript{89} In a litigation context, the approach must shift from merely examining the advisability and effectiveness of these statutes to testing their constitutionality.\textsuperscript{90} Many arguments of constitutional dimension have been leveled at the statutes,\textsuperscript{91} but only a few stand out as particularly telling and merit discussion below.

\textsuperscript{88} Even the most carefully collected data on the 1970 spring demonstrations cannot definitely pinpoint the cause. The Scranton Commission noted that for the 6 days after April 30, the day President Nixon announced the Cambodia invasion, but prior to Kent State, approximately 20 new campuses reported activity each day. Four days after the shootings at Kent State, 100 or more new campuses reported disturbances each day. By May 10, 448 campuses were experiencing demonstrations. After May 14 and the shootings at Jackson State, that figure rose even higher. \textit{See} SCRANTON COMMISSION REPORT, \textit{supra} note 8, at 17-18. Though the rise in disturbances appears a response to the Kent State shootings, perhaps the large-scale demonstrations simply could not get under way until several days after the President's speech. Alternatively, the abrupt rise may be explained as a student reaction to the combined events.

\textsuperscript{89} Haverford College v. Reeher, Civil No. 70-2411 (E.D. Pa. July 19, 1971); United States Nat'l Student Ass'n v. Finch, Civil No. 970-69 (D.D.C., filed Apr. 16, 1969).

\textsuperscript{90} Federal court adjudication of constitutional claims, particularly those of overbreadth and vagueness, may raise an abstention problem. This is certainly true when there exists a pending state court proceeding to determine the constitutionality of the legislation and is possibly true when there is no pending state court proceeding. In Haverford College v. Reeher, Civil No. 70-2411 (E.D. Pa. July 19, 1971), Judge Lord, writing for the majority of a three-judge court, found no reason to abstain, distinguishing Younger v. Harris, 401 U.S. 37 (1971), and Perez v. Ledesma, 401 U.S. 82 (1971), because there was no pending state court proceeding relevant to the Pennsylvania statute.

While there may have been prior support for the proposition that abstention is ruled out where first amendment freedoms are at stake, \textit{e.g.}, Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); the \textit{Younger} decision suggests that the district court in \textit{Haverford College} may have reached an erroneous conclusion on the abstention issue. While \textit{Younger} specifically discussed the propriety of federal court intervention in pending state court proceedings, the opinion also dismissed the claims of those who had not actually been prosecuted under the allegedly vague statute, their claims being instead based on a perceived inhibition of conduct or an uncertainty as to whether the statute applied to their conduct. In addition to cases of pending state court proceedings, cases of the unsupported possibility of future prosecutions compel federal court abstention under \textit{Younger}. Boyle v. Landry, 401 U.S. 77, 79 (1971). Thus, the distinction proffered by Judge Lord fails to dispose of this problem, and federal courts may find adjudication of constitutional claims against other state cutoff statutes foreclosed by the abstention doctrine.

\textsuperscript{91} For example, plaintiffs in \textit{Haverford College} variously contended that: the Pennsylvania statute interfered with a constitutionally protected relationship between students and institutions of higher education, Brief for Plaintiff at 10, Haverford College v. Reeher, Civil No. 70-2411 (E.D. Pa. July 19, 1971); violated plaintiffs' right of privacy, \textit{id}. 15; was void for vagueness, \textit{id}. 20; was unconstitutionally overbroad, \textit{id}. 29; unconstitutionally chilled the exercise of first amendment freedoms, \textit{id}. 37; lacked minimal procedural due process requirements, \textit{id}. 44; violated the privilege against self-incrimination, \textit{id}. 50; effected an unconstitutional delegation of legislative and judicial power, \textit{id}. 60; and violated the equal protection guarantee of the fourteenth amendment, \textit{id}. 72. Plaintiffs also contended the statute compelled a search of their papers and effects without probable cause, \textit{id}. 59.
A. State Action

State financial aid legislation warrants constitutional scrutiny under the fourteenth amendment's due process and equal protection clauses only if the accepted state action requirements are satisfied. Many general university discipline cases searched with considerable difficulty and often little success for state action in order to determine the fourteenth amendment obligations of educational institutions. But cutoff statutes explicitly thrust the state into the actual disciplinary process and supply an obviously affirmative answer to the state action question.

When state action is involved in a challenged proceeding, that action must be tested against the limits imposed by the fourteenth amendment. It appears that many cutoff provisions fail this test in one way or another: some for vagueness, some for overbreadth, others for lack of procedural due process, and perhaps some for denying equal protection. Federal action, subject to the due process clause of the fifth amendment, would be subject to the same scrutiny.

B. Vagueness and Overbreadth

Before distinguishing between vagueness and overbreadth and illustrating where those defects appear in various cutoff statutes there is one preliminary matter that must be considered. Financial aid statutes do not impose traditional criminal sanctions: no jail term or fine is imposed. A little over a decade ago, it could be said that "except for [one exceptional case] no vagueness attack on a noncriminal statute has succeeded." Indeed, there is a lengthy list of cases rejecting the vagueness rationale outside the criminal sanction area.

Two lines of analysis are available for disposition of this problem, each suggesting that such a limitation is unjustified. First is the
straightforward argument that void-for-vagueness attacks do have a place in noncriminal proceedings. This finds support in cases applying the vagueness doctrine to strike down loyalty oath requirements when plaintiffs risked only the loss of their jobs. The doctrine has also been repeatedly employed in recent years to upset university regulations, as in *Stacy v. Williams*, where unduly vague campus speaker regulations were voided.

This rationale has been adopted in at least one district court decision involving state aid cutoff legislation. In *Haverford College v. Reeher*, the court, dismissing the criminal-civil distinction, concluded that "the better view is that which finally bases [a determination of the standard of certainty required] on the seriousness of what is at stake under the statutory scheme." The *Haverford College* approach should be followed because it is more consistent with the underlying purposes and overall development of the vagueness and overbreadth concepts than a simple civil-criminal distinction. Vagueness is not concerned solely with adequately warning those to whom a statutory provision speaks, but also with ensuring regularity of protection of diverse constitutional rights by creating "an insulating buffer zone of added protection . . . of several of the Bill of Rights freedoms." In the education context financial aid termination and consequent removal from academia are likely to deter freedom of expression as fully and certainly as a criminal sanction.

Speaking collectively of the vagueness and overbreadth concepts, it would be improper to deny their application to cases suggesting a substantial onus on first amendment rights, simply because of the lack of criminal penalties, unless the buffer-zone function were also denied. The latter course would require the decision to speak in absolutes, since the only method of voiding the statute—after abandonment of vagueness and overbreadth—is direct reliance on an explicit constitutional provision, such as the first amendment.

Yet no reason has emerged for denying courts latitude in their manner of formulating the rationale of a constitutional decision solely because no criminal sanctions are imposed. On the contrary, "it is the essence and cardinal aim of due process to minimize the frequency and gravity of those occasions, in a society, when it is necessary to reach the

98 306 F. Supp. 963 (N.D. Miss. 1969); see id. 968 n.4 (collecting cases).
100 Id. at 8-9.
102 Id. 75.
issues of ultimate power." The corollaries, vagueness and overbreadth, facilitate that minimization.

Secondly, removal of financial aid can be treated as simply a penal sanction. At least one recent case involving expulsion from college specifically held it immaterial to a vagueness attack that the "controversy involves a disciplinary rule rather than a criminal proceeding." Since removal of aid is often tantamount to expulsion, it is unlikely that a vagueness attack will fail solely because no orthodox criminal sanction is involved. Of course, whatever the theory, that vagueness can apply to noncriminal proceedings does not mean that the "seriousness of what is at stake" will not influence judicial decisions whether to apply the doctrine.

If vagueness is applicable in the noncriminal area, it is possible to question some cutoff provisions on the ground that they fail to furnish adequate warning of proscribed behavior and thereby violate the due process clauses of the fifth and fourteenth amendments. Intimately related to inadequate warning is the fact that vague statutes provide unsatisfactory standards for enforcement, factfinding, and review, and thus raise the specter of discriminatory application. Adequate warning is, of course, a cornerstone of the due process clause, but the Court has rarely voided statutes solely on this ground. The questions whether the end sought by the imprecise language justifies its potential for ensnaring or deterring innocent conduct, and whether more precise, alternative language is available to accomplish the legislative purpose, are ones of subjective judgment "peculiarly within the responsibility and competence of legislatures." Nevertheless, there are instances where statutory uncertainty is so egregious that sound judgment, though admittedly subjective, requires that the statutes fall.

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105 The Court has tried to determine whether a statute is penal from legislative intent. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963). Section 504 lacks any extensive legislative history. In the absence of legislative history, the Court has determined the nature of a statute through application of a test considering:

- whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Id. at 168-69 (footnotes omitted).

106 Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969).


The Florida cutoff statute presents the clearest example of "an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . ."112 It commences the aid termination process113 when a student or employee of a state institution "has participated in disruptive activities."114 Participating in a peaceful demonstration, making noise in one's dormitory, or attending a loud party may or may not be prohibited under the statute. It is impossible to tell in advance with any degree of certainty. In Soglin v. Kauffman,115 the word "misconduct," an equally indefinite term, was held too vague a standard under which to inflict punishment. "Disruption," in its naked form as in the Florida provision, should fare no better.116 There are other instances where the warning quality of cutoff statutes is open to question. For example, when is a disruption "of a serious nature"?117 When is a crime one of "moral turpitude"?118

Beyond the rudimentary criticism of the lack of warning, statutory indefiniteness is often criticized for its potential to chill first amendment rights.119 Here, vagueness and overbreadth doctrines merge.120 An overbroad law, one which inhibits or prohibits protected behavior, usually suffers from at least a latent vagueness. When the Supreme Court has spoken in the vagueness idiom, it has usually meant this aspect of vagueness in an overbroad law. To this extent the doctrines are one. They are distinct in that a statute can be extremely precise in the vagueness-adequate warning sense and yet be void for its overly broad sweep.121 Conversely, a statute that is unquestionably narrow in the overbreadth sense may still be voided as vague.122 Still, particularly in cases involving first amendment rights,123 statutory uncertainty and overreaching are inextricably intertwined.

Whether the vocabulary of vagueness or overbreadth is used, some cutoff statutes suffer from potential invasions of areas protected by the first amendment. This alone may render the statutes unconstitutionally

113 The process is completed by school recommendation to terminate aid after the student has engaged in the prohibited behavior. FLA. STAT. ANN. §239.50 (Supp. 1971).
114 Id. § 239.581.
115 418 F.2d 163 (7th Cir. 1969).
122 Perhaps the clearest examples are the adequate warning cases. Cases cited note 111 supra.
overbroad. Often, one need not show that his behavior is constitutionally protected, because an overbroad law’s chill on free expression of others is felt adequate justification to strike down the law even in a factual setting not calling into play the statute’s actual overbreadth.

The line between an overbroad law and a valid one is at best thin, and nearly always must be drawn in the context of a factual situation before the court. This makes it difficult to state with confidence that a particular statute is overbroad. Once again, however, sound subjective judgment suggests some cutoff statutes are of dubious validity. For example the Washington statute provides:

Any student who organizes and/or participates in any demonstration, riot or other activity of which the effect is to interfere with or disrupt the normal educational process at such institution shall not be eligible for such aid.

The Washington provision may be saved from the void-for-vagueness rationale applicable to the Florida statute because it at least requires that the disruption result from a demonstration, riot, or the like. But the statute remains susceptible to an overbreadth attack, because it appears that a student who plans a peaceful demonstration, surely protected behavior, that turns out to “disrupt the normal educational process” will lose his financial aid. Requiring no element of intent, the statute would penalize the planners of a peaceful demonstration if it effected violence or disruption. Because a rational student may be deterred by the statute from exercising his first amendment rights, either narrower construction or complete invalidation of the statute is in order.

Statutes that simply use “disruptive” or “disorderly” to describe the behavior prohibited also hover dangerously close to overbreadth. The favored position of free expression in our society allows some minor disruptions of daily routine to accompany it. Therefore, a blanket prohibition against any disruptive or disorderly effects is likely to run afoul of the approved standard in the demonstration area. Once again, the detailed facts of a particular situation are likely to be determinative.

128 Id.
Cutoff legislation invites vagueness and overbreadth decisions even more openly where a university or an agency is the entity responsible for determining whether the inherently malleable triggering words call for application of the sanction.\textsuperscript{131} As recognized by the majority in the \textit{Haverford College} case, the ability of the federal judiciary to ensure regularity in the protection of constitutional rights is substantially diminished when factual determinations and statutory constructions are rendered by private institutions or public agencies, rather than state or federal courts.\textsuperscript{132} The lesser ability of federal courts to supervise these renderings demands a broader constitutional buffer zone.

\section*{C. Procedural Due Process}

Both constitutional arguments and objections to the merits of a particular aid termination decision are of little value to an accused student unless they can be presented in a timely manner. The lack of provision for procedural due process in many aid termination statutes raises the questions whether students will have the opportunity to challenge a decision in this way and whether such omission is itself a constitutional defect.

Statutory cutoff legislation may be divided into two categories for examination of procedural due process requirements. The first group provides for "automatic" termination of state aid in certain specified instances.\textsuperscript{133} Such provisions are characterized by the legislative commands of "must" and "shall" in mandating the termination of aid. Typically, conviction in any court or a determination by the educational institution that the student has disobeyed a "valid" institutional regulation resulting in a "serious disturbance" acts as the trigger mechanism invoking the statutory command that the student's aid must be terminated.

Statutes in the second category, the "discretionary" group, are phrased in terms of "may terminate," and vest in either a state higher-education authority\textsuperscript{134} or in the institution itself\textsuperscript{135} the discretionary


power to terminate financial aid on a case-by-case basis. Any examination of procedural due process defects must carefully discriminate among proceedings in which the issue for determination is the criminal guilt or lesser misbehavior of the student, those that also determine whether any institutional rule infraction was of a "serious or disruptive nature," and those in which aid termination is the central issue.

The "automatic" formula's failure to provide even the most rudimentary aspects of procedural due process with respect to the issue of aid termination should not be regarded as a constitutional defect. By statutory command, once the finding of criminal guilt or violation of an institutional rule is established, aid termination is accomplished. Since guilt or proscribed conduct has been determined at a prior hearing, it is difficult to imagine what the subject matter of an aid termination hearing should be in the "automatic" category. Financial aid must be terminated once a court convicts or the institution makes certain determinations. Requiring a separate hearing on the aid termination issue would provide a forum without any possibility of substance. Any due process claims of the student in that case must be directed at the court proceeding or the underlying institutional disciplinary process. While the possibility of aid termination and consequent interruption of the educational process argue strongly for procedural fairness at any school disciplinary proceeding, under the first statutory category they do not require an additional hearing on the aid termination issue alone.

In contrast, statutes of the "discretionary" type vest in either a governmental higher education authority or in the institution administering the aid the power to determine whether or not aid should be terminated in each case. The requirement of procedural fairness in these determinations may be analogized with that in recent Supreme Court decisions in the public assistance area. In Goldberg v. Kelly the Court held that before assistance payments could be terminated, procedural due process requirements mandated a hearing with adequate notice and any other requirements that might be necessary to ensure the fundamental fairness of the proceedings. This prior hearing was necessary despite the statutory provision for a hearing to review the termination decision after it had been taken. The Court singled out the

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136 See, e.g., CAL. EDUC. CODE § 31291 (West Supp. 1971) (Recipient of state financial aid may be determined ineligible for further aid if he engaged in prohibited activity); PA. STAT. ANN. tit. 24, § 5104.1 (Supp. 1971) (The higher education authority may deny all forms of financial assistance to any student who is convicted of a criminal violation or an institutional rule violation.) The discretionary group also includes those statutes, which, although phrased in terms of "must" or "shall" terminate as are the automatic group, still require a discretionary decision by another body on the issue of final aid termination.

137 Presumably, this might be a separate question for determination in the same proceeding which decides whether the student has, in fact, broken the institutional rule.

138 Perhaps the only issue that a student could raise at such a hearing would be the defense that there had been no valid prior conviction.


140 Id. at 267-68.
potential harm to the aid recipient that might result from an unwarranted interruption in the orderly flow of payments. Of course, the value of an uninterrupted flow of educational payments may lack the emotive force which propelled the Court to safeguard the sustenance payments in Goldberg, but nevertheless educational benefits do represent a significant economic advantage to the student, and their continued orderly flow may in many cases be necessary for the student's unimpeded attendance at the institution. Their importance lies in the education which they secure, an education which enables the student "to earn an adequate livelihood, to enjoy life to the fullest, [and] to fulfill as completely as possible the duties and responsibilities of [a] good citizen." If aid is viewed in such a favorable light, the Court could require that its receipt be protected by the same procedural requirements that were mandated by Goldberg.

The school disciplinary cases lend additional support for the imposition of procedural fairness requirements in the "discretionary" category. In Dixon v. Alabama State Board of Education, the court of appeals held that due process required notice and a chance to be heard when the student faced possible dismissal from a tax-supported institution of higher education. Dixon, and the later school discipline cases involving a possible expulsion or suspension, have recognized the potentially great effect that such sanctions may have on the student, as well as the value to the student of remaining in continued attendance, and have said that such disciplinary proceedings, when the requisite state action is found, are circumscribed, at minimum, by the due process requirements of the fourteenth amendment. Here, the consequences of aid termination are potentially as serious as those found in the school discipline cases. This is particularly true when the statutory scheme not only cuts off payments at the present institution but also precludes any aid for some period in the future, no matter what institu-

141 Id. at 265.
143 294 F.2d 150, 157 (5th Cir. 1961).
144 In Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968), the court noted that:

[1]In the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from earning academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

tion the student may be admitted to after termination of his aid by the original school.147

D. Equal Protection

Equal protection objections to financial aid termination legislation focus mainly on the unequal treatment accorded similarly situated students. Financial aid recipients may find their aid, perhaps even their education,148 terminated for conduct that would merely bring institutional discipline for their wealthier contemporaries.149 The statutes seem grossly underinclusive:150 their limitation to only those students who receive governmental financial assistance misses many students engaging in campus disturbances. This underinclusiveness argument might be easily dismissed—with the frequently reiterated proposition that legislatures can attack problems on a piecemeal basis—were it not for the choice of wealth as the particular basis of classification.

Accepted doctrine under the equal protection clause would suggest an initial determination of the appropriate standard of judicial review, strict scrutiny being accorded whenever the legislative classification is suspect or the individual right affected is fundamental. In the case of cutoff legislation, it might be argued that the statutes classify according to wealth, or empirical evidence might show that application of the statutory cutoffs had focused on racial minorities.161 Alternatively the courts might find a fundamental interest in obtaining higher education. If a suspect classification or burden upon a fundamental interest were found, unconstitutionality would follow unless the government advanced a compelling state interest in the chosen scheme.162 If neither stimulus


148 The purpose of many state-sponsored aid programs indicates an official awareness that many aid recipients are able to pursue an advanced education solely because of their state aid. For example, the purpose of the Pennsylvania program of scholarships and loan guarantees is "to prevent tragic underdevelopment of human talent by making financial assistance available to young people who might otherwise be unable to pursue a higher education." Pennsylvania Higher Education Assistance Agency, Summary Statistics of PHEAA Programs for the 1969-70 Academic Year (introductory Highlights).

149 Courts have not passed on the equal protection objections to such legislation. In Haverford College v. Reeher, Civil No. 70-2411 (E.D. Pa., filed July 19, 1971), the court concluded that the decision on vagueness and overbreadth had mooted plaintiffs' argument on equal protection grounds. This reasoning seems erroneous given the court's conclusion that the section of the Pennsylvania statute which provides for aid termination after a felony conviction was not unconstitutionally vague or overbroad. That section would still be open to an equal protection attack.


to strict scrutiny were found, a statute would be found constitutional merely upon a showing that it is designed to serve a legitimate state interest and that the classification scheme is rationally related to the purpose.¹⁵³

But this relatively mechanistic analysis, which has been applied by the Court in the past, is ill-suited to constitutional exegesis. It tends to oversimplify the process of interpreting the Constitution and to allow too much room for the entry of subjective considerations into the decisionmaking process. The rigid dichotomy between a scheme demanding a "compelling state interest" and one demanding only a "legitimate state interest" is too facile, and conducive to the suppression of relevant facts, circumstances, and interests. Courts should instead engage in a more visible and more precise balancing process to ensure the consideration and proper weighting of all relevant factors. Better results are likely to flow from a calculus illuminating and balancing the "character of the classification in question, the relative importance to the individuals in the class discriminated against of the government benefit they do not receive, and the asserted state interests in support of the classification."¹⁵⁴ In essence, a precise and discriminating analysis is advisable.

Most aid is distributed on the basis of need,¹⁵⁵ and thus the cutoff statutes do classify according to wealth. The real question is the constitutional effect of this classification. In James v. Valtierra¹⁵⁶ the Supreme Court chose to ignore "an explicit classification on the basis of poverty,"¹⁵⁷ which the dissenters thought should be viewed as a suspect classification demanding exacting judicial scrutiny.¹⁵⁸ The Court’s failure to even mention the wealth distinction in Valtierra could be read to mean that the equal protection clause will not in the future be used to proscribe statutory distinctions based on wealth. A more palatable reading, not revealing quite so dramatic a reversal, would be that the sensitivity of the Court to wealth classifications will not be of such proportions as to automatically stimulate the sort of rigid scrutiny previously applied to wealth classifications and racial classifications.¹⁵⁹ Under this view, a wealth distinction should necessitate a weightier state interest than, for example, one based on age, but should not lead to an

¹⁵⁵ The Pennsylvania program requires that applicants "demonstrate a need for financial assistance from the Commonwealth as demonstrated by the application and income data." PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, supra note 148, at 1.
¹⁵⁷ Id. at 144-45 (Marshall, J., dissenting).
¹⁵⁸ Id. at 144 (Marshall, J., dissenting).
¹⁵⁹ Hunter v. Erickson, 393 U.S. 385 (1969) (race); Loving v. Virginia, 388 U.S. 1 (1967) (race); Harper v. Board of Elections, 383 U.S. 663 (1966) (wealth); Douglas v. California, 372 U.S. 353 (1963) (wealth); Korematsu v. United States, 323 U.S. 214 (1944) (race). Although other interests and classifications were involved on both sides in these cases, the Court’s decisions were premised on those noted.
almost automatic invalidation as the traditional strict scrutiny standard seemed to invoke and as may be more appropriate in the racial area.

Governmental educational aid benefits are highly valuable to the individuals whose aid might be terminated by the statutes. The courts have often recognized both the economic benefits flowing from an advanced education and the social and civic advantages which accrue to the student as a result of his education. Considered on a somewhat abstract level, the value of education is closely analogous to that which the courts have attached to access to other governmental assistance payments. A blanket assertion of the high value of education, however, should not preclude judicial examination of the value of a governmentally subsidized education, for while the value of education stands as a general proposition, the value of having that education financed through state or federal aid will vary according to the availability of alternative means of financing.

Alternative options available to the individual student undercut the critical importance of state or federal aid. The availability of financial aid from private sources may provide an alternative to state aid. New plans for the repayment of present educational loans through the future earnings of the student may provide readily available aid for any student willing to undertake the responsibility of repayment. Under the contingent repayment plan, for example, in return for money borrowed the student agrees to repay a certain percentage of his future income, rather than the amount of the principal and interest at a fixed rate. Long-term loan programs may also provide an alternative, although such plans themselves work an extreme hardship on students from low-income families.

To the extent that such alternative methods of educational finance are available, the impact of state or federal aid termination is minimized for the individual. Under this analysis the benefit denied to the class as a result of the allegedly discriminatory legislation is not the opportunity of achieving a higher education, but of having that education financed by governmental sources rather than private financial sources. The courts must examine options available to individual students to accurately assess the impact of state and federal aid termination and appropriately assign a value to this factor in the equal protection balance.


162 Heavy reliance upon loans might seriously impede low-income students. It has been suggested that "to ask young persons from low-income and minority backgrounds to assume [substantial indebtedness] to get through a program of higher education presents a formidable barrier." The low-income student's career possibilities are likely to be significantly less remunerative, thus rendering repayment more difficult. Id. 626.
The asserted government interest for the statutory classification is the preservation of order on college and university campuses so as to maintain an environment suitable for academic endeavors. This is undoubtedly a permissible legislative objective, although it is doubtful that it is of the same level of necessity and seriousness that courts have previously required when the "suspect classification" analysis is found to apply. The importance, in an equal protection analysis, to be accorded this government interest should depend in part on the effectiveness of the cutoff legislation in serving it, as well as the availability of less drastic means. The government should have the burden of proving the effectiveness, a burden that may well be difficult to carry, as our earlier analysis should indicate.

In summary, the individual interest at stake is that of a governmentally financed higher education, and alternative means of finance may dilute the importance of that interest. The asserted state interest is a significant one, and while it may not be as compelling as those required for other "suspect" classifications, it will be sufficient in some cases. The ultimate equal protection decision as to any particular piece of legislation should probably depend upon the availability of other means of finance, which may well vary from time to time and area to area, and upon government proof of the effectiveness and necessity of cutoff legislation to achieve the goal of stemming campus disorders.

CONCLUSION

The constitutional defects and policy infirmities of state and federal financial aid withdrawal statutes evidence their hasty drafting and ill-considered adoption. Certainly the most telling criticism of the legislation is that it cannot be shown to have dampened campus disturbances. In addition, in its intrusion into academic disciplinary procedures, the legislation has imposed measurable administrative burdens on the institutions and raised the possibility of significant educational deprivation for many students. The legislation should be dealt with as the Scranton Commission recommended: additional legislation should not be enacted, present legislation in the form of riders should be allowed to expire, and permanent legislation should be repealed.

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163 E.g., Korematsu v. United States, 323 U.S. 214 (1944).