"No Pass, No Play": Equal Protection Analysis Under the Federal and State Constitutions

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INTRODUCTION

In recent years, a growing concern has emerged in society regarding the quality of education offered by our public school systems. One outgrowth of this concern has been the emergence of so called “no pass, no play” rules or statutes. While these rules vary from state to state, and even vary within many states, the basic thrust of these rules is to provide that if a student does not maintain a certain level of academic achievement, he or she will be prohibited from participating in any extracurricular activities for a specified period of time.

Since their adoption, “no pass, no play” rules have become a subject of controversy at both the local and national level. Proponents of the rules argue that they advance education by giving the student who fails to meet minimum academic standards an incentive to do better, and more free time

1. Texas is the only state that has enacted a “no pass, no play” statute. TEX. EDUC. CODE ANN. § 21.920 (1987). However, various school boards throughout the nation have adopted rules which have the same effect on students. Thus, throughout the rest of this Note, the author will simply refer to the state action in question as “no pass, no play” rules.

2. While there is a general association in society between extracurricular activities and interscholastic athletics, it is important to emphasize that the term has no such limitation. Extracurricular activities include field trips, student clubs or organizations, student government and athletics. Thus, contrary to the perception of some, these rules do not simply affect student athletes.

3. While the following list is by no means exhaustive, it does serve to exemplify how these “no pass, no play” rules differ from area to area:
   (a) The State of Texas: If a student fails any class he may not participate in extracurricular activities. TEX. EDUC. CODE ANN. § 21.920 (1987).
   (b) Helena, Montana: A student must maintain a 2.0 or “C” average to participate in extracurricular activities. Adams, Montana Court OKs “No Pass, No Play”, NAT'L L.J., Oct. 20, 1986, at 33, col. 1.
   (c) Los Angeles, California: A student must maintain a “C” average and have no failing grades to participate in extracurricular activities. McGrath, Blowing the Whistle on Johnny, Time, Jan. 30, 1984, at 80.
   (d) Norwalk, Connecticut: A student must maintain a 1.5 or “D+” average to participate in extracurricular activities. Cavanaugh, Student Athletes Face Stricter Grade Rules, N.Y. Times, Sept. 2, 1984, § 23, at 1, col. 1.

to devote to studies.\textsuperscript{5} However, opponents of the rules question this logic. They contend that the rules may in fact lead more students to either drop out of school altogether, or to pursue academic course work which does not present any substantial challenge.\textsuperscript{6} The most recent entrant in the controversy has been the judiciary. Challengers in the courts have attacked the constitutionality of these "no pass, no play" rules by asserting that the rules violate their equal protection rights under both the Federal Constitution and the relevant state constitution.\textsuperscript{7} However, as of yet, the challengers have not had success.\textsuperscript{8}

This Note will focus on the merits of the equal protection challenges which have been raised against these "no pass, no play" rules under both the Federal Constitution and the individual state constitutions. Section I of this Note will briefly examine the merits of the federal claim and will conclude that such a challenge is, at best, a weak one. Section II of this Note will discuss the recent developments in state constitutional law and will suggest that these developments may present one avenue, at least in some states, by which "no pass, no play" rules may be found to be unconstitutional as violative of equal protection. The Note will conclude that if a student's individual equal protection rights are to be protected from these "no pass, no play" rules, then that protection will have to come through interpretations by state courts of their respective constitutions.

I. \textbf{Equal Protection Analysis Under the Federal Constitution}

A. Background

The equal protection clause\textsuperscript{9} of the United States Constitution plays a central role in the cases challenging the constitutionality of "no pass, no play" rules. However, before one can attempt to discuss the merits of any equal protection challenge, it is helpful to review the analytical process that

\textsuperscript{5} McGrath, supra note 3, at 80.
\textsuperscript{6} A New Law Cuts Deep in the Heart of Texas, supra note 4, at 17.
\textsuperscript{7} In one case, the challenger also asserted that the "no pass, no play" rule violated his due process rights under both the federal and state constitutions. See Spring Branch Indep. School Dist. v. Stamos, 695 S.W.2d 556 (Tex. 1985), appeal dismissed, 106 S. Ct. 1170 (1986). However, this challenge, which was quickly rejected by the court, is outside the scope of this Note.
\textsuperscript{8} See id.; Montana ex rel. Bartmess v. Board of Trustees, 726 P.2d 801 (Mont. 1986).
\textsuperscript{9} The equal protection clause, found in the fourteenth amendment, states: "No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
the Supreme Court has developed to interpret the equal protection clause.\textsuperscript{10} This section will provide a brief review of this analytical process.

When confronted with an equal protection challenge under the fourteenth amendment, the Supreme Court will first ask whether the government classification infringes upon a “fundamental right”\textsuperscript{11} or constitutes a “suspect classification.”\textsuperscript{12} If so, the Court will subject the classification to a strict standard of review and the government will need to show that the classification is “necessary to promote a compelling governmental interest.”\textsuperscript{13} History has shown that this test is a very difficult one for the government to meet.\textsuperscript{14} In fact, one commentator has aptly noted that this standard of review is “strict in theory and fatal in fact.”\textsuperscript{15} Thus, if the Court finds that strict scrutiny is the appropriate standard of review, the classification will almost certainly be found to violate the equal protection clause of the fourteenth amendment.

Traditionally, if the Court did not find that the classification infringed upon a “fundamental right” or constituted a “suspect classification,” the classification would then be subject to a mere rational-basis standard of review.\textsuperscript{16} Under this standard, “the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution.”\textsuperscript{17} History has shown that the rational-basis standard of review is a very easy one for the government to satisfy.\textsuperscript{18} As one commentator has observed, the rational-basis standard involves “minimal scrutiny in theory and virtually none in fact.”\textsuperscript{19} Thus, if the Court finds that the rational-basis standard is the appropriate standard of review, the classification will almost certainly survive the equal protection challenge.

\textsuperscript{10} The historical development of this analytical process is outside the scope of this Note. For an overview of this development, see Note, Alternative Models of Equal Protection Analysis: Plyler v. Doe, 24 B.C.L. Rev. 1563, 1567-82 (1983).

\textsuperscript{11} Examples of rights recognized by the Court as “fundamental” include: the right to travel (e.g., Shapiro v. Thompson, 394 U.S. 618 (1969)); the right to vote (e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)); and, the right to obtain a criminal appeal (e.g., Griffin v. Illinois, 351 U.S. 12 (1956)).

\textsuperscript{12} The classic examples of a “suspect class” are those involving race (e.g., Loving v. Virginia, 388 U.S. 1 (1967)) or national origin (e.g., Hernandez v. Texas, 347 U.S. 475 (1954)).

\textsuperscript{13} Shapiro, 394 U.S. at 634 (emphasis in original).


\textsuperscript{15} Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).


\textsuperscript{17} J. Nowak, R. Rotunda & J. Young, Constitutional Law § 14.3 (3d ed. 1986).


\textsuperscript{19} See Gunther, supra note 15, at 8.
While the preceding two standards provided the only basis of review under the equal protection clause for many years, the past few decades have given rise to a third standard of review. This intermediate-level standard has been recognized by the Court most clearly when the classification in question has been based on gender.\(^{20}\) Under this standard, the government must show that the classification it has created is "substantially related" to an "important governmental objective[]."\(^{21}\) While the precise requirements called for by this standard are still not clear, it is clear that the standard requires something less than strict scrutiny and something more than mere rational-basis. In applying this standard, one finds that the Court has sometimes held the classification in question to survive the equal protection challenge, and other times it has held the classification in question not to survive the equal protection challenge.\(^{22}\) Thus, it is not possible to make any broad generalizations regarding this standard of review.

### B. Application of the Federal Equal Protection Analysis to "No Pass, No Play" Rules

1. Strict Scrutiny

Using the multi-tiered equal protection analysis that is employed by the Supreme Court, this section will briefly examine the merits of a federal equal protection challenge to a "no pass, no play" rule. The first question one must ask is whether a "no pass, no play" rule infringes upon a "fundamental right" or gives rise to a "suspect classification." If so, the rule will be subject to strict scrutiny by the Court and, as noted above, will almost certainly be struck down.

By examining the relevant authority, it seems certain that the Supreme Court will not find an individual's right to participate in extracurricular activities to rise to the level of a "fundamental right." Initially, it should be noted that the Court has been very reluctant to add to the list of recognized "fundamental rights."\(^{23}\) In addition, while the Court has recognized the importance of education in a number of its opinions,\(^{24}\) it has specifically held that education itself is not a "fundamental right" under the United


\(^{21}\) Id. at 197.

\(^{22}\) See Michael M. v. Superior Court, 450 U.S. 464 (1981) (survived the challenge); Craig, 429 U.S. 190 (did not survive the challenge).

\(^{23}\) See Note, supra note 10, at 1372.

States Constitution.25 Obviously, if the Court is unwilling to place education within the realm of a “fundamental right,” it will certainly not be willing to attach such a label to extracurricular activities which, arguably, are part of the educational process. In fact, several courts have used this precise reasoning to dismiss federal equal protection claims involving extracurricular activities.26 Thus, there is little or no doubt that one’s right to participate in extracurricular activities does not rise to the level of a “fundamental right” under the Federal Constitution.

Turning to the issue of whether a “no pass, no play” rule gives rise to a “suspect classification” under the Federal Constitution, the answer here also seems to be negative. The concept of a “suspect class” finds its roots in the often cited footnote of Justice Stone’s majority opinion in United States v. Carolene Products Co.27 There, Justice Stone wrote: “Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”28

The Court has relied upon this language to find classifications based on race or national origin to be “suspect.”29 However, again the Court has been hesitant to expand the list of “suspect classes.”30 It would be a very strained argument to suggest that a classification which distinguishes students on the basis of academic achievement is “suspect.” Yet that is the classification used in the “no pass, no play” rules: if one fails to maintain a specified level of academic achievement, one may not participate in extracurricular activities for a certain period of time. One’s race, national origin or any other immutable characteristic which is normally the basis of a “suspect classification” does not seem to be a factor.31 Thus, one can

25. Rodriguez, 411 U.S. at 37 (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”); Plyler, 457 U.S. 221 (“Public education is not a ‘right’ granted to individuals by the Constitution.”).
26. Cooper v. Oregon School Activities Ass’n, 52 Or. App. 425, 438-41, 629 P.2d 386, 394-96 (1981) (“Although interscholastic sports is an important and integral part of a student’s total educational experience, we cannot classify plaintiff’s interest as ‘fundamental’ in view of the fact that the U.S. Supreme Court has held that the right to education itself is not fundamental.”); Montana ex rel. Bartmess v. Board of Trustees, 726 P.2d 801, 803 (1986) (“The United States Supreme Court has held that education is not a fundamental right guaranteed by the federal Constitution. Based on that holding, we conclude that participation in extracurricular activities is not a fundamental right under the U.S. Constitution.” (citation omitted)).
27. 304 U.S. 144 (1938).
28. Id. at 152-53 n.4.
29. See supra note 12 and accompanying text.
30. See Note, supra note 10, at 1373.
31. Some have argued that the “no pass, no play” rules give rise to a “suspect class” because the effect of these rules has been disproportionately felt by members of minority groups. See Taylor, Education Reform—Or Discrimination?, Nat’l L.J., Aug. 18, 1986, at
conclude that the Court will not find a "no pass, no play" rule to give rise to a "suspect classification."

Having determined that a "no pass, no play" rule does not infringe upon a "fundamental right" or give rise to a "suspect classification," it is clear that such a rule will not be subject to strict scrutiny under the Federal Constitution. The next issue is whether intermediate-level scrutiny or rational-basis scrutiny will be the appropriate standard of review. While arguments can be made on both sides, it seems clear that the Court will find the rational-basis standard to be the appropriate standard.

2. Intermediate-Level Scrutiny

The Court has applied intermediate-level scrutiny to several different types of cases. However, the Court has never clearly set forth the elements which it looks to in order to invoke such a standard. One commentator has suggested the presence of one of two circumstances whenever the Court has invoked intermediate-level scrutiny. The first circumstance is when "important, though not necessarily 'fundamental' or 'preferred,' interests are at stake." The second circumstance is when "sensitive, although not necessarily suspect, criteria of classification are employed." Clearly, the second circumstance is not raised by a "no pass, no play" rule. Classifying students on the basis of academic achievement does not give rise to either a "suspect" or "sensitive" classification. Thus, if the Court were to invoke intermediate-level scrutiny to review a "no pass, no play" rule, it would have to be based upon the first circumstance.

The challengers of a "no pass, no play" rule could argue that, while education is not a "fundamental right" under the Federal Constitution, the Court has certainly recognized it to be a very important right. In fact, in Plyler v. Doe, the important role which education plays in our society was clearly one of the factors which compelled the Court to invoke intermediate-

10, col. 1. However, even if such a disproportionate effect were actually shown, the Supreme Court has clearly held that such an effect alone is not enough to constitute a violation of the equal protection clause. One must also show that the government had a discriminatory purpose in adopting the rule. Washington v. Davis, 426 U.S. 229 (1976). It seems clear that a government's purpose in adopting a "no pass, no play" rule is based upon its belief that such a rule advances education. Thus, this argument would also not be a successful challenge under the equal protection clause.

32. J. Nowak, R. Rotunda & J. Young, supra note 17, at 531-33 (The authors suggest that intermediate-level scrutiny has been employed in cases involving gender, illegitimacy and alienage.).
33. Id. at 534.
35. Id.
36. Id. § 31, at 1090.
37. See supra note 24.
level scrutiny in reviewing a school financing plan. Thus, if one considers participation in extracurricular activities to be part of the overall educational process, an argument can be made that the importance of developing well-rounded, educated children should invoke intermediate-level scrutiny to review a "no pass, no play" rule. However, this argument is unlikely to succeed for several reasons. First, while the Court has recognized the importance of education, it has also recognized that decisions regarding educational policy are more appropriately made by state and local authorities. In *San Antonio Independent School District v. Rodriguez*, the Court wrote that:

> Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social and even philosophical problems." The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.

Second, while the Court did apply intermediate-level scrutiny in *Plyler*, that case also involved the children of illegal aliens. Thus, the intermediate-level scrutiny applied by the Court seems to have been invoked not only because of the importance of education but also because of the presence of a disadvantaged group. In a "no pass, no play" challenge, that element would not be present.

Finally, while the Court has invoked intermediate-level scrutiny in several cases, the prevailing view of the Court today is that the rational-basis test will be invoked when the governmental classification "does not involve a fundamental constitutional right, suspect classification, or the characteristics of alienage, sex or legitimacy." Given these facts, while an argument can be made that intermediate-level scrutiny should be the appropriate standard of review for a "no pass, no play" rule, this argument is, at best, a weak one. Rather, one can safely conclude that the Court will find the rational-basis standard to be the appropriate standard of review to apply to a "no pass, no play" rule.

### 3. Rational-Basis Test

Applying the rational-basis standard to a "no pass, no play" rule, it is clear that a federal equal protection challenge to such a rule will not be

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39. *Id.* at 221-24.
40. Several lower federal courts have recognized this concept. *See*, e.g., *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968) ("[Athletics is] an integral part of the public school system . . . .").
41. 411 U.S. 1.
42. *Id.* at 42 (citations omitted).
successful. Certainly, the government has a legitimate interest in advancing the education of its youth. Since there is a rational basis for believing that a "no pass, no play" rule promotes this purpose by providing students with both incentive and time to study, the Court will clearly uphold the rule. Thus, if the individuals who are adversely affected by these rules are going to have any success in the courts, this success will have to be based upon a source other than the Federal Constitution.

II. Equal Protection Analysis Under the State Constitutions

A. Background

Over the past fifty years, the scope of the Federal Constitution has been greatly expanded by the federal judiciary. A significant portion of this expansion came during the Warren Court era. During this era, the "Court interpreted the Fourteenth Amendment to nationalize civil rights, making the great guarantees of life, liberty and property binding on all governments throughout the nation." However, one effect of this expansion was to limit significantly any development in the area of state constitutional law. When one spoke of constitutional adjudication, the focus was on the Constitution of the United States and not on the individual state constitutions.

In recent years, this trend has begun to shift. As one commentator has observed, "state courts have increasingly relied on state constitutions to decide issues formerly governed by the United States Constitution." By doing so, the state courts have begun to interpret their own constitutions to be more protective of individual rights than the Federal Constitution.

In light of these recent developments in state constitutional law, this section of the Note will focus on the merits of a state equal protection challenge to a "no pass, no play" rule. While state courts are clearly not bound by

47. See W. Brennan, supra note 45. ("Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.").
48. While many states technically do not have an equal protection clause, most have interpreted other clauses of their constitution to include the guarantee of equal protection. See, e.g., Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982). In Lujan, the court stated: The Fourteenth Amendment to the United States Constitution declares that no state shall deny a person equal protection of the law. Although the Colorado Constitution does not contain an identical provision, it is well-established that a
federal precedent when they interpret their own constitutions, one finds that
in the equal protection area, most state courts have chosen to follow the
analytical framework developed by the United States Supreme Court. Thus,
part B of this section will discuss the merits of a state equal protection
challenge to a "no pass, no play" rule within this federal analytical frame-
work. Part C of this section will then focus on the merits of a state equal
protection challenge in those few states which have begun to move away
from the federal framework and develop their own analytical approach to
their equal protection clause. As one will see, if a student's right to participate
in extracurricular activities is going to be protected, then that protection will
have to come through interpretations by state courts of their respective constitu-
tsions.

B. State Equal Protection Analysis Within the Federal Framework

The United States Supreme Court has clearly held that education is not
a "fundamental right" under the Federal Constitution. However, this hold-
ing does not preclude each state court from considering the issue for it-
self under the relevant portions of its own constitution. The various state
courts which have confronted this issue have gone different ways. Some
courts have held education to be a "fundamental right" under their state
constitution and others have not. Obviously, the ultimate determination
a court reaches regarding this issue is of critical importance in a state which

like guarantee exists within the constitution's due process clause and that its
substantive application is the same insofar as equal protection analysis is con-
cerned.

Id. at 1014 (citations omitted). See also Karasik, Equal Protection of the Law Under the Federal and Illinois Constitutions: A Contrast in Unequal Treatment, 30 De Paul L. Rev. 263, 270 n.33 (1981) ("Illinois was only the eighth state to include an equal protection clause in its constitution. Most states, however, compensated for this constitutional defect by expanding other provisions, most commonly the due process clause.").

49. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1222 (1985) ("Most state courts use conventional federal equal protection analysis when interpreting the various equality provisions of their state constitutions.").

50. See supra note 25.

51. States which have held that education is a "fundamental right" under their own con-

52. States which have held that education is not a "fundamental right" under their own con-
employs the federal framework to decide a state equal protection challenge. This section will examine the merits of a state equal protection challenge to a "no pass, no play" rule in states which have held education to be a "fundamental right," states which have held education not to be a "fundamental right," and states which have not yet decided the issue. As one might expect, the chance one has for a successful state equal protection challenge varies greatly depending upon within which of these three groups the challenger's state falls.

1. Application of the Federal Framework in States That Have Held Education To Be a "Fundamental Right"

In a state which has held education to be a "fundamental right" guaranteed by the state constitution, it is clear that, under the federal equal protection framework, any classification which restricts or penalizes the exercise of this fundamental right will be subject to strict scrutiny by the courts. As demonstrated above, this standard of review is a very difficult one for the government to meet. The court will require the government to show a compelling governmental interest, including an almost perfect fit between the means chosen and the end sought to be achieved, in order to justify its classification. In almost every case, the court will find the classification to fall short of this strict scrutiny standard, and the classification will be found to violate the state's equal protection clause. Thus, in a state which has held education to be a "fundamental right," the critical determination a court must make when confronted with a state equal protection challenge to a "no pass, no play" rule is whether an individual's right to participate in extracurricular activities falls within the boundaries of this "fundamental right." If it does, a "no pass, no play" rule will be subject to strict scrutiny and will almost certainly be invalidated. If it does not, a "no pass, no play" rule will only be subject to a rational-basis standard and will almost certainly be upheld.

Examining the relevant case law in those states which have held education to be a "fundamental right," it becomes evident that a challenger to a "no pass, no play" rule can make a strong argument that an individual's right to participate in extracurricular activities is encompassed within his "fundamental right" to receive an education. As long ago as 1927, the Arizona Supreme Court emphasized that the concept of education was by no means limited to the learning of the "three R's." In *Alexander v. Phillips* the Court wrote:

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53. *See supra* notes 11-15 and accompanying text.
54. *See supra* notes 13-15 and accompanying text.
55. *See supra* notes 17-19 and accompanying text.
56. 31 Ariz. 503, 254 P. 1056 (1927).
That athletic games under proper supervision tend to the proper development of the body is a self-evident fact. It is not always realized, however, that they have a most powerful and beneficial effect upon the development of character and morale. To use the one game of football as an illustration, the boy who makes a successful football player must necessarily learn self-control under the most trying circumstances, courage, both physical and moral, in the face of strong opposition, sacrifice of individual ease for a community purpose, teamwork to the exclusion of individual glorification, and above all that "die in the last ditch" spirit which leads a man to do for a cause everything that is reasonably possible, and, when that is done, to achieve the impossible by sheer will power. The same is true to a greater or lesser degree of practically every athletic sport which is exhibited in a stadium.

It seems to us that, to hold things of this kind are less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens, physically, mentally, and morally, than the study of algebra and Latin, is an absurdity.57

In more recent years, other state courts have expanded on the ideas set forth in Alexander. In Pauley v. Kelly,58 a school financing case, the West Virginia Supreme Court of Appeals defined education as "the development of mind, body and social morality (ethics) to prepare persons for useful and happy occupations, recreation and citizenship."59 Expanding this definition, the Court continued:

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in their society.60

Clearly, the elements on this list are not all developed in the classroom. Extracurricular activities, such as student government, student clubs and organizations, band, and athletic teams all play an important role in this overall development. Thus, if the court wants to insure that one's "fundamental right" to receive an education is advanced, it appears that the right to participate in extracurricular activities will have to be included within this "fundamental right."

57. 254 P. at 1059.
58. 255 S.E.2d at 859.
59. Id. at 877.
60. Id.
Perhaps the case which has gone the farthest in developing the idea that the right to participate in extracurricular activities is included within one's "fundamental right" to receive an education is *Hartzell v. Connell*. In *Hartzell*, a local high school charged a fee to any student who wished to participate in extracurricular activities. In deciding whether the plan violated the free school guarantee of the California Constitution, the California Supreme Court had to determine whether one's right to participate in extracurricular activities came within the scope of this constitutional provision. After a lengthy discussion in which the court examined the role extracurricular activities play in the overall educational process, the court held that "all educational activities—curricular, or 'extracurricular'—offered to students by school districts fall within the free school guarantee of article IX, section 5." While the court based its final holding on this determination, it is interesting to note that Chief Justice Bird, in a concurring opinion, also found the plan to violate the equal protection guarantee of the California Constitution. In doing so, the Chief Justice subjected the plan to strict scrutiny since she found that "educational extracurricular activities—like their credit generating counterparts—promote the constitutionally recognized purposes of public education. Accordingly, they are encompassed within the concept of education as a fundamental interest." Thus, in those states which have held education to be a "fundamental right," there is definitely persuasive precedent to support the position that a student's right to participate in extracurricular activities is also included within this right. As such, a strong argument can be made that a "no pass, no play" rule should be subject to strict scrutiny in these states.

By applying strict scrutiny to a "no pass, no play" rule, it becomes evident that such a rule will be found to violate the state's equal protection clause. While the government may arguably have a compelling interest in promoting the quality of education received by its youth, there has been no showing that a "no pass, no play" rule actually achieves this goal. In fact, several commentators have suggested that a "no pass, no play" rule does just the opposite. These commentators suggest that such a rule leads a number of

62. 679 P.2d at 36-37.
64. 679 P.2d at 38-43. The cited portion of the court's opinion presents an excellent discussion of the valuable contributions that extracurricular activities make to the overall educational process.
65. Id. at 43.
66. Cal. Const. art. I, § 7(a)-(b); art. IV, § 16(a).
68. Reinhold, supra note 4, § 1, at 16, col. 2 ("[W]hether the rule was actually raising achievement is still an open question, Larry Yawn, the Governor's education aide, conceded. He said the state was only now beginning to gather the data to answer the question . . . .").
students to drop out of school altogether\textsuperscript{69} or to avoid challenging course work.\textsuperscript{70} Certainly a rule which may have this effect does not meet the tight means-ends fit which is required under strict scrutiny. Thus, in those states which have held education to be a “fundamental right,” a state equal protection challenge to a “no pass, no play” rule will probably be successful.

2. Application of the Federal Framework in States Which Have Held Education Not To Be a “Fundamental Right”

In those states which have followed the lead of the United States Supreme Court in \textit{San Antonio Independent School District v. Rodriguez} \textsuperscript{71} and have held education not to be a “fundamental right” protected by the state constitution, a state equal protection challenge to a “no pass, no play” rule seems to have little or no chance of success. The analysis here is very similar to that developed in Part I of this Note where the author considered the merits of a federal equal protection challenge to a “no pass, no play” rule.\textsuperscript{72} Basically, since these courts have held that the right to education is not a “fundamental right,” they will almost certainly not be willing to hold one’s right to participate in extracurricular activities to be a “fundamental right.” Thus, strict scrutiny will not be the appropriate standard of review.

While one could try to argue that the importance of education, and the role that extracurricular activities play in the overall educational process, call for an intermediate-level standard of review, this argument is again a weak one. Examining those cases in which state courts have held education not to be a “fundamental right” protected by their constitution, one finds that even though the courts have recognized the importance of education, they have still gone on to apply a rational-basis standard of review.\textsuperscript{73} If a court is not willing to apply intermediate-level scrutiny when one’s right to receive an education is at issue, it will not be willing to apply intermediate-level scrutiny when one’s right to participate in extracurricular activities is at issue. Thus, one can conclude that a state equal protection challenge to a “no pass, no play” rule in a state that has held education not to be a “fundamental right” will have a very slim chance of success.

3. Application of the Federal Framework in Those States Which Have Not Considered the Issue of Whether Education Is a “Fundamental Right”

A majority of the state courts in the nation have never directly decided whether education is a “fundamental right” protected by their state con-

\textsuperscript{69} See \textit{A New Law Cuts Deep in the Heart of Texas}, supra note 4, at 17.
\textsuperscript{70} See Levin, \textit{A Tough New Texas Law Tosses High School Football for a Late-Season Loss}, \textit{People Weekly}, Nov. 18, 1985, at 52.
\textsuperscript{71} 411 U.S. 1 (1973).
\textsuperscript{72} See supra notes 39-44 and accompanying text.
ition. A challenger to a “no pass, no play” rule in such a state would initially want to argue that education should be recognized as a “fundamental right” under the state constitution and that one’s right to participate in extracurricular activities comes within the scope of this “fundamental right.” Certainly, such a challenger would want to cite the applicable case law in other jurisdictions which supports this position. However, one would also want to point out the close relationship between the states and the system of public education. As the Supreme Court observed in Brown v. Board of Education, “[t]oday, education is perhaps the most important function of state and local governments.” This observation is supported by the fact that all of the fifty state constitutions contain clauses regarding the establishment and support of a free public school system. Thus, there is considerable support for the position that education should be recognized as a “fundamental right” in those states which have yet to decide the issue. However, even before this decision is reached, there are persuasive arguments that an individual can make to support a state equal protection challenge against a “no pass, no play” rule.

An individual raising a state equal protection challenge in a state that has not yet decided whether education is a “fundamental right” would want to assert that the sheer importance of education itself, and the role that extracurricular activities play in the overall educational process, should certainly require the government to make more than a mere rational-basis showing to justify the classification created by a “no pass, no play” rule. This was the position adopted by the Montana Supreme Court in Montana ex rel. Bartmess v. Board of Trustees. In Bartmess, the plaintiffs argued that the “no pass, no play” rule adopted by Helena High Schools violated their equal protection rights under both the federal and state constitutions. The...
court quickly rejected the federal claim since the United States Supreme
Court had specifically held education not to be a "fundamental right." The issue then became whether the rule violated the state's equal protection clause.

In deciding this issue, the court first pointed out that it was not deciding "whether or not the right to education itself [was] a fundamental right." Rather, the court reviewed a number of Montana cases which had recognized the importance of extracurricular activities and held that, while one's right to participate in extracurricular activities was not a "fundamental right" under the state's constitution, it was clearly a right "subject to constitutional protection." Having made this decision, the court held that a "middle-tier analysis" was the appropriate standard to apply to the state equal protection challenge and that under such a standard the government "must demonstrate that its classification is substantially related to an important governmental objective."

In applying this "middle-tier" standard of review, the Bartmess court upheld the "no pass, no play" rule in question. However, the Bartmess court applied a very weak version of "middle-tier" review. While the school board had conceded that extracurricular activities were "a fundamental ingredient of the educational process," and the court recognized that there were no "studies showing improved grades for students operating under such a [no pass, no play] rule," the court nevertheless found the "middle-tier" standard of review to be satisfied. Certainly, an argument can be made that, had the court applied the more rigorous standard normally associated with intermediate-level scrutiny, the rule would have been struck down. Nevertheless, the application of a heightened standard of review at least indicates that the challengers of a "no pass, no play" rule have a good chance of invalidating such a rule, even if the state court has not yet decided the issue of whether education should be classified as a "fundamental right."

C. State Equal Protection Analysis in Those States Which Have Rejected the Federal Framework

In recent years, a few state courts have decided to completely abandon the analytical concept of determining what is, and what is not, a "fundamental right."

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80. Id.
81. Id. at 802.
82. Id. at 805.
83. Id. at 804-05.
84. Id. at 805.
85. Id.
86. Id. at 810 (Sheehy, J., dissenting).
87. Id. at 805.
88. Id.
mental right” for purposes of equal protection analysis. The New Jersey Supreme Court summed up the reasoning of these states when it wrote:

We have not found helpful the concept of a “fundamental” right. No one has successfully defined the term for this purpose. Even the proposition discussed in Rodriguez, that a right is “fundamental” if it is explicitly or implicitly guaranteed in the Constitution, is immediately vulnerable, for the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment. And if a right is somehow found to be “fundamental,” there remains the question as to what State interest is “compelling” and there, too, we find little, if any, light. Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it.

The question then becomes what approach do these states employ to analyze a state equal protection challenge. Examining the relevant case law, several cases suggest that these states have adopted what can be categorized as a balancing approach to equal protection analysis. In Dupree v. Alma School District No. 30, the Supreme Court of Arkansas found a school financing scheme to violate the equal protection clause of the state constitution. In doing so, the court balanced the individual’s right to receive an education against the government’s financing plan. On the individual’s side of the scale, the court found that “[e]ducation becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.” On the government side of the scale, the court found that the financing plan bore “no rational relationship to the educational needs of the individual districts.” In light of this balance, the court found the financing plan to be in violation of the equal protection clause of the state constitution.

Similarly, in Olsen v. Oregon, the Supreme Court of Oregon was confronted with an equal protection challenge to a school financing plan. In considering this challenge, the court wrote that:

We prefer the approach made by the New Jersey court in Robinson v. Cahill. Its approach could be termed a balancing test. Under this approach the court weighs the detriment to the education of the children

89. See, e.g., Carson v. Maurer, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980). In interpreting the equal protection guarantees of the New Hampshire Constitution, the court first wrote, “we are not confined to federal constitutional standards and are free to grant individuals more rights that [sic] the Federal Constitution requires.” The court then went on to conclude that the appropriate standard of review was “whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.” Id.
91. 651 S.W.2d 90 (Ark. 1983).
92. Id. at 93.
93. Id.
94. 276 Or. 9, 554 P.2d 139 (1976).
of certain districts against the ostensible justification for the scheme of school financing. If the court determines the detriment is much greater than the justification, the financing scheme violates the guarantee of equal protection.95

However, in applying the balancing test here, the court found the financing plan to survive the equal protection challenge.96 In examining the individual's side of the scale, the court found that "[t]he present financing system does not totally deprive the children of the poorest district in Oregon . . . of an education."97 On the government side of the scale, the court found that "this tradition of local government providing services paid for by local taxes existed at the time of statehood and continues to be a basic accepted principle of Oregon government."98 In light of these variables, one can see why the court held the equal protection clause not to be violated.

In those states which apply this balancing approach to a state equal protection challenge, it is not exactly clear how a given state will respond when such a challenge is asserted against a "no pass, no play" rule. However, it is obvious that a court will have to consider and explain the interests which lie on both sides of the scale before it draws any conclusion. As the Olsen court observed, the balancing approach "seems to better expose the court's reasoning in reaching its decision as compared to distinguishing between what is important and what is fundamental."99 Thus, before one can decide on the merits of a state equal protection challenge to a "no pass, no play" rule in one of these states, one must first examine the interests on both sides of the scale.

The interest on the government's side of the scale when it adopts a "no pass, no play" rule is to advance the quality of education received by the youth within its state. The government wants to develop a citizenry that possesses the basic educational skills needed to participate in the social, political, and economic systems of our society. While most would agree that this is a legitimate interest of government, there is some question as to whether a "no pass, no play" rule actually promotes this interest. Many would argue that a "no pass, no play" rule actually leads children to drop out of school altogether or to pursue course work which does not challenge the individual's intellect.100 If this is true, it is clear that a "no pass, no play" rule does little or nothing to promote the government's interest. In addition, some commentators point out that participation in extracurricular

95. Olsen, 554 P.2d at 145 (citation omitted).
96. Id. at 149.
97. Id. at 145.
98. Id. at 147.
99. Id. at 145.
100. See McGrath, supra note 3, at 80; A New Law Cuts Deep in the Heart of Texas, supra note 4, at 17.
activities is a valuable educational tool in itself.\footnote{101} Indeed, several of the courts referred to in this Note have taken this exact position.\footnote{102} If participating in school government or a student club is as valuable to the individual as the lessons taught in the classrooms, a "no pass, no play" rule again does little to advance the government's interest.

However, there are those who claim that a "no pass, no play" rule is a very effective means by which the governmental interest is advanced. Those who make this claim argue that a "no pass, no play" rule gives children both the time and the incentive to study.\footnote{103} These claimants assert that the lessons the individual learns in the classroom will be more valuable to both himself and the government than the lessons learned during extracurricular activities. If these assertions are true, then the government's side of the scale becomes more weighty.

Turning to the individual's side of the scale, one must examine the detriment that a "no pass, no play" rule places on the child. Those opposed to a "no pass, no play" rule argue that the detriment is great. First, they contend that participation in extracurricular activities alone is a crucial part of the overall educational process. To take this opportunity away from a certain class of individuals places them at a serious disadvantage when compared to those that are allowed to participate.\footnote{104} Second, it is argued that no matter how hard some individuals work, they are not going to be able to achieve the required academic level of performance in every class.\footnote{105} While a student may have trouble with geometry, he may excel in drama or music. To take away the individual's opportunity to participate in the school play or the school band because of one poor grade does little for the individual or the government. A person should be allowed to develop the skills that he does have rather than being forced to perform a skill that he does not have. Third, there may be a financial detriment to the individual who is hoping to afford a college education by relying on a music, drama, or athletic scholarship.\footnote{106} Denying the individual the right to participate in extracurricular activities may negate this chance. Finally, some commentators feel that there is emotional and psychological damage suffered by the individual who is effected by a "no pass, no play" rule.\footnote{107}

Obviously, proponents of a "no pass, no play" rule believe that the detriment to the individual is slight. They point out that the ban is usually

\footnote{101. See Taylor, \textit{supra} note 31, at 10.}
\footnote{102. See \textit{supra} notes 56-67 and accompanying text.}
\footnote{103. See McGrath, \textit{supra} note 3, at 80.}
\footnote{104. See Taylor, \textit{supra} note 31, at 10.}
\footnote{105. See Levin, \textit{supra} note 70, at 53; Johnson, \textit{supra} note 4, at 32.}
\footnote{106. See Johnson, \textit{supra} note 4, at 32.}
\footnote{107. \textit{Id.}}
only for a short period of time, and that the individual who earns the return of his privilege to participate will be better off in the long run.108

The discussion of the interests that are represented on both sides of the scale shows that a state which employs the balancing approach to equal protection analysis might go either way. There are certainly significant interests at stake for both the government and the individual. To a large extent, the final outcome of such a challenge will depend on the individual state court's perception of the value of extracurricular activities. If these activities are highly valued, the "no pass, no play" rule is likely to be invalidated. If they are not, the rule is likely to be upheld. However, no matter which outcome is reached, the balancing approach does have the advantage of requiring a court to set forth explicitly the interests it feels to be of significance. This alone helps to focus the public's attention on the impact which these "no pass, no play" rules have had on the individual and on whether they are actually effective.

CONCLUSION

"No pass, no play" rules have been adopted in many areas throughout the country. As these rules continue to increase in number, it is clear that more and more individuals will turn to the courts to challenge their validity. This Note has shown that the equal protection clause of the United States Constitution offers little help to such challengers. However, the equal protection clause of each individual state constitution suggests a different result. In recent years, state courts have become much more protective of individual rights by interpreting their own constitutions. This fact, along with the applicable case law in several states, suggests that a state equal protection challenge may provide a successful means by which to invalidate a "no pass, no play" rule. Thus, if the individuals who are adversely affected by these rules are to find constitutional protection, that protection will have to be found within their own state constitutions, rather than within the Federal Constitution.

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108. See McGrath, supra note 3, at 80.