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Robert M. O'Neil

Indiana University School of Law - Bloomington

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GOD AND GOVERNMENT AT YALE: THE LIMITS OF FEDERAL REGULATION OF HIGHER EDUCATION

Robert M. O'Neil*

When the presidents of both Harvard and Yale Universities challenge the propriety of federal government policy toward higher education, the entire academic community should take note. Their concerns clearly transcend the interests of their respective institutions. In his June 1975 address to the Associated Harvard Alumni, President Derek Bok warned that "the critical issue for the next generation is Harvard's independence and freedom from governmental restraint." He voiced particular concern about "the ills that might accompany any government aid that the University receives: . . . clumsy legislation, . . . stifling bureaucratic requirements, . . . —[and] erratic fluctuations" in funding. Bok's concern was neither abstract nor remote. Late in the afternoon before his alumni speech, he had received a special delivery letter from the Acting Director of the Office for Civil Rights of the Department of Health, Education and Welfare. Harvard, along with 28 other major universities slated to get large federal grants before the close of the fiscal year, was given less than two weeks in which to revise its affirmative action plan or pledge to follow a model approved by the agency. Bok's concern was intensified by the fact that Harvard's affirmative action plan, unlike those of most other universities, already had been approved by the HEW regional office. The latest letter from Washington implied a rescission—or at least a major qualification—of that earlier approval.

The comments of Yale President Kingman Brewster came earlier in the spring, in a less urgent context. Speaking to the Fellows of the American Bar Foundation, Brewster warned that "there is a growing tendency for the central government to use the spending power to prescribe educational policies." He continued: "Use of the leverage of the government dollar, to accomplish objectives which have nothing to do with the purposes for which the dollar is given, has become dangerously fashionable." Brewster's illustrations were taken not only from the field of affirmative action but also from proposed health manpower legislation designed to increase the number of medical graduates going into rural and family practice. After expressing doubts even about the constitutionality of cur-

* Executive Vice President for Academic Affairs and Professor of Law, University of Cincinnati. A.B., 1956; A.M., 1957; LL.B., 1961, Harvard University.
1. Harvard University Gazette, June 13, 1975, at 1, col. 2.
rent federal regulation in these areas, Brewster concluded: "High on the agenda of the [legal] profession, especially its scholarly branch, should be to see that in terms of both limits on authority and redress against its abuse, the coercive power of the federal purse is made subject to a rule of law." 3

Brewster's challenge certainly deserves a thoughtful response. No court decisions neatly prescribe the "rule of law" which he invokes. Despite much recent discussion about the autonomy of colleges and universities, and their need for protection against intrusive legislation, few pertinent precedents exist. Apart from the Dartmouth College case, 4 there are a few lower court decisions recognizing the autonomy of colleges and universities vis-à-vis state legislation, but no cases clearly in point on Brewster's issue—the relationship between higher education and federal regulation or control. Clearly the subject deserves careful analysis in constitutional as well as public policy terms. This article attempts a preliminary overview of the constitutional issues.

I. GOVERNMENTAL REGULATION OF HIGHER EDUCATION: A PROSPECTUS

Governmental regulation of higher education comes in many forms and emanates from all levels—federal, state and local. Typically, regulation or control is tied to funding, although that is not invariably the case. (Until recently, for instance, Massachusetts required faculty members at private colleges and universities to sign disclaimer-type loyalty oaths. Only after a major test case was the oath requirement removed. 5) Many forms of regulation are unobjectionable—for example, health, fire, and safety regulations which usually apply alike to public and private institutions of higher learning. Whether out of concern for academic freedom or for other reasons, government historically has been loath to interfere in matters of curriculum, admissions, personnel policies, and other sensitive sectors of higher education. In fact, the extent of governmental interference in the administration of colleges and universities has been relatively limited. 6

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6. A most dramatic evidence of this restraint is the largely unexercised powers of the Board of Regents of the University of the State of New York, a body which dates from colonial times. The Regents have most extensive powers over both public and private higher education in New York state. See O'Neil, Private Universities and Public Law, 19 Buffalo L. Rev. 155, 180-81 (1970). Recently there have been indications of a greater regental inclination to exercise this largely dormant power, in a conflict with the Trustees of the State University of New York over new degree programs at the controversial Old Westbury campus. See N.Y. Times, Feb. 2, 1975,
Recent events have begun to change rather profoundly this historically limited relationship. Within the past decade, several forces have combined to produce a metamorphosis. One factor, of course, is the dramatic growth of governmental support of higher education. (Enrollments increased sharply during the decade, to be sure, but funding grew at a much faster rate than the size of student bodies.) A second clear cause of rising governmental regulation of higher education was the campus disorders of the late 1960's and early 1970's, which drew the attention of legislators toward higher education to an unprecedented degree. The enactment of much restrictive legislation during this period leaves little doubt that student protest was a major catalyst for government intrusion into academic life.\(^7\) The third factor, later to develop and less easily isolated than the others, is the growing dissatisfaction of many groups with the quality and value of higher education.\(^8\) As the number of jobs for college graduates and the practical value of a baccalaureate degree decline, the invitation to new forms of government regulation is manifest.

To these three environmental factors should be added two other sorts of pressure, one from within the academic community and the other from without. The internal pressure has been for greater governmental support to the private colleges and universities, many of which have been faced with near financial crisis as a result of rising costs, dwindling enrollments, and uncertain private support in the 1970's. From outside higher education, about the same time, has come much political pressure for greater accountability of higher education in regard to race and sex. Even where overt discrimination has not been practiced, women and minorities have been dramatically underrepresented in graduate and professional student bodies, on faculties and professional staffs. Since few institutions of higher learning voluntarily undertook to correct the situation in the 1960's, governmental mandates for affirmative action became inevitable in the '70's.

As these factors coalesced they generated increasing government regulation. Sometimes the focus has been "accountability"—as with the state of conditions which the Michigan legislature attached to the appropriations for the state's three major universities.\(^9\) Sometimes legislative control has been designed to encourage or discourage certain forms of behavior. The Pennsylvania law which required institutions throughout the world to

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\(^8\) There is mounting evidence of "consumer protection" not only with respect to proprietary post-secondary institutions, but across a broader field. See, e.g., Chronicle of Higher Ed., Dec. 9, 1974, at 1, col. 2-4; National Observer, Jan. 25, 1975, at 3, col. 1-3.

report violations of either campus or civil law by Pennsylvania students provides a graphic example. Legislatures in several states have imposed "faculty workload" conditions, ostensibly designed to ensure that professors did what they were paid to do, although some such laws evinced a punitive tone. Occasionally government regulation has actually touched upon curriculum—as in the case of Ohio's 1974 requirement that all state-assisted medical schools create departments of family practice out of whole cloth in 90 days. In many states legislatures or coordinating boards have sharply curtailed the admission of nonresident students. (Typically these quotas apply to public institutions. As a condition of Commonwealth aid, however, the University of Pennsylvania must admit 70 percent state residents to its Medical School and 50 percent Pennsylvanians to the Veterinary School.) Finally, of course, there are the conditions and restrictions (chiefly under federal law) designed to prevent discrimination and to enhance educational or professional opportunities for minorities and women.

Government regulation of higher education is nothing new, of course. Even the Morrill Act had its conditions, and few appropriations for higher learning have been without some accompanying restriction or control. What has changed is not the fact of regulation, but its extent. This change is partly the result of the increasing public focus upon higher education as a regulated sector. Meanwhile, there has also been a sharp rise in the regulation of all institutions. Affirmative action, for example, is as much the burden of the corporate executive's life these days as of the university president's. Meeting the new and costly standards for occupational safety and health is a problem which colleges and universities share with all other large employers. Yet the growth of government regulation has hit higher education especially hard for two reasons: First, because higher education for so long has been largely exempt from most forms of government regulation; and second, because the special costs of compliance cannot be passed on to a "consumer" as they can be by private business. There is also a feeling throughout much of higher education that the tone, if not the content, of much of the new regulation is inappropriate for the academic community. A university president or dean understandably winces at being called a "contractor," or at having a diverse and distinguished faculty characterized as "the labor force" or at reference to academic qualifications as "competence." There is also much concern

about Labor Department Wage and Hour investigators measuring entitlement to compensation on the basis of the number of contract hours taught, regardless of discipline, course level, or professional qualification. The whole experience of being regulated by the same standards that apply to business and industry has been an uncomfortable one for higher education and helps to explain some of the annoyance of Bok, Brewster and others. These concerns are not, however, constitutional ones. They are matters of public policy and politics. The fact that federal regulation may be annoying, or unfamiliar, or expensive, or even insensitive to academic niceties does not make it unconstitutional. The issue to which President Brewster has quite properly drawn the attention of legal scholars is a constitutional one and not one of legislative judgment or policy. It is important to identify and analyze the legal issues, elusive though they may be.

II. THE CONSTITUTIONAL DIMENSION OF GOVERNMENT CONTROL

We might restate the Brewster argument as follows: Federal funding is being used in ways that are constitutionally suspect because the goals or objectives of current restrictions and conditions are constitutionally suspect. There seems to be no suggestion that Congress lacks constitutional power to appropriate funds for virtually any facet of higher education, public or private. Although the Constitution does not specifically create any power to aid higher education (or elementary and secondary education for that matter), such power simply has been assumed. Recently the Supreme Court seemingly laid to rest any lingering doubts on this issue. While upholding the Higher Education Facilities Act,16 the Court observed that a law designed to aid higher education "expresses a legitimate secular objective entirely appropriate for governmental action."17 Thus the basic issue here is not the goals or objectives for which the money may be spent, but conditions collateral to the main purpose of the appropriation.

Restrictions and conditions on federal funding for higher education might be challenged for any of four quite distinct reasons. First, it could be argued that conditions are suspect because they are unrelated to or logically remote from the program and activities supported by the appropriation—that is, Congress may not condition support for Program A on the achievement of certain standards in unrelated, nonfunded, Program B.

17. Tilton v. Richardson, 403 U.S. 672, 679 (1971). The only issue involved in that case—and, indeed, the only possible constitutional challenge to federal support for higher education—was based upon alleged conflict with the establishment clause of the first amendment. Such conflicts have been exceedingly troublesome in elementary and secondary education, and productive of much litigation which we shall discuss at 533-34 infra. In higher education, however, few constitutional questions have been raised about the propriety of the limited current forms of federal institutional support.
Second, such conditions might be challenged because they seek to accomplish indirectly goals or objectives which the federal government may not achieve through direct regulation—that is, they proceed through the back door when the front door is closed. Third, conditions or restrictions may be challenged because they compel the institution to violate the constitutional rights of students, faculty members or other individuals as a condition of receiving federal funds. Finally, such restrictions may be challenged because they invade the autonomy of the college or university as an institution of higher learning, regardless of their effect on individuals. We must examine each of these hypotheses in turn before passing a final judgment on the constitutional claim.

A. Relationship between Funding and Regulation.

One source of President Brewster's concern is the sometimes attenuated relationship between the program that receives the funds and the program that is the subject of regulation. In his recent speech to the American Bar Foundation Fellows, Brewster observed that the leverage currently asserted by Congress and federal agencies "might be called the 'now that I have bought the button, I have a right to design the coat' approach." He continued:

Thus if we are to receive support for physics, let's say, we must conform to federal policies in the admission of women to the Art School, in women's athletic facilities and recruitment of women and minorities—not just in the federally supported field, but throughout the University. This is constitutionally objectionable, even in the name of such a good cause as "Affirmative Action." In the legislative and in the popular mind, when the spending power is involved, there is a relaxed "anything goes" attitude toward the spread of federal regulations.18

This argument certainly has at least a superficial appeal. It would be troublesome if all federal support for the nuclear reactor could be cut off because the university did not admit enough women to the art program. In fact, this is not an entirely fair description of the affirmative action machinery. Title IX of the Education Act Amendments of 1972—the object of most of the recent outcry—provides that termination or denial of federal funds "shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found."19

19. 20 U.S.C. § 1682 (1972). The coverage provision of the proposed Title IX regulations may be ambiguous in this regard; it "applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance." 40 Fed. Reg. 24139 (June 4, 1975). There may be some disagreement about the precise meaning of the term "benefits from" in the coverage clause. The one case cited in an earlier portion of the proposed regulations, Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969), does
Similar language appears in Title VI of the 1964 Civil Rights Act, basic Congressional injunction against discrimination in the use of federal funds.\(^{20}\) Thus it is not quite accurate to say that Congress has fashioned the coat on the basis of having bought the button.

Let us assume, however, that Brewster's characterization of the appropriation-condition relationship is essentially correct. The argument that control should extend only to the funded programs sounds logical enough at first. There are no constitutional decisions dealing directly with the issue. There are, however, two analogous contexts which afford some insight. One is the group of recent cases dealing with the effect of governmental aid to and control upon otherwise private colleges and universities—the extension of the state action doctrine and the Bill of Rights to the private campus. The other analogy comes from the recent cases dealing with state aid to church-related schools and colleges.

The state action cases are especially relevant here. In the late 1960's, federal courts began to deal with suits by students at private colleges and universities. These suits sought to ground federal jurisdiction (and the Bill of Rights guarantees) on governmental aid to or support of private higher education. Plaintiffs in these cases argued by analogy to other contexts in which courts had found otherwise private conduct to be state action because of substantial governmental aid or involvement. At first the courts declined to find state action, dismissing suits against even such eminent recipients of massive public funding as Columbia, Stanford and New York University, not to mention smaller private colleges.\(^{21}\) The *Columbia* decision focused upon the relationship between the action which gave rise to the suit (dismissal of a student involved in campus protest) and the governmental funding (most of which was for scientific research, medical education and such public services as hospitals and health care). The court stressed, as a principal reason for dismissing the aggrieved student's suit, the lack of any direct connection between Columbia's governmentally funded programs and its student discipline.\(^{22}\) The decision strongly implied that Columbia probably could not have summarily dismissed an employee of the Harlem Hospital or a faculty member engaged in nuclear research, though it could and did expel an undergraduate student without notice or a hearing.

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A later federal decision in New York made explicit the institutional bifurcation implied in the Columbia case. The case involved Alfred University, a private liberal arts college which houses the State University of New York Ceramics College and provides general education to ceramics majors. Alfred receives about a fifth of its operating budget from the State University, which accounts for about a quarter of the faculty and nearly a third of the student body. The ceramics students receive Alfred degrees, although they pay somewhat lower tuition than liberal arts students. The State University provides pro rata support for various Alfred services, including the salary of the Dean of Students. When a group of students sued for reinstatement after being suspended for disrupting a ROTC ceremony, the district court dismissed the entire suit for lack of federal jurisdiction. The court of appeals, however, split the student body down the middle; the University, it held, was engaged in state action vis-à-vis the ceramics students, but not with respect to the liberal arts students. Thus students could have had wholly different constitutional rights depending upon the particular degree program in which they had enrolled, though they attended many of the same classes, used the same student services and even shared a room in the residence halls. The Alfred decision was the high water mark of the "federal rights follow government funds" notion, although other cases in the late 1960's were generally consistent with it.

More recently, the federal courts have taken a less fragmented view of private colleges and universities. In two Pennsylvania cases, involving Pittsburgh and Temple, the courts found state action with respect to the entire institution—though in both cases the extent of governmental involvement is so substantial that any other outcome would have been surprising. Even more relevant is a recent case involving the University of Pennsylvania, much more clearly "private" than either Pitt or Temple.

23. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). A later Second Circuit case raised an interesting variant. In Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970), the defendant institution (a small Lutheran College on Staten Island) was clearly private and beyond the reach of the federal courts or the Bill of Rights for most purposes. But the plaintiffs, a group of black students suspended following a demonstration, claimed that the conduct rules under which they were disciplined had been adopted under the mandate of state law. (In the summer of 1970 the New York legislature required all colleges and universities in the state to file student conduct rules as a condition of continuing eligibility for state aid.) The court remanded the case for a determination of the extent to which legislative pressure had led to the students' suspension. Before further proceedings could begin, the students were reinstated and the case thus became moot. For other views of the Second Circuit, since the Alfred and Wagner cases, see Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), cert. denied, 419 U.S. 874 (1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

Penn retains a completely private board and charter. Yet in recent years a degree of interdependence between the university and the Commonwealth has brought about what the court described as a "symbiosis". Penn now receives about 25 percent of its general funds budget from the state; it is extensively involved with the Philadelphia Redevelopment Authority; its students receive substantial loans and grants from the state; the University itself receives funds for capital construction, research projects and enjoys large state and local tax exemptions. In return, the Commonwealth regulates Penn's policies, mandating lower tuition for state residents and requiring the preferential admission of Pennsylvanians to certain graduate schools. Taking all these factors into account, the district court held that it had jurisdiction of a suit brought by a woman faculty member who alleged discrimination in the denial of tenure.

The Penn decision is highly significant in several respects. It marks the furthest extension of the state action doctrine to a traditionally and structurally private university. It also seems to reject the "rights follow the funding" notion of the Columbia case. The judge did not ask, for example, whether the particular faculty member's salary was paid by a federal grant, or how many state-assisted students she taught, or whether her department had contracts with the city or state. Instead, the court judged the University as a total institution and based its decision on the entire institutional-governmental nexus. Having held that Penn's conduct was state action for this purpose, undoubtedly the same result would now follow in other contexts such as a student dismissal case or a suit seeking access to the campus for leafletting or picketing.

The second analogous area of constitutional precedent may be less helpful than the state action cases. Nearly every term for the past five years, the Supreme Court has had to judge the constitutionality of state legislation designed to aid private elementary and secondary schools. This is clearly not the place to summarize the now highly complex state of the law on public aid to parochial education. Suffice it to say that the Court has been reluctant to compartmentalize or functionalize church-related schools in differentiating between permissible and impermissible aid. The most recent decision, Meek v. Pittenger, clearly reflects this integrative view. The Court held unconstitutional under the establishment clause several forms of state aid to parochial schools, although the aid in question was ostensibly limited to secular instructional materials, services and activities. In this and earlier cases the Court has rejected the notion that "teachers in church-related schools would succeed in segregating their religious beliefs from their secular educational duties." Rather, the Court has

27. 95 S. Ct. 1753 (1975).
stressed the total educational mission and environment of the school, regardless of the specific object of subvention. Even though the auxiliary service personnel in *Meek* were to be on the staff of a public agency rather than of the private school, they were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 29

In the parochial school aid cases, the Supreme Court added a further argument against bifurcation: If direct support were permitted, violations of the establishment clause could be avoided only by detailed regulation of duties and continuing surveillance of school programs and activities.30 The Court has refused to engage in functional differentiation of parochial schools partly because a new set of constitutional problems—threats to freedom of worship or academic freedom—might be created in the process of avoiding the establishment clause problem. It is wiser, the Court has concluded, to stay out of the thicket altogether.

The relevance of the parochial school cases to the current context is not precise. On one hand, it is true the courts have taken a more lenient approach to church-state issues in higher education; degrees and forms of "entanglement" that would be impermissible at the elementary-secondary level have been allowed in higher education because of the far wider range of institutional choice and the greater maturity of the students.31 Yet even in higher education some courts have been reluctant to sustain direct institutional aid to church-related colleges, even where such aid has been legislatively earmarked for "secular" purposes.32 Moreover, the academic freedom argument has even greater force at the college than at the elementary-secondary level; any judicial approach that requires the fragmentation of an educational institution or its functions may well increase the risk of governmental intrusion.

Let us now return to the first branch of the Brewster argument—that conditions and restrictions on federal funding are constitutionally suspect because they often reach far beyond the funded program or activity. It

30. *Id.* at 1767. *See also* *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).
is, says Brewster, one thing to mandate affirmative action in physics (which receives government grants) but quite another to do so in art (which presumably gets no government support). The two constitutional analogies surely do not sustain this argument, and may in fact undermine it. The University of Pennsylvania was held to be engaged in state action for all purposes once the requisite degree of interdependence had been found; an English professor as well as a hospital employee or a student in urban planning has rights that can be asserted in the federal courts.

This holistic view of institutions also makes educational and administrative sense. It simply will not do to have one set of rights for art students and another for physics students. Students may not select a major until well after their matriculation, and even after making that choice may take courses in both art and physics. Along the way they may even switch majors. Over time, government support for physics may decline and aid to the humanities (including art) may increase. Faculty members may hold joint appointments partly in government-aided fields and partly in fields supported entirely by private funds. Even where funds are restricted by a government agency or a particular donor, they aid the entire institution and not simply the target program—if only to the extent they release general funds for use elsewhere.

In fact, the history and status of Yale University illustrate the difficulty of drawing neat, simple lines between what is public and private in higher education. Yale's early history was closely intertwined with that of the colony and later the state of Connecticut. To this day, the Governor and Lieutenant Governor of the state are fellows of Yale and thus entitled to play a role in its governance. Yale is a major recipient of federal funds—not only in physics but in many other fields as well. In certain specialized

33. Yale's origins were anything but private, as we regard that term today. The first building was constructed as the result of a grant of £500 from the Connecticut (colonial) Assembly. New Haven was chosen as the site for the new college largely because the town donated eight acres of land “at the end of the town”—far more than needed for the original campus. In the 1780's, when enrollment was still under 300 students, the charter was amended to provide that the Governor, Lieutenant Governor and six state senators would sit as trustees on the Yale Corporation, in return for “substantial financial assistance.” Later the senators were replaced by alumni designees; the two state officials remained on the Corporation, however, as reminders of the role of state government in Yale's formative years. R.A. Holden, Yale: A Pictorial History (1967).

34. See Note, Private Government on the Campus—Judicial Review of University Expulsions, 72 Yale L.J. 1362, 1383-84 (1963), for comment on the significance of this and other interrelationships. There is at least one other formally private university whose governing board includes public officials; the Governor of Louisiana, the State Superintendent of Public Instruction, and the Mayor of New Orleans are members of the Tulane University Board, reflecting that institution's essentially public origin as the University of Louisiana. See Guillroy v. Administrators of Tulane Univ., 203 F. Supp. 855, 861 (E.D. La. 1962).
academic fields, Yale is the only institution in the state which provides
graduate education. Yale degrees in many professional areas meet a pre-
requisite to certification or licensing. Throughout the university’s history
its relationship with the city of New Haven has been extremely close—
as witnesses the perilous weekend in May, 1970, just before the Kent State
tragedy, when city and university officials worked in closest harmony to
avert disaster. Thus there is something anomalous about the suggestion
that federal funding may require affirmative action in some parts of the
University but not in others.

B. Direct and Indirect Objectives

A second possible premise of President Brewster’s argument is that
government may not use conditioned funding to accomplish objectives it
may not accomplish through direct regulation. One passage in the Ameri-
can Bar Foundation speech suggests such a view:

Were it not for the federal financial support, it would be hard to find war-
rant in the Constitution for federal regulation of medical school curricula.
Even more dubious is the constitutionality of requiring a school to draft
some of its graduates, by lottery or otherwise, to serve involuntarily, in
places not of their choice.36

Again, as with the first argument, there is certainly a superficial appeal.
What the government cannot constitutionally accomplish directly, the argu-
ment runs, it should not be able to accomplish indirectly by the use of
the funding power. The carrot, in other words, should be no longer than
the stick.

Only one Supreme Court decision really approaches this issue, and from
a quite different perspective. Nearly forty years ago, in United States v.
Butler,37 the Court struck down the Agricultural Adjustment Act. By a

35. For a graphic account of that weekend in New Haven, see Jones, Diary of a
1, col. 1-4. The communication between university and city officials was frequent and
essential to the preservation of order during days and nights when Kent State University
and other campuses were heading for chaos. See also R. O’Neil, J. Morris, & R.
Mack, No Heroes, No Villains 50-51 (1972).
36. Yale Alumni Magazine, April 1975, at 35. The reference is to a provision of
health manpower legislation which passed both houses of Congress in 1974 but did not
survive conference and thus never became law. It would have denied capitation grants
to medical schools which failed to increase sufficiently the proportion of their graduates
going into rural and family practice. A year later, Congress tried an alternative ap-
proach to the same end; the new bill (adopted by the House of Representatives on
July 11, 1975) would require individual medical graduates to pay back $2000 to the
United States if they refused to serve at least a year in an area of short medical supply.
Cincinnati Post, July 12, 1975, at 12, col. 4-6. Although the funds to be “repaid” go
to the institution, the obligation of repayment falls on the individual under this new
approach.
37. 297 U.S. 1 (1936).
In fact, the Butler Court was careful to articulate the direct-indirect power relationship with somewhat greater care. Toward the end of the majority opinion there appears an important illustration of the scope of the holding. The analogy is drawn, by a curious coincidence, to the precise field with which we are here concerned—federal aid to education:

There is an obvious difference between a statute stating the conditions on which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to regulation which could otherwise not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which the money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.\(^\text{38}\)

The italicized language is critical. "Teaching doctrines subversive of the Constitution" is considerably narrower than "taking action which Congress cannot compel through regulation." Thus what the Court said in Butler is not that Congress may not use federal aid to induce conduct by educational institutions which it could not directly compel—but rather that it could not induce independently unconstitutional conduct by institutional recipients.

Quite apart from Butler, the argument proves too much. If it were the law that Congress could not condition benefits upon conduct that cannot be directly compelled, many well accepted programs would be in jeopardy. For example, during the 1960's Congress adopted a provision under which National Defense Education Act loans would be "forgiven" for teaching in an inner city school.\(^\text{39}\) Quite clearly Congress has no power to conscript education school graduates to teach in particular locations. Yet it has never been seriously suggested that the NDEA forgiveness provision is unconstitutional for that reason—or that similar loan provisions for medical students founded on the lack of direct coercive or conscriptive power. The

\(^{38}\) Id. at 73-74 (emphasis added).

absence of direct regulatory authority may raise suspicions, of course, but that fact alone cannot be dispositive.\textsuperscript{40} Even to the Butler Court the issue was not so simple, and surely it is no simpler today than it was in 1936.

C. Invasion of Individual Rights

A third and more plausible premise of the Brewster argument is that government may not use conditioned funding to violate individual rights or liberties. It is now settled beyond doubt that conditions may not be attached to government benefits (or offers of benefits) which ask individuals to relinquish their rights as a condition of eligibility. The doctrine of unconstitutional conditions has become deeply embedded into our constitutional law; we have come full circle from the time when Justice Holmes suggested a policeman must choose between his job and his right to speak freely.\textsuperscript{41} Loyalty oaths, restrictions on political activity, invasions of privacy and countless other intrusions have been struck down because they forced individuals to choose between a government benefit and a right of citizenship.\textsuperscript{42}

The issue here is, however, a slightly different one. It is the extent to which government may condition aid to institutions (such as colleges and universities) upon their willingness to infringe the rights of individuals. In order to put this newer issue in focus, let us consider four possible situations that would clearly pose the problem. Suppose, for example, that the final regulations issued under Title IX of the Education Amendments of 1972 had forbidden sex discrimination in textbooks and curricula. And suppose further that the regulations required institutions receiving federal funds to take positive steps to eliminate "sexism" in instructional materials and course content. If a college or university then terminated the appointment of a faculty member who refused to stop using a "sexist" text, or refused to make his class discussion more sympathetic to the status of women, a rather clear constitutional violation would be present. Presumably the first amendment gives a college professor a right to be a sexist—that is, to make disparaging comments about women in his classes or to assign male-dominated reading materials. (If he discriminates against women in grading, or excludes them from his course, that is quite a different matter.) Not only would the college have violated the academic free-


\textsuperscript{41} For discussion of unconstitutional conditions and individual rights, see generally French, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234 (1961); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968).

domain of the faculty member by imposing sanctions on such grounds, in
addition, and more importantly for our purposes, the federal regulation
requiring such a sanction would itself be unconstitutional for compelling
conduct by the beneficiary in violation of an individual's constitutional
rights. Here, at least, the impact of Butler would be clear: If government
may not force a school or college to teach "doctrines subversive of the
Constitution" as a condition of funding, it may not force the institution to
adopt personnel policies "subversive of the Constitution." 43

A second example is suggested by one of President Brewster's targets.
During the last session Congress approved health manpower legislation
which would have withdrawn capitation funding from medical schools that
failed to increase the number of their graduates practicing in neglected
areas such as urban ghettos and small towns. Had such a condition
become law, problems surely would have arisen. Medical schools might
course have complied without violating the rights of students—by re-
cruiting more minority and rural students who might return to practice in
the communities from which they came, or by offering special internship
opportunities for graduates electing inner city or rural practice, or by
stressing family and community practice in the curriculum. Such methods
might have fallen short of the mark, however; as Brewster implied, it
might have become necessary to coerce geographical and professional
choices on the part of some medical graduates in order to meet the federal
requirement. Were that the only way in which the condition could be met
and capitation eligibility retained, a serious constitutional issue would arise.
Such an institutional response, like firing sexist faculty members, would be
"subversive of the Constitution" within the meaning of Butler.

A third example also comes from the health field. Suppose the National
Institutes of Health decided to require all hospitals and medical centers to
perform abortions on demand within the first three months of pregnancy
as a condition of receiving federal funds. 44 For most recipient institutions,

43. Significantly, the once-considered textbook and curriculum provisions of the
Title IX regulations were omitted because the Department of Health, Education and
Welfare "is of the view that any specific regulatory requirement in this area raises
constitutional questions under the First Amendment." HEW believes that "local edu-
cation agencies must deal with this problem in the exercise of their traditional authority
and control over curriculum and course content." Title IX Questions and Answers, in
Final Title IX Regulation Implementing Education Amendments of 1972 (June,
1975).

44. This suggestion is not wholly hypothetical. Recently the federal Court of
Appeals for the Eighth Circuit held that public hospitals in St. Louis must provide
therapeutic abortions to indigent patients. The court went on to hold that the method
of staffing the obstetrics-gynecology clinic of the city hospital with students and faculty
of the Jesuit St. Louis University Medical School resulted in an unconstitutional denial
of equal protection to indigent women wishing to exercise their rights granted by the
Supreme Court in Doe v. Bolton, 410 U.S. 179 (1973), and Roe v. Wade, 410 U.S. 113
such a requirement would probably pose no serious problems. But one can imagine a medical center with a largely Catholic obstetrical staff. If that staff declined to perform abortions, the hospital administration probably would be forced to dismiss at least some staff members—or at least refuse to hire any more Catholics in the future. Here, too, the federal condition would become unconstitutional if the only avenue of compliance involved the abridgement of individual rights of conscience and worship. Butler, once again, would clearly apply.

A final example is a bit more immediate than the others. It is widely assumed that affirmative action rules require preferential treatment of minorities and women in admissions and employment. Although federal officials have vigorously denied such assertions, institutions generally do give some special consideration to women and minorities in initial admission and hiring. Such consideration of sex and race seems constitutionally permissible; while the Supreme Court refused last year to decide the preferential admission case, it has consistently declined to review quota hiring decisions of many lower federal courts. But suppose a college or university were told that it is making insufficient progress toward meeting its affirmative action goals and must accelerate the pace—something which, by the way, federal officials have never done. And suppose further that the college anticipated no new openings in the targeted areas. Such a situation would force the college to terminate an otherwise qualified male white Anglo faculty member solely to make room for a new woman or minority candidate. This judgment, based solely on race or sex, would appear to violate the rights of the faculty member denied reappointment—even though the motive be the laudable one of increasing opportunities for previously excluded groups. Once again Butler's dictum would come into play: Federal funding may not be used to compel institutions to violate the constitutional rights and liberties of individuals.

47. An additional comment may be necessary to distinguish this case from the case of preferential admission or hiring. Such decisions reflect a variety of factors and are never based solely on the rank ordering of numerical criteria. The issue is not whether exclusive reliance may be placed upon race or sex, but only whether race or sex may be taken into account in view of the historic under-representation of such groups. Moreover, the initial applicant has no interest in a continuing relationship comparable to that of the nontenured or probationary employee. Thus a decision to prefer a woman or minority applicant at the threshold is vastly different from the decision to displace a white male incumbent for the sole purpose of bringing in a minority or female outsider. See generally O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925, 940-41 (1974).
These examples are interesting, but are all (happily) hypothetical. One would like to have some real cases that are a bit more recent and more closely in point than Butler. There is one such case that does at least approach the issue. Several years ago Haverford and a group of other colleges and universities brought suit in federal court against the Pennsylvania Higher Education Assistance Agency.\(^4^8\) They sought to enjoin on constitutional grounds the statutory provisions by which colleges and universities around the world had to report any violation of campus rules and most violations of the criminal law by students receiving Pennsylvania scholarships and loans. Although the relationship was technically between the individual student and the agency, the law could operate only if the institution agreed to report student transgressions. The sanction was clearly spelled out in the law: If a college refused to promise that it would report such information to the Agency, students attending that college would not be able to receive Pennsylvania aid. For private colleges with high tuitions and large numbers of Pennsylvania students, there was really no choice but to sign the agreement.

The plaintiff's claim in the Haverford case was essentially the one we have been considering here—that the eligibility conditions forced the colleges and universities to violate the constitutional rights of their students. Specifically, it was argued that the statutory provisions were vague and might require reporting of much constitutionally protected as well as punishable conduct. It also appeared that the review procedure, triggered by the college's report of a student transgression, might well deny due process. The court struck down most of the statutory provisions as unconstitutionally vague or overbroad and thus violative of the students' freedom of expression. The bulk of the opinion was devoted to rather familiar first amendment issues. The court touched only briefly on the manner in which the Pennsylvania law invaded the student-college relationship. The Agency had urged a distinction between public and private institutions, since the latter were not constitutionally required to give hearings to their students and could punish speech that would be constitutionally protected on a public campus. The court refused to accept this distinction—partly because it did not think the statute severable in this manner, but also because it felt the argument constitutionally unpersuasive:

If Pennsylvania may not punish students

Since the state cannot directly deny a student eligibility because of the exercise of First Amendment rights . . . it cannot do so indirectly by tagging that denial onto a determination by a university which is not bound to respect such rights.\(^4^9\)

This discussion is somewhat cryptic, but does seem to be trying to state a modern corollary of Butler: If Pennsylvania may not punish students

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49. Id. at 1209.
directly for protected expression (e.g., by expelling them from Penn State or by terminating their financial aid on Agency initiative), neither may it use private colleges and universities as the media for accomplishing that result indirectly. The result is not that a state is denied the use of any indirect means to accomplish what it cannot accomplish directly. Rather, it is that government may not use conditions on public benefits to force recipients to violate the rights of others.

There is another higher education case which might have decided a similar issue but which aborted before reaching it. In 1965 the Regents of the University of Colorado authorized their general counsel to bring suit in state court alleging the unconstitutionality of the loyalty oath required of all faculty members. The Regents had two interests—first, that the law imposed a criminal sanction on anyone who failed to enforce the law properly; and secondly, that the law effectively required the Regents to violate the first amendment rights of faculty members. The trial court dismissed the suit because of a Colorado doctrine that a public agency may not challenge the constitutionality of a law under which it operates. Before the appeal could be taken, a statewide election brought a marked change in the politics of the Regents, and the new majority refused to permit an appeal. Had the Colorado case gone to a higher court, we might well have had a clearer decision on the issue now before us.

A third case comes from a quite different field, but does afford some guidance. In the early 1960's, several California welfare departments adopted drastic measures to detect welfare fraud. Alameda County ordered its caseworkers to take part in "operation bedcheck", whereby they were to conduct predawn raids on the homes of both suspect and nonsuspect welfare recipients. One Benny Max Parrish, an Oakland social worker, refused to participate because he felt the program required him to invade the privacy of his clients. When he was dismissed for "insubordination", Parrish brought suit for reinstatement. The Supreme Court of California sustained his constitutional claim, holding the predawn raids unconstitutional and then holding that Parrish could properly refuse to take part in them. The decision stopped short of a clear constitutional holding on the issue before us. Parrish prevailed because the court defined insubordination as refusal to carry out a lawful order. Since "operation bedcheck" was unlawful, Parrish was not guilty of insubordination. The court did not say, as it might have, that public employment may not be conditioned on the willingness of the employee to violate the rights of other individuals. While strongly implied, such a precept was unnecessary to the outcome of the Parrish case.

50. The case was fairly clear on the merits because the Colorado oath was virtually identical to that of Washington state which had recently been struck down by the Supreme Court in Baggett v. Bullitt, 377 U.S. 360 (1964).

The guiding principle should be clear enough now, even though there is no precisely applicable precedent. President Brewster quite properly raises constitutional doubts about any conditions on government support to higher education which presuppose the infringement of individual rights and liberties. The difficulty is that we do not appear to have any such conditions in current statutes or regulations. As we have noted, the health manpower legislation to which Brewster pointed with alarm never became law, and even if it had, it need not have required medical schools to abridge unconstitutionally the career choices of their graduates. The proposed textbook and curriculum provisions were left out of the Title IX regulations—precisely because “any specific regulatory requirement in this area raises questions under the First Amendment.” Nor do the current affirmative action rules compel or even condone the dismissal of white male faculty to make room for less qualified women or minorities. It is important in this highly sensitive area to deal with what is, rather than with what might be.

D. Conditions and Institutional Rights

There is a fourth possible dimension to the Brewster argument—institutional autonomy in higher education. Even where conditions may not force the institution to abridge individual rights or liberties, it is worth asking whether colleges and universities themselves have interests that cannot constitutionally be violated. This is a novel and difficult issue, which requires much more extensive treatment than it can receive here. But let us begin the analysis with the material currently available.

Obviously colleges and universities do have constitutional rights. If nothing else, the Dartmouth College case proved this much. But few institutions of higher learning any longer rely on special charters of the kind that Dartmouth College protected. In other respects, it would seem that institutions of higher learning would have at least the constitutional rights and liberties of corporations and other nonprofit institutions—for example, the right to engage in interstate activity. In fact, we will soon

52. For a summary of the recent clarification of HEW Office of Civil Rights position on this issue, see Chronicle of Higher Ed., Dec. 23, 1974, at 1, col. 2-4. There is a related and increasingly difficult issue with which the courts are just beginning to deal—the conflict between affirmative action programs and commitments on the one hand, and union agreements with seniority commitments on the other. One federal court of appeals has held that the employer must follow the union agreement seniority provisions rather than contrary provisions of a conciliation agreement with the Equal Employment Opportunity Commission. Jersey Central Power & Light Co. v. International Bhd. of Electrical Workers, 508 F.2d 687 (3d Cir. 1975).


54. For an extended discussion of this issue in the context of interstate migration by colleges and universities newly offering external degree programs away from the main campus, see Granat et al., Legal and Other Constraints to the Development of External Degree Programs (mimeo. 1975), at 4-32 to 4-35.
hear much more about precisely this issue—interstate activities—in higher education. With a few notable exceptions such as Antioch, colleges and universities have seldom ventured beyond the boundaries of a single state. Quite recently, as a result of the growth of external degrees and other non-traditional degree programs, some enterprising institutions have become peripatetic. Consequently, the range of state regulation has markedly increased—both to protect residents against marginal out-of-state programs, and to protect the local “market” for home institutions. These new regulations will undoubtedly be challenged soon by migratory colleges. A new concept of interstate commerce, applied to higher education, may well emerge from these cases. At the moment, since no such cases appear to be pending, it is enough to flag the issue.\(^5\)

The concept of academic autonomy has received some limited protection under state constitutional law. In the early 1950’s, for example, the Supreme Court of California resolved the loyalty oath controversy by holding that the University of California Regents, and not the legislature, had the sole constitutional power to impose an oath upon the faculty.\(^5\)\(^6\) At other times the California courts have deferred to the special constitutional status of the Regents of the University in defining the reach of general state legislation.\(^5\)\(^7\) Even more clearly have the three major public universities in Michigan—the University of Michigan, Michigan State and Wayne State—enjoyed protection from the general law by reason of their constitutional status. As early as 1893 the Supreme Court of Michigan stayed the hand of the legislature from attaching regulatory conditions to the University’s budget.\(^5\)\(^8\) In 1911 and 1924 the court looked to the state constitution in protecting Michigan State University from legislative interference.\(^5\)\(^9\) Most recently, a 1973 decision of the Michigan court of appeals follows and strengthens this tradition, holding that the legislative power to regulate internal affairs of the three universities is sharply limited by the state constitution.\(^5\)\(^0\) In striking down conditions on faculty workload, tuition and fees, student conduct, use of firearms, staffing ratios, budgeting and other matters, the court left little doubt about the governing principle:

\(^5\) There have been several skirmishes, notably between Antioch College and the New York Board of Regents. See id. at 4-12 to 4-20.


\(^8\) Weinberg v. Regents of the Univ. of Mich., 97 Mich. 246, 56 N.W. 605 (1893).


The legislature is attempting to control the internal operations of universities by dictating how the funds appropriated may be spent by the board of regents, governors, or trustees, as the case may be. Such control is clearly beyond the power of the legislature. [The Michigan Constitution] clearly vests [in the governing boards] the power to control and direct the expenditure of their institutional funds.61

Clearly the provisions of a state constitution afford no protection against federal regulation. The constitutional universities in Michigan and California are thus no better off in regard to conditioned federal funding than are the statutory systems in other states. The basic question remains—whether there is any federal constitutional autonomy which safeguards institutions of higher learning against intrusive conditions and restrictions.

Several constitutional premises might aid an answer to this novel and difficult question. First, one might look to the doctrine of academic freedom, which has evolved out of the first amendment safeguards of expression and association. All of the academic freedom decisions to date have involved individual rights and liberties—to engage in political activity, to teach freely, to join lawful if controversial groups, and the like. One might, however, broaden the concept to the institutional level, since the climate of academic freedom at a college or university is much more than simply the aggregate of individual civil liberties. Perhaps a college or university should be given standing to assert its own interest in freedom from restraint or intrusion, even where there are no direct invasions of the liberties of its faculty members and students. Clearly academic freedom involves more than simply the teaching and research of individual faculty members. Such vital institutional functions as the selection and counseling of students, the promotion, reappointment and tenuring of faculty members, and determination of curriculum are essential components of academic freedom.62 Individuals within the academic community cannot be free to teach and study if the institution is not free to carry out these functions. If governmental regulation should seriously invade or disrupt these activities, even without directly abridging the liberty of individual professors or students, a cogent constitutional case could be made for institutional standing to assert its autonomy.

Second, the governance systems of colleges and universities may merit constitutional protection. Surely in the case of a state university or college, certain aspects of decisionmaking are as much beyond the reach of federal law as are decisions internal to other branches of state government. It is harder to ground the autonomy of private colleges and universities on the tenth amendment—unless one looks back to the historic interdependence of private higher education and state government. Illustratively,
Yale's quasi-public character may afford a source of protection rather than vulnerability. Since the Governor and Lieutenant Governor of Connecticut are ex-officio Board members, their presence suggests a special relationship with the state and a possible source of immunity against intrusive federal regulation. This theory has not yet been developed fully, much less litigated, but deserves some attention in the current quest for safeguards. The governance of higher education clearly warrants some protection against a degree of federal interference which has not yet occurred but which many fear may be in prospect.

Third, there are procedural rights at the institutional level. A college or university, as much as an individual, is entitled to due process of law. Benefits may not be withdrawn or terminated without notice and a hearing, as the federal anti-discrimination laws clearly recognize. Specificity in standards of conduct is as essential for an institution as for a private person. Just as in the case of a person, an agency may not violate its own rules in dealings with a college or university. This latter claim appears to underlie the University of Maryland's recent suit against the HEW Office of Civil Rights, claiming improper interference in litigation between the university and an aggrieved faculty member. In short, the contours of procedural due process seem substantially the same for institutions as for individuals—at least where sensitive interests such as academic freedom and governance are at stake.

Finally, an institution of higher learning may assert a claim to substantive due process as a limitation on the conditioning power. Last term in Cleveland Board of Education v. LaFleur, the Supreme Court struck down mandatory maternity leave policies because they related arbitrarily and irrationally to concededly valid personnel interests of the school boards. Even where no clear denial of equality is present, the lack of a rational nexus between the interest served and the means of serving it may invalidate the restrictions. In this regard institutions should be able to raise claims comparable to those successfully asserted in recent cases by individuals.

While the analogy between individual and institutional interests is obviously imperfect, it must be the starting point in defining the constitutional claims of colleges and universities faced with mounting governmental regu-

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63. Cf. Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971). This case, apparently the only one dealing with procedural due process for institutions of higher learning affected by governmental action, involved approval by the Immigration and Naturalization Service for attendance by nonimmigrant alien students. The court prescribed procedures which must be followed before denying institutional eligibility.


65. For an account of the filing of the Maryland suit, see Chronicle of Higher Ed., June 10, 1974, at 1, col. 1-3.

lation. Apart from the interest a university may have in avoiding the deprivation of rights of others, there do appear to be independent institutional interests. At the very least a college or university is entitled to procedural due process before being deprived of an important government benefit such as eligibility for funds, or listing on a roster of approved institutions. The claim to institutional academic freedom is a wholly plausible one, though no court has gone beyond the protection of individual liberty within the academic community. The internal decision-making or governance systems of colleges and universities may well merit judicial protection against intrusive governmental regulation. Finally, and most subtly, there is the promising prospect of the concept of substantive due process as the guarantor of a rational relationship between the asserted government interest and the particular regulation or restriction. It will require a substantial amount of litigation to secure any of these novel claims; the stakes and the incentive are such, however, that we are likely to see an increasing volume of university-initiated suits along precisely these lines in the near future.

III. Conclusion

President Brewster is, then, partly right and partly wrong. He makes a most telling point—one that needs to be heard both in Washington and in state capitols—that limits must be set upon governmental regulation of higher education. Colleges and universities are sensitive institutions, and can be easily damaged, as the McCarthy era proved. On the other hand, Brewster overstates the case when he implies that current regulation reaches or exceeds those limits. While one may profitably debate the wisdom of Title IX and its regulations, the health manpower legislation, the current affirmative action programs, and many other measures, recourse in such cases must lie through the legislatures and not through the courts. Congress did not require medical schools to coerce their graduates into rural or inner city practice. HEW did not ban sexist textbooks or require curricular modification in its Title IX regulations. In fact, the very constitutional issues and limits with which we have been most concerned here have also been recognized by those who draft legislation and administrative codes. What they need now is better guidance, not more criticism. It is time to stress the essential principles and values that are shared by the regulators and those who are being regulated. The academic community is, after all, not alone in its appreciation of constitutional limits on governmental power.
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