NEW YORK UNIVERSITY
Interdepartmental Communication

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V-C Arnold Goren

Dear Arnold:

I am sending you a preliminary memorandum of what I've been thinking to date on the possibility of litigation concerning the Right to Independent Education. I am seeking some research support. With the help of a Law Review Student, I also hope to publish an article on the subject by summer. But the subject is large and complex enough to enlist a crowd of workers.

The second copy is for de Capriles.

Thanks.

Al La Grazia

Some philosophical and legal notes on

THE CONSTITUTIONAL RIGHTS OF INDEPENDENT UNIVERSITIES AGAINST GOVERNMENT ENCROACHMENTS

by Alfred de Grazia *

Are there grounds for arguing that the United States Constitution guarantees the freedoms of independent colleges and universities against governmental encroachment to the extent of protecting them from unreasonable and oppressive actions tending towards their ultimate dissolution? That is the major question to which we shall address ourselves here.

The discussion will proceed in general terms, but it is well to bear in mind that everyday happenings in many jurisdictions throughout the United States marshal behind the generalities and that there is a vast array of statistical evidence available to support the generalizations. A typical instance may be cited. The City University of New York and the State University of New York, in coordination, have sought to locate a permanent home for a Barnard Baruch School of Business. For a year or more, New York University, an indepenent school with a new and flourishing establishment in the Wall Street Area, has sought to dissuade the statal authorities from settling upon a nearby location, contending that the governmental institution would reduce severely the fiscal

In the case of a large University such as NYU, it is always a question of what is the beginning of the end, but the most sanguine prognosticators at this point argue over whether the fatal blow was ten years old, that of last year, the present business school move, or the one after it.

Speedy relief against an action that may cause serious and irreparable damage suggests, of course, injunctive proceedings, should a substantive constitutional right be involved. But also, there is the question whether at some time, at any time, or over some period of time in the life of an organization that enjoys constitutional prerogatives of a kind, legal proceedings of a non-injunctive type may be directed at the state and local governmental agencies involved.

the independent schools are heavily dependent.

d) The funding of extensive lobbying activities from the public treasury. Also the building up, through heavy capital support, public spectacles, etc. such as football teams, that attract support and students and provide public prestige.

e) The setting of tuition rates at levels that will capture students of means sufficient to attend the independent schools.

f) The physical location of schools where the full range of activities of independent school and the constituency of such schools are seriously damaged.

g) The diminishing of the ability of independent schools to set standards of education and introduce innovations that go counter to those of the preponderant and powerful governmental schools and agencies.

h) The application of ill-suited, erratic systems of aid to independent schools that are accompanied by regulations that demand conformity despite their actual tendency to weaken the structure and operations of the independent schools.

that a substantive right inheres in the college being buffeted by governmental actions and policies, there would presumably be a procedural remedy such as an injunction available to the college.Where a single action or closely related set of actions cannot be pinpointed at a certain moment of time, any broader interrelated clsuter of actions, or any action subsequent to the critical one or set, that pursue (s) to all intents and purposes the thrusts of those damaging actions may also be construed as subject to legal proceedings, perhaps even in equity. In sum, then, encroachments upon constitutional liberties and rights may be voided legally at any stage of their development.

b) The freedom to obtain an education of one's choice, that is, the freedom to be taught as one wishes to be taught. Do not students have the right to attend institutions of higher education that they believe to be relevant to their interests and to do so without suffering onerous disabilities?

c) A monopoly in respect to a constitutional right is evil per se and void. The organization, direction, supervision and containment of a constitutional liberty is unconstitutional. The right to vote for a party of one's choice, for example, cannot be so regulated as to seriously impede it. The elements of education are students, teachers, communications between them, and resources for their effective communication and expression. These elements cannot be tampered with without violating the constitutional freedoms summed up in the freedom to achieve an education. These constitutional freedoms that contribute to the educational freedom are, but not exclusively, freedoms of speech, press, religion, assembly, petition, due process of law, equal treatment under the laws, the right to organize corporate groups and to own property necessary for such activities, the right to privacy, freedom from unreasonable searches and seizures, Education is the mirror of society and is therefore the sum of its rights and liberties.

be deemed uncconstitutional, the freedom of and for education is a constitutional right that cannot be subject to monopoly either by a private or by a governmental group. Such is the nature of a constitutionally protect right and liberty.

e) Constitutional rights of individuals may not be destroyed by the destruction of the groups in which those individuals are organized. The right to a free press extends not only to the working members of the press but to the organization that houses and pays them. So it is with universities and colleges. It is true that almost all schools of higher education are organized Not-for-profit; however, the constitutional liberties and rights under discussion do not depend upon the non-profit character of the institution. (although they receive presumptive legislative favor from

what happens to a student as a result of governmental intervention once he is enrolled is relevant to his access to education. Even in governmental universities, students enjoy certain constitutional rights, as do professors.

h) Competition in the marketplace of ideas may not be restrained, even though competition in the marketplace of the economy may be restrained. The economics of education are subordinate to the question of the freedom of education.

i) Drastically changed social conditions and the effects of the total of public policies may create circumstances for the restatement of constitutional theory. If at one period of the nation's history, it may be constitutionally permissible for the states to engage heavily in educational endeavors, as was done with respect to the land grant colleges from the time of the Northwest Ordinance, at yet a later time, the advantages and preferment given the state enterprises in the field of education may be so great in their effect as to destroy the validity of the total mix of education in America, and, at that moment, the rescue and preservation of the independent sector of the national educational enterprise is granted the additional protection of a constitutional right.

III.

There has (perhaps) never been a legal case dealing directly With the rights of independent colleges in the face of transgressions by statal systems. However, just as the preceding affirmations of the rights of independent colleges may be expected to have legal impact, it may be expected that a number of arguments may be adduced against the validity of such rights. The most important of such adverse claims may be presented here.

e) That institutions of higher education do not form a distinct type of institution when compared with other institutions that have come under state monopoly or competition. Independent colleges are distinct from labor unions, large corporations, welfare associations, and public utilities in respect to the kind and quality of the liberties claimed, which is distinction enough for the purposes of the argument of constitutional protection.

f) That state monopolies have been exercised wisely or unwisely in various sectors of the economy and have been held constitutional, as in the Slaughterhouse Cases. See e) above, and also, benevolent despotism is not legal grounds for the monopolization of a right or liberty under the American Constitution.

But see f) above. Further the inherent meaning and logic of the words "integration" and "centralization" contain the meaning of imperative rule and control. The claim is a) contradiction in terms.

k) That the state cannot validly support anyone who needs money to enjoy his freedom fully. But this has been one of the main reasons behind the erection of government higher education establishments. Further it is not a question of enjoying the liberty fully but enjoying it without continuous erosion at the hands of the state and unnecessarily. Moreover the power of the state to tax and spend is used for thousands of activities, few of which enjoy the status of rights and liberties.

l) That the independent colleges and universities are by their nature restrictors of freedoms of all those who cannot attend them. But see c), d), and e) above. Unprovable except on the untenable logic that everyone's liberty is an infringement upon that of everyone else's.

It is probably not coincidental that countries whose schools are entirely governmental offer a far samller proportion of the population the opportunity to attend college. There is no significant probability that the guarantee and protection of independent institutions in their right to educate will diminish the educational opportunities of the population. There is nothing being argued or proposed that would prevent any state from effectively or more effectively educating at a higher level every single person of the population.

o) That the time for court intervention has not come, for the situation is not serious. This is a matter for determination according to standards of the normal, the reasonable, by the use of statistical research and case studies. Ab initio, the assertion that the victim cannot make a claim to a freedom short of the grave is poor law.

If a case for educational freedom of independent colleges were to be heard by a federal court, it would occur as a challenge to the constitutional validity of an action, any action, of a body that was generally acting beyond its constitutional powers. Occasions for such actions would number many thousands, of course: an administrative order to an independent school; a denial of an equal claim on the treasury; an allegation of damages; and so forth. Where a particular instance of damage were to occur such that irreparable harm might reasonably be caused, injunctive proceedings might be pursued.

that [redacted] would subject independent schools to the same regulations that bind governmental schools; that restrict aid to types that independent schools do not want; that direct them from [redacted] practicing their individual virtues and achieving their own goals. This would the kind of "embrace" in the name of freedom that they would normally reject if they were not in such desperate straits.

not likely to come as a surprise, and the legislatures will have had ample opportunity to accommodate their behavior before, during and after court proceedings. The court formula can strike to the heart of the matter, that is, but the need for legislative action will continue to be present. However, with the proper court formula, the legislatures will be impelled to watch how they drive on the street; legislative activity, constitutionally limited and guided, continues to be necessary and vital to the success of higher education.

The simplest remedy that the courts can apply to the situation is to restrain the higher administrative and legislative authorities of the government from providing more than a certain percentage of the actual places filled by students in higher educational institutions, whose officers are chosen by, or are accountable to any government agency.(Conformity to normal "police powers" rules are, of course, acceptable.) Evidence advanced in the judicial proceedings will provide a cutting point for determinng the limits of governmental participation in the establishment and ruling of higher education. This point may be ordinarily 50% to 60% of the total enrollments in institutions of higher learning

of responding to this need. Hence the court may prefer to decree another simple formula: an absolute limitation of encroachment together with permission to provide as many places as may be deemed advisable from the standpoint of public policy standards concerning low-cost opportunities for education by issuing vouchers to attend independent schools provided that access to such vouchers be undestricted as to field of study and the school to be chosen.

Such vouchers are likely to be highly popular and much sought after. They may be provided through a lottery or some other method that preserves equality among those who are otherwise qualified to enter a governmental school and also express a wish to be included in the lottery. The value of the voucher may be set at the average cost of education in the independent schools of the jurisdiction. To this average may added a supplement equal to any difference that may exist between the average sum and the particular school or the special school of the independent college and university into which the holder of the voucher is ultimately admitted. There are many advantages to the voucher formula, too many to be treated here : its effects upon the governmental schools may be profound and healthy, yet easily adapted to.

This possibility suggests that the formula based upon enrollments may not be as successful as one based upon a percentage of all funds expended for higher education in the jurisdiction in question. That is, the aggregate of expenditures for higher education to be spent by governmental schools may be limited to 50% or 60% or whatever ~~the~~ cutting point appears reasonable. Hence, any diminution of aid to the independent schools will result in the diminution of funds available to the governmental schools, and any increases will pari passu increase the funds available to government schools.

Actually, even if the enrollment formula were employed, the dismay over retaliations would be brief. Independent enrollments would decline but then, reciprocally, so would those for government schools. But the total spending formula would have the additional advantage of preventing the government from increasing greatly its cost per [redacted] student so as to attract the best of professors, the best of students, and accommodate all of its activities in greater splendor and luxury. It is well to reflect, regarding the question of retaliation in either event, that not even the impulse to retaliate would be likely to emerge wherever the percentage of enrollments or expenditures would be ~~under one~~ below the 60-40 ratio, say at 58%- 42%.

Is a national formula possible, given the diversity that exists in educational establishments among the states? Alaska, Hawaii and other states have so few independent colleges and students that a rollback to 50% or 60% might inflict a crushing hardship upon the students of the state; not to mention the administrators and faculties of the governmental schools. Of course, groups would form promptly to set up independent colleges, a movement badly needed from the standpoint of educational innovation everywhere. But in any event the rollback would be a ~~hardship~~ gain, not a hardship, if it took the form of divestitures, for new, independent, competitive, and less bureaucratic educational units would be created -- and there is nothing unconstitutional about that. There is ample justification in constitutional law for permitting governmental property to be granted to non-profit foundations. That there would be numerous qualified groups offering to assume the responsibilities is beyond doubt, even in Alaska.

to the purpose of the constitutional limitation. The hypothetical court decree guarantees not the survival of education under all conditions but only the equal protection of the laws and the freedoms of the constitution against state and governmental encroachments,

By way of comparison the right to vote is granted constitutional protection, but people are not forced to vote, and they may well vote stupidly. Nor does the constitutional guarantee of freedom of the press insure a good press, a press for everyone, or an economically viable press; it does protect the press from governmental encroachments of a significant kind. So it is with the independent schools: the problems of higher education and of institutional management are innumerable. The Constitution may only protect and guarantee the independent schools from state encroachments and ultimate destruction at governmental hands. The rest of the educational adventure is up to the legislatures, public opinion, the economy and society, and the totality of the academic community itself.