

stability and operations of the New York University Graduate School of Business. ^{This School} ~~and~~ which has been one of the strongest elements of a University that has been severely buffeted by the increasing socialization of higher education in New York City and State. (In 1973, the University was compelled to sell outright its School of Engineering and its University College to the State system, these to be replaced by a state school of engineering and a new community college.)

Indubitably state universities and state and local boards of regents or trustees take actions that independent colleges and universities view to be deliberately or unwittingly harmful. Rarely does it occur to any among the latter to resort to legal proceedings on constitutional grounds. Yet when one peruses the variety of unfavorable and deleterious actions, one becomes impressed by the notion that, if some constitutional provisions are read in a fresh light, there may be remedies. The prejudicial actions taken include the following types (and, one must add, the incidence of each is frequent in every state):

- a) Administrative rules and legislative enactments governing most aspects of the organization and behavior of the university community.
- b) Increasing appropriations of public funds supplied by tax and bonding sources that are indirectly, and occasionally directly, the sources of support also of the "constitutionally protected" independent universities. The allowance of tax deductions for gifts to governmental universities, as well as to independent universities, is a common case in point.
- c) Competition in the solicitation of grants and awards from the same sources in the independent and commercial sectors upon which

The statistics of the past fifty years of higher education in America show that the compounding of all of such actions has provably reduced the numbers, proportions, activities, freedom, *There has been a steep decline in "consumer choice."* and rights of the independent schools. There has been an absolute decline in the vitality of independent schools. Except for purposes of public relations, few responsible spokesmen will deny expert forecasts of the ultimate survival of only a few independent schools, although the formal fiction of independent schools that are in fact governed by governmental authorities may continue for some time.

II.

If there is a provable deterioration of the many independent schools over a period of time and a demonstrable destruction of many of them owing to the actions of authorities already mentioned, then there must be in every case of deterioration and destruction some action or set of actions that can be called "the straw that breaks the camel's back." If so, then provided

Grounds for legal action, if they exist, must be located in legislative or administrative errors or excesses, or they must be constitutional, based upon federal or state constitutions or both. The constitutional issue is by far the more important, for it asserts a wrong and a remedy that can be argued in court, and faces squarely the question whether independent universities exist on foundations that are not casual, token, or perfunctory.

The following provisions and interpretations of the United States Constitution may be relevant to the maintenance and survival of independent higher educational institutions:

a) Academic freedom. (1st, 5th, 9th and 14th amendments).

Can academic freedom be said to exist when the environment of the freedom is regarded as dispensable and inconsequential, and the wholesale substitution of one class of persons for another on arbitrary grounds is regarded as immaterial and irrelevant?

The right of professors to teach, write, do research, and engage in associated and peripheral activities cannot be divorced from the conditions under which these activities are possible to them as individuals and cooperative academicians.

d) As a monopoly of education is unconstitutional, the definition of monopoly is important and must be defined meaningfully.

The experience of economic regulation gives ample experience in the definition of monopoly. Monopoly means not only sole ownership of a branch of industry, but also and more importantly the ability to determine the most numerous and important policies of the industry. Even if it is questionable whether, without legislative definition, an economic monopoly would be grounds for judicial intervention, and even if it may be said that a governmentally imposed monopoly in certain walks of life cannot

f) The spending power of a government ^{may} not be used to destroy a constitutional right. The power to tax is the power to destroy. The power to subsidize a favored instrument is the power to destroy an unfavored group. A government newspaper, elaborate and distributed without cost, would be deemed unconstitutional probably ab initio; the same argument applies to a large degree to independent universities, but the process of dismemberment and deterioration has been permitted to proceed much farther.

It must be considered, however, that the government in effect publishes a huge amount of material in the face of the free press, so that obviously there is a balance between the right of a free press and the right of a government to carry out its chosen functions. The burdens imposed upon a group must be examined with regard to their actual effects upon the functioning of the group. *How heavy must a burden be before it becomes unconstitutional? Here the presumption favors the party possessing the right.*

g) The quality of a right is pertinent in a constitutional examination of the fulfillment of the right. It is not enough to provide access, under limited conditions, to an education; the door must be kept ^{open} wide and free. But also, the constraints imposed as a result of governmental intervention must be considered;

j. A government activity may be used to expand liberties but not to infringe upon them in any significant way. For instance, it is permissible for agencies of the federal government to hire public relations and information officers, but if these are so numerous and large in their effect, and so aggressively directed, that they threatened the freedom of the press, they would be behaving unconstitutionally and subject to a variety of penalties and restraints.

k) [^]The substance of a liberty or right need not be specifically mentioned in the constitution to be protected. The right to form in political parties, the right to travel outside of the national boundaries, and, here, the right liberty of education, are specific instances.

a) That there is no proof of damages. Proof of damages may be adduced from surveys of student applications and intentions over the past decades; from enrollment comparisons, following the establishment of government colleges; stagnancy of independent school enrollments for individual schools; groups of schools and the country as a whole; growth of governmental school endowments ~~from~~ and grants from previously independent-directed sources; movements of professors; growth of government school enrollments ^{protests against deprivation of consumer choice from parents & students} among families of middle and upper income; etc.

b) That independent schools have always been regulated by the state and there is no present reason to change this situation, and, further, that there is constitutional reason for limiting it. This objection can be dismissed for being the logical equivalent of any objection to the intervention of law in an area that has been lawless, e.g. denial of due process of law ~~in~~ in criminal cases, civil liberties, etc.

c) That the deprivation of independent colleges is negligible and tolerable. Responses of a) and b) above apply. Moreover, as conditions change, the deprivations may ~~be~~ provably increase.

d) That independent colleges foster ideologies against the common good. This very assertion involves a demand that differing beliefs may be constitutionally suppressed and therefore advocates an unconstitutional violation of freedom of speech, etc.

g) That no monopoly has been enacted or exercised and that the schools have been failing under their own incompetence. See a), e) and f) above, and also, a monopoly contains the dimensions of proportionate size of the market, of determining pricing, of determining quality decisions, of restraining innovation,

of diverting clientele: these characterize the academic scene. *Note also that statistics show a correlative decline in the number of independent schools and the rise of governmental school budgets. Factorial analysis will confirm this.* h) That the nature of the monopolistic controls, if admitted as g) above have no effect upon the freedoms of the institution.

Freedom is always in context. Although its essence may be even metaphysical and subjective, its conditions are sociological, economic and legal. When these are unfavorable, freedom cannot prevail.

i) That the academic institution in all of its other operations and facets can be held distinct from its exercise of freedom of education. See h) above. ^A context of freedom is generally imperative to its use.

j) That the integration and centralization of ~~the~~ authoritative rule over educational institutions does not produce a monopoly or an infringement, and that governmental schools are as free or freer than independent schools; therefore, there is no issue.

m) That the state cannot extend freedom to a group of institutions that include religious institutions. In most cases, the religious facet is minor, and is already deemed to be protected in that no government may abridge the freedom of religion. On the side of positive aid in achieving educational freedom, sectarian colleges already enjoy tax-exempt status. It is possible that the government's encroachments upon educational freedom may also be considered an encroachment upon religious liberty.

n) That the ~~state~~ true reasons for the growth of governmental colleges and universities ^{are} ~~to~~ to extend the freedom for education to the poor, to advance the possibilities of free science and otherwise to enhance the enjoyment of rights and freedoms. There is no issue concerning the right of the government to establish institutions of higher learning; however, the power of the state to uplift the condition of a category of persons in respect to their education may not and need not include the power to destroy the equally valuable and similarly directed capacities of other organs of society to undertake and pursue ^(educational) ~~educational~~ goals. Actually the ~~functioning~~ ^{functioning} independent schools in freedom have been one of the most potent sources of agitation and achievement of education for the underprivileged.

p) That most people who work for independent colleges, as well as state colleges, or who study in them, do so for pecuniary and vocational motives and not out of ideals of freedom. This is equivalent to saying that because most people read merely the want-ads and advertisements of a newspaper, or for that matter, that they read books and see films for amusement, should deprive the press of its constitutional rights.

q) ~~That~~ the U.S. Constitution is ~~silent~~ on the freedom to educate, especially as it concerns institutions. The Constitution has been enlarged, inescapably and logically, by deduction and precedents, as well as by changing conditions. The freedom to educate is clearly good law and has been for fifty years or so (Meyers vs. Nebraska); the extension of personal rights to corporate bodies where their functions are congruent and inextricably mixed has been a part of constitutional law for a much longer period.

r) That the question is one for which the judiciary is inherently unqualified, particularly with respect to decreeing a remedy. The courts have taken upon themselves exceedingly complicated determinations in respect to monopolies, apportionment, desegregation and other complex issues that required constitutional ~~determination~~ redress. Still the matter of remedy is important and should be taken up now more fully.

If the court were to accept the constitutional question and decide it favorably to the independent party, the court could rest at that point and let the legislature or administrative authorities return and revise their total approach to higher education support. This has commonly occurred in the litigation of apportionment cases in a number of jurisdictions. However, either in response to a request for instructions by the defendant state party, or in accord with its own desire to prevent confusion and to allow time for the appropriate steps at ~~re~~ ^{re}organization, the court might do as it did in the case of Brown vs. Board of Education, that is, ask the parties to return to court within a reasonable period and supply suggestions for a method whereby the court would implement its decision.

Still another possibility is that the court may decree a formula immediately, following upon the hearing of the case, especially if the evidence of the proceedings in the case offers ~~their~~ ^{its} own apparent solution. If ~~the~~ present general analysis has been correct, the evidence offered in court would indicate a formula of solution. In fact, the formula of solution might be the one that legislatures themselves would, if prompted to act, adopt.

The courts would be unlikely to suggest one kind of remedy, for example, that it would be best for the legislatures to avoid too. That would be the concoction of forms of aid

The considerable bureaucracies of the governmental colleges, always and prominently represented in the halls of legislatures, are driven intrinsically and inherently to insist upon the independent schools pursuing the same forms of organization and lines of behavior as they must pursue. Furthermore, they are eternally watchful that the undercurrents of demands for liberties sought by their own students and faculties not be encouraged by the grant^{ing}~~ed~~ to outsiders of such freedoms, lest they burst forth and overwhelm their own structures. The most important of these smouldering felt needs is ~~the~~ for a right to the freer choice of schools. Next most important of the unwelcome demands is for autonomy or independence of the constituent institutional units of the governmental educational system. These two simple remedies that might constitute the most precious of personal and individual freedoms would be the most intensely opposed by the entrenched interests of the state systems. Given this situation, any independent college movement for educational freedom would normally prefer the probable effect of court action to the submission of a favorable decision of the courts to the administrative and even the legislative agencies of the state.

As part of their pleading, therefore, the independent colleges would logically seek a court ruling that would not place the burden for the remedy upon the legislative and administrative authorities without guidelines ~~for~~^{from} the court. If it is constitutionally correct to state that the courts must make a determination of the rights of the parties in the projected cases, the courts may and must act without regard to the potential ability to avoid a constitutional issue. That the constitutional issue has been present all the while is

If the situation in a given state or region has gone beyond this point, then the government may be ordered to roll back its percentage of enrollments. At the choice of the authorities, into which the courts may not need to enter further, this may be done by divestiture ³ through sale or gift, or by the closing of inefficient units, or by tightening up ~~admission~~ admissions policies.

The major difficulty of this simplest of all formulas that would serve as the basis for a court decree is that the governmental system may wish to continue its expansion because educational opportunities are still not adequately provided to the population according to political criteria and welfare criteria to which the court may not wish to contribute. And the state systems may argue that the independent colleges are not capable

The decree of the court may be expected to arouse opposition to certain forms of aid that are presently accorded independent schools out of the public treasury. For instance, New York University and other New York State schools have begun to receive general grants from the state treasury amounting to several millions of dollars per year. Whatever the merits of existing forms of aid, they may be assumed to be beneficial for the purposes of argument and their withdrawal may be assumed to be detrimental to independent schools, even under the formula of the limit-cum-voucher. A similar danger of withdrawal of funds came in certain jurisdictions when the public school systems endeavored to integrate racially public school systems following the decision of the Supreme Court in Brown v. Board of Education of Topeka.

But consider the case of the optimist, who believes that reason will prevail and the government agencies will ultimately give more funds to independent schools than can be expected to come to the schools under the limit-cum-voucher formula or some other system decreed^{by} the basic limitation. It is rather like expecting ~~the~~ a chain store to set up independent retailers around it, that is, improbable. However, if such an enlightened government did exist or would come into being, it might as well be presumed generously to exceed the minimal demands of constitutional law. Thus the optimist would be satisfied.

Would independent colleges in some circumstances reduce their enrollments, thereby forcing government colleges to do the same under the formula? Individual schools might reduce in size, usually in order to increase their quality, something the present governmental system has done harm to, rather than helped, by its competition. But for every enrollment possibility within the putative 40% guarantee, there would most likely be several candidate ~~schools~~ schools with places. Now let us suppose that the government loses interest in higher education; its percentage slides before the putative 60%. All independent schools theretofore collecting individual/scholarships would lose most of them. Is this not regrettable? It is, but it is not germane