Some philosophical and legal notes on

May be a duplicate watch out!

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 to from settling upon a nearby location, contending that the governmental institution would reduce severely the fiscal stability and operations of the New York University Graduate School of Business. ~~and which~~ This School 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 Schools 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.)

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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.

I.

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 constitituional grounds. Yet when one peruses the variety of unfavorable and deleterious actions, one becomes impressed by the notion that, if some constituional 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 universityes. 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 whi

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.

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, and rights of the independent schools. There has been a steep decline in "consumer choice." There has been an absolute decline in the vitality of indepdent 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 deteriorationa and destruction some action or set of actions that can be called "the straw that breaks the camel's back." If so, then provided

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.

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 irrelavant? 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.

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.

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

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 (although they receive presumptive legislative favor from) do not depend upon the non-profit character of the institution.

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 wide open and free. But also, the constraints imposed as a result of governmental intervention must be considered;

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 tend 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.

j. A government activity may be used to expand liberties but not to infringe upon them in any signfficant 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 liberty of education, are specific instances.

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.

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 and grants from previously independent-directed sources; movements of professors; growth of government school enrollments among families of middle and upper income; etc. protests against deprivation of consumer choice from parents & students;

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 intenvention of law in an area that has been lawless, e.g. denial of due process of law 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.

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.

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 essense may be even metaphysical and subjective , its conditions are socialogical, 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~~ commands generally ~~imperative to~~ its use.

j) That the integration and centralization of ~~a~~ 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.

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.

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. It is common knowledge that the rate of destruction of sectarian colleges is especially rapid

n) That the ~~main~~ true reasons for the growth of governmental colleges and universities are 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 goals. Actually the ~~[illegible]~~ independent schools functioning in freedom have been one of the most potent sources of agitation and achievement of education for the underprivileged.

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.

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 redress. Still the matter of remedy is important and should be taken up now more fully.

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.

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 juriddictions. 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 reorganization, the court might do as it did in the case of Brown vs. Boadd 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 is 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 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

that ~~they~~ 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 ~~their~~ 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.

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 granting 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 freeer choice of schools. Next most important of the unwelcome demands is for autonomy or independence of the constituent insttitutional 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 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

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 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

If the situation in a given state or region has gone beyond this point, then the government may be ordered tp 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 through sale or gift, or by the closing of inefficient units, or by tightening up 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

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 unrestricted 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.

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.

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 ~~pupil~~ 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 the~~ below the 60-40 ratio, say at 58%- 42%.

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 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.

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 states, 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 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.

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 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

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.