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PRIVATE UNIVERSITIES AND PUBLIC LAW

ROBERT M. O'NEIL*

"The distinction between a public and a private college," Christopher Jencks and David Riesman have observed, "was of no special importance during the first two centuries of American higher education. Then, after the Civil War, it became one of the central issues and divisions within the emerging academic system. Today . . . the distinction seems once again to be losing some of its importance."

To the federal courts, however, that distinction has recently assumed a greater importance than it ever had before. As the courts have suddenly been called upon to review suspensions and expulsions of college students, a whole body of campus constitutional law has emerged. Federal judges are no longer reluctant to test the disciplinary procedures of state colleges and universities by fourteenth amendment standards comprising that body of law. The courts have balked, however, when the institution imposing the challenged penalty is not state-supported. Suits against large private universities have been dismissed,

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2. A note about terminology is essential at the outset. For lack of better terms that are as brief and as widely understood, we shall use "public" and "private" throughout this article to denote different types of colleges and universities. By "public college or university" we mean an institution of higher learning, whether or not granting degrees, which is "operated by a State, subdivision of a State, or governmental agency within a State." All else is, for these purposes, private. The definitional phrase is borrowed from Title IV of the Civil Rights Act of 1964, § 401(c), 78 Stat. 247 (1964), 42 U.S.C. § 2000a-1(c) (1964). That section goes on, however, to include a group of institutions that we shall, for the moment, have to regard as private—those "operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source." Many of the most difficult cases that we shall examine here fall precisely into this category; it is curious that the Congress had no difficulty calling these institutions "public" when the federal courts have been reluctant to do so.


4. For a most unusual and rather elaborate judicial articulation of the ground rules which federal courts should follow in this area, see General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968). Largely a codification of decisions already reached by this and other courts, the General Order indicates that the volume of campus litigation has reached the point where some form of traffic control is essential.
sometimes without systematic inquiry into the institution's character, its sources of support or its actual relations with government.\textsuperscript{5}

I. Dartmouth College Revisited

There are several explanations for judicial resort to a distinction that so imperfectly reflects the realities of higher education. Such precedents as there are in the state courts shed little light on the present controversy, since they typically turned upon contract law, applicable equally to public and private institutions.\textsuperscript{6} Federal court decisions applying the state action concept in other sectors have not been particularly helpful either—in part because they dealt almost entirely with racial discrimination (which is seldom involved in suits against private colleges); and partly because they determined only access to a beneficial status, but not necessarily the perquisites and incidents of that status. Suits for reinstatement in a private college, by contrast, ask the court to examine the internal processes of an institution entitled by reason both of autonomy and of academic freedom to a special deference.

An even more basic reason for the persistence of a rigid public-private distinction is the judicial view of higher education. Throughout the recent cases run two unstated assumptions that are traceable to John Marshall. A century and a half ago, in the \textit{Dartmouth College} case, Marshall perceived a neat distinction between "a civil institution to be employed in the administration of government" and "a private eleemosynary institution."\textsuperscript{7} Dartmouth, of course, was of the latter sort, and that was the chief reason why New Hampshire could not alter its basic character by mere legislation. In the course of the opinion, Marshall ventured a second observation about higher education that has been


\textsuperscript{6} For a review of the early cases turning on allegations of breach of contract—and assessment of the possible contemporary relevance of these cases—see Goldman, supra note 3, at 651-54; \textit{Developments in the Law—Academic Freedom}, 81 HARV. L. REV. 1045, 1145-47 (1968). The latter source suggests that "a rigorously followed contract theory could provide a means for creating and preserving student rights." \textit{Id.} at 1146. For a less optimistic view about the prospect of reviving the contract theory, see \textit{NEW YORK UNIV. SCHOOL OF LAW, STUDENT CONDUCT AND DISCIPLINE PROCEEDINGS IN A UNIVERSITY SETTING 5-6} (1968). ("The most common refuge of university administrators in justification of student discipline for violation of vaguely stated norms of conduct without hearing is that the right to impose such sanctions was secured by contract entered into by each student upon registration at the university.")

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equally persistent: Private institutions like colleges and universities "do not fill
the place, which would otherwise be occupied by government, but that which
would otherwise remain vacant."8 Higher education, in other words, was an
essentially private activity which might occasionally be supplemented by the
public sector.

There is much doubt whether Marshall's view was correct even in his own
time.9 In any event, there is no doubt about its inapplicability to contemporary
higher education. Yet the federal courts, faced with hard questions of federal
jurisdiction and the reach of the fourteenth amendment, still view private higher
education in Marshall's terms.10 Until Marshall's two propositions are reexam-
ined and revised, judicial review of private university discipline will continue
to generate dubious constitutional decisions.

What is the alternative to Marshall's framework? The answer—stated in
summary form here because it will be developed fully in the following pages—is
to treat private colleges and universities like other non-governmental institutions
claimed to be acting for or in the place of the state. Here as in the many other
contexts where courts have wrestled with state action problems, there is an al-
most infinite gradation of government involvement: Some private universities are
engaged in state action for all purposes and some for no purpose; most of them
fall, however, somewhere in between, and should be judged by the fourteenth
amendment under some but not all circumstances. (The question, what consti-
tutes those "circumstances," will be a major concern of this article.)

In deference to the federal courts that have considered such cases, the field
is a difficult and treacherous one. The recent experiences and views of Judge
Henry Friendly may serve to illustrate. Invited to Dartmouth College for a
major lecture in May 1968, Judge Friendly chose as his theme the very dis-
tinction with which we are presently concerned. He recalled at several points
what Marshall had said of Dartmouth. He observed that the Chief Justice may
have "made things too easy for himself . . . by drawing so bright a line [between
public and private institutions] even on facts known or knowable in 1819."11 In
any case, the line had surely become more blurred today than in Marshall's
time.

The very morning after Judge Friendly's lecture, there occurred at Alfred
University a fracas that would soon subject his theoretical model to a severe
practical test. (The incident reflected intense student opposition to ROTC,

8. Id. at 647.
9. Judge Friendly has recently urged reexamination of the issue, starting with some
skepticism about the way in which "Marshall may have made things too easy of himself . . . ."
(1969). For the suggestion that Marshall's decision actually brought about, rather than re-
lected, a bifurcation of American higher education, see H. BABBIDGE & R. ROSENZWEIG, THE
FEDERAL INTEREST IN HIGHER EDUCATION 9 (1962).
11. H. FRIENDLY, supra note 9, at 10-11.

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culminating in efforts to disrupt an awards ceremony—but the details are unimportant here.) Seven students were suspended on the spot by the Dean of Students, and his judgment was later sustained by a Faculty Committee. The students brought suit in a federal district court for reinstatement, but were rejected, and they appealed to the Second Circuit.¹²

Alfred University is *sui generis*—a judge’s nightmare, a constitutional lawyer’s delight, and a marvel to the student of governance of higher education. Basically, it is a small liberal arts college in Western New York, superficially indistinguishable from Hobart, St. Bonaventure, Wells, or its other neighbors. But there is one critical difference, on which the case turned: Alfred is the site of the Ceramics College of the State University of New York, one of six specialized “contract colleges” that comprise a distinctive component of New York’s hybrid system of public higher education. (Four of the other five contract colleges are at Cornell; the fifth is the College of Forestry at Syracuse University; the affiliative arrangements with the private host universities are similar, save for minor differences in governance and support.)¹³

New York’s Education Law provides the framework for a complex relationship between Alfred and the Ceramics College: The State pays the entire operating cost of the Ceramics College through a line item in the annual SUNY budget.¹⁴ In addition it pays a fixed amount per credit hour for courses which ceramics students take in the liberal arts branch of the University. The State also bears a *pro rata* share of the administrative costs of the institution, including the salaries of Alfred’s President, Dean of Students and other officers. The faculty, although paid by the state, are hired and promoted on the same basis as liberal arts professors. The students enroll at and receive a degree from Alfred; the governing statute makes Alfred responsible for “the maintenance of discipline and . . . all matters pertaining to its educational policies, activities and operations . . . as the representative of the state university trustees.”¹⁵

Under this arrangement the Ceramics College accounts for about one third of the Alfred student body, between a quarter and a fifth of the faculty, just over a fifth of the annual operating budget, and about one tenth of the campus

¹³. The governing provisions are all found in N.Y. Educ. Law (McKinney 1953); § 5711 (New York State Veterinary College at Cornell); § 5712 (New York State College of Agriculture at Cornell); § 5714 (New York State College of Home Economics at Cornell); § 5715 (New York State School of Industrial and Labor Relations at Cornell); and §§ 6001-07 (New York State College of Forestry, at Syracuse University). The Forestry College, unlike the Ceramics College, has a separate board of trustees which includes several state officials as well as administrators of Syracuse University. Provisions for reimbursing the host college for costs of educating students in the contract colleges vary slightly among the three institutions, although the basic formula is essentially as described in the Alfred litigation.
¹⁴. The state appropriation for the Ceramics College during the year of the litigation was roughly $1.8 million. Powe v. Miles, 294 F. Supp. 1269, 1272 (W.D.N.Y. 1968), aff’d, 407 F.2d 73 (2d Cir. 1968).
buildings (which, under the Education Law, remain the property of the State.) Clearly the relationship has been mutually beneficial: The State University needs a liberal arts college to furnish the non-technical education and the degrees to its ceramics students, and chose Alfred at a time when there was no suitable host institution within the skeletal state system itself. Alfred, in turn, profited in prestige, probably in ability to attract good students interested in ceramics (whether or not they took a technical major), and in access to a share of the State University operating budget.

Quite fortuitously, the students who petitioned the federal court for reinstatement included four enrolled in the liberal arts division and three in the Ceramics College. The district court held after several days of testimony that Alfred was a private university for all purposes, and therefore declined jurisdiction as to either group of students. Finding not “the slightest contact between the State of New York and the specific action taken against these plaintiffs,” it dismissed the suit for failure to show action taken “under color of” state law as required by the jurisdictional statute.

Three options faced the Court of Appeals: To affirm the district court on jurisdictional grounds; to find state action as to the institution because of its relations with the State; or to find state action only as to the ceramics students and reach the merits at their behest. The middle course seemed to Judge Friendly the one mandated by the Supreme Court’s state action cases. As to the ceramics students, there was state action “for the seemingly simple but entirely sufficient reason that the State has willed it that way.” Under the statute, the Dean of Students acted as a representative of the SUNY trustees in making conduct rules and enforcing them against the ceramics students. Such a degree of “governmental involvement” in the activities of the private university made the latter’s acts state action for these purposes—indeed, a fortiori from Burton v. Wilmington Parking Authority, the leading case on the point.

From this point the presumption in favor of going the whole way seems compelling. But Judge Friendly drew the line here. Unless one were to rely upon the charter granted by the state—an attribute which Alfred shared with countless other private institutions—the Court of Appeals could not find an adequate basis for state action as to the dismissal of the liberal arts students. He disagreed that the function of the University analogized its acts to those of a company town or a shopping center open to the public. He also put aside its interdependence and close involvement with the state, finding the Ceramics College separable from the targets of the liberal arts students’ complaint. Here is the critical test of state action on which the suit foundered: “The state must

16. Id.
19. Powe v. Miles, 407 F.2d 73, 82 (2d Cir. 1968).
be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint. Though the state paid about a third of the salary of the Dean of Students who imposed the suspension, the Court found him acting as a private official in his handling of the liberal arts students.

Such a parsing of the Alfred student body may be constitutionally defensible, but reflects imperfectly the realities of higher education. Consider the quite plausible case of two Alfred roommates, one working toward a ceramics degree but taking some liberal arts courses (as he must), the other working toward a liberal arts degree and taking several ceramics courses (as he well might). If the two engaged in a demonstration, and were suspended or expelled for violation of campus rules, the ceramics student would be constitutionally entitled to a hearing while his roommate would have only such recourse as common law may provide through the state courts. If the "public" student brought suit, a first amendment attack might be mounted against the rules allegedly violated; if he did not sue, the rule would remain beyond challenge by the "private"

21. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). A similar limitation upon the reach of the state action concept has been suggested in two other recent private college cases: Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 548 (S.D.N.Y. 1968). This requirement that the injury complained of be inflicted by that part of the institution in which the governmental involvement is clear seems out of keeping with the developed principles in this field. Such a requirement suggests, for example, that if a southern state university could find a donor willing to endow a chair for the director of admissions, it might refuse black students with complete impunity. Given the practical difficulty of tracing government funds appropriated for the general needs of a college or university, this test also suggests that only when the state pays the entire operating costs will the plaintiff be able to show that the state was constitutionally responsible for the allegedly wrongful act. No such requirement seems to have been imposed in several other contexts where state action has been found on the part of private institutions, e.g., private hospitals receiving substantial federal support through the Hill-Burton Act, 60 Stat. 1041 (1946), 42 U.S.C. § 291 (1964). See, e.g., Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964). Any suggestion that this application of the state action concept is confined to allegations of racial discrimination has been put to rest by Sams v. Ohio Valley General Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969). For further observations on the dangers of allowing an institution to claim that its challenged acts are "private" even though the institution as a whole receives substantial government support, see Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833, 855-57 (E.D. La. 1967) (3 judge court; Wisdom, J.), aff'd 389 U.S. 571 (1968).

22. The New York courts have decided many cases against private colleges and universities, but the results fail to provide a clear pattern. See, e.g., Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435 (1928); People ex rel. Goldenkoff v. Albany Law School, 198 A.D. 460, 191 N.Y. S. 349 (1921); Goldstein v. New York Univ., 76 A.D. 80, 78 N.Y.S. 739 (1902); Drucker v. New York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (Sup. Ct. 1968); Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct.), rev'd 17 A.D. 2d 632, 231 N.Y.S.2d 410, aff'd, 12 N.Y.2d 802, 187 N.E.2d 18 (1962); Ede v. Columbia Univ., 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct. 1917); People ex rel. O'Sullivan v. New York Law School, 68 Hun. 118, 22 N.Y.S. 663 (Sup. Ct. 1893). These cases dealt, of course, with a wide range of issues over a very long time span. Nonetheless, it would be extremely difficult to describe with any precision the law of New York regarding judicial review of either academic or non-academic sanctions imposed by private institutions of higher learning. What is true for New York is even more true for most other states, where far fewer such issues have reached the courts.
student, at least in the federal courts. And lest the analysis seem relevant only to a single small college, bear in mind that precisely the same constitutional test would now apply to two roommates at Cornell, one in the Industrial and Labor Relations School, the other in political science or economics. Clearly such a bifurcation is not likely to make campus discipline any easier either for administrators who impose it, or for students who face it. But the practical implications of the Alfred decision are not the subject of our concern. We must return to the constitutional issues.

The constitutional issues cannot be satisfactorily resolved so long as Marshall's two propositions in the Dartmouth College case remain unchallenged. We shall examine those propositions shortly. First, however, we must take account of the range of vital policy questions lurking behind and beyond the present relationship between courts and institutions of higher learning. At least one of these policy questions must be squarely faced here as a threshold matter: Are there special and essential interests of private higher education that would be seriously jeopardized by federal judicial review of disciplinary proceedings? If there is such a risk, then perhaps the courts are right to enter the field so circumspectly and hesitantly.

II. THE IMPORTANCE OF BEING PRIVATE

Even where differences are not profound, a conviction persists that there is something special and valuable about private higher education. It was long felt that the private sector uniquely offered access to the small, highly selective liberal arts college; that no counterpart to Reed, Swarthmore, Haverford and Bard could be found in the public sector. The recent emergence of New York's Old Westbury and Harpur, California's Santa Cruz and Michigan's Oakland suggest that this distinction, while still important, is not endemic.

Yet even in New York, where higher education is probably most homogeneous, the influential Heald Committee has recognized that private institutions "give American education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity." Judge Friendly, who has spent most of his life in New York State, finds unique value in "the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law . . . ." He adds that "perhaps the very diversity in the organization and control of American educational insti-

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23. See C. Jencks & D. Riesman, supra note 1, at 288.
tutions of higher learning may help to save us from what recently occurred in France.\footnote{26}

Quite clearly some perception of important institutional differences guides the decision making of American high school seniors and their parents. It is hard to articulate precisely the differences between Stanford and Berkeley, or Denver and Colorado, Brigham Young and Utah, Miami and Florida, NYU and CCNY, and so on. Frequently the faculties of the public institution seem superior, and the student body brighter. Yet many students and parents continue to prefer the private university even at great financial sacrifice.\footnote{27} Jencks and Riesman think the reasons for such a preference may often be more social than academic:

Parents may know, for example, that the faculty at the University of Colorado is better than at the University of Denver, and may nonetheless prefer Denver on the grounds that their daughters will be less likely to marry the wrong man at Denver, or that their sons are more likely to make friends who will be useful in later life. Or they may want their children to go to college only with other girls, only with Seventh Day Adventists or only with whites.\footnote{28}

Even in these respects, recent trends have diminished the effective differences. Private institutions have, on the one hand, become increasingly democratic for financial and other reasons; at the same time state systems of higher education have developed a degree of diversity that was impossible in the days of a single state university. Thus coeducation is replacing separatism even in the Ivy League and the Seven Sisters,\footnote{29} while in Texas and a few other places state systems preserve colleges segregated by sex.\footnote{30} The large private institutions have

\footnote{26. Id. In a footnote, Judge Friendly quotes Disraeli: If I were asked, "Would you have Oxford with its self-government, freedom, and independence, but yet with its anomalies and imperfections, or would you have the University free of those anomalies and imperfections, and under the control of the Government?" I would say, "Give me Oxford, free and independent, with all its anomalies and imperfections." \textit{Id.} at 40 n.130.}

\footnote{27. The enrollment data confirm this impression. Charles A. Nelson has recently reflected that "there was a great deal of talk in the 1950's, and it persists today, of the demise of the private college. Yet for the most part the private colleges are markedly stronger than they were in late 1940's and the 1950's." He goes on to point out that although the dominance of the public sector has steadily increased, enrollment in private institutions rose some 46\% between 1948 and 1964—since which time it has nearly stabilized. Nelson, \textit{Quantity and Quality in Higher Education}, in \textit{Higher Education and Modern Democracy} 177 (A. Goldwin ed. 1967). There is also evidence of financial health during this period. The recent report to the President on federal support for higher education noted that from 1959-60 to 1965-66, "private institutions increased the book value of their physical plant per student by almost 50\% as compared to an increase of 12\% for public institutions. These figures suggest that private institutions were able to undertake a substantial modernization of their physical plant." \textit{Toward A Long-Range Plan for Federal Financial Support for Higher Education} 12-13 (1969) (emphasis in original).}

\footnote{28. C. Jencks \& D. Riesman, \textit{ supra} note 1, at 287.}

\footnote{29. See Clark, \textit{Adding the Opposite Sex Creates Some Special Problems}, Chronicle of Higher Ed., Sept. 29, 1969, p. 8 (survey of practices and problems in institutions that have recently broken tradition and become coeducational).}

\footnote{30. For recent, and unsuccessful, attempts to break down the sex barrier at Texas A. \& M., which is unquestionably a public institution, \textit{see} Alfred v. \textit{Heaton}, 336 S.W.2d 251
been at least as aggressive in recruiting minority students as the state universities; in fact, Denver has a significantly larger proportion of black students than Colorado, Stanford a higher share than Berkeley, and Miami more than Florida—although the numbers are still pitifully small in all cases. And it is well to remember that the Federal Government has come down hardest on "segregated" black dormitories and black studies programs not at state institutions, but at Antioch and Northwestern. Thus, at least since 1964, it is quite clear that private colleges receiving federal funds (as most do) may not wholly disregard the fourteenth amendment in dealing with their students—even when they might wish to do so for benign purposes.

Even where religion is concerned, the differences are less pronounced today. Many major state universities have comprehensive programs of religious studies, and recognize a wide range of student religious organizations; the imposing and costly chapel at the Air Force Academy goes unchallenged; and few think the wall between church and state has been breached by appointing a Roman Catholic priest as Academic Vice President of the City University of New York, or as Dean of Students at Rutgers/Newark. The recognition of such diversity in the present systems of public higher education qualifies the uniqueness of the private sector.

Nonetheless the preference of Denver over Colorado is not mere personal whim. It is an individual right with important constitutional underpinning, which goes back at least to a Supreme Court case striking down Oregon's threat to do away with private secondary schools. (Curiously, this purge never touched Reed, Linfield, or the University of Portland.) The judgment of a unanimous Court broadly vindicated the private schools, both secular and sectarian: "The fundamental theory of liberty upon which all governments in this Union repose (Tex. Ct. Civ. App. 1960), appeal dismissed and cert. denied, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Ct. Civ. App. 1958), appeal dismissed and cert. denied, 359 U.S. 230 (1959)."


33. The practice varies quite widely, reflecting differences in constitutional and statutory policies toward church and state, legislative attitudes, and the historical structure of higher education in the state. For a persuasive argument that greater latitude should be permitted state colleges and universities in this regard, see Louisell & Jackson, Religion, Theology and Public Higher Education, 50 CALIF. L. REV. 751 (1962). For a recent review of the growth of religious studies at public campuses in California—a state with a particularly firm tradition of separation between church and state—see Los Angeles Times, Oct. 20, 1969, pt. IV, at 5, col. 1-3. Not all public institutions are ready to accept the more relaxed view of religious studies and activities, however. For a report of the suspension of the charter of the Newman Club at Farmingdale (N.Y.) Agricultural and Technical College for sponsoring a mass on campus, see N.Y. Times, Feb. 18, 1969, at 28, col. 6-8.

34. N.Y. Times, Sept. 17, 1969, p. 1, col. 4-5. The City University official, Rev. Timothy S. Healy, was formerly executive vice president of Fordham University. He reports that no dispensation was necessary either for him to accept his new position in the City University, or to wear civilian clothes on the job.
excludes any general power of the state to standardize its children by forcing
them to accept instruction from public teachers only.\textsuperscript{36}

In passing, the Court implied that private schools have no constitutional
right to be different in all respects, noting that the case raised no question about
"the power of the State reasonably to regulate all schools, to inspect, supervise,
and examine them, their teachers and pupils; to require . . . that certain studies
plainly essential to good citizenship must be taught, and that nothing be taught
which is manifestly inimical to the public welfare."\textsuperscript{36}

Perhaps it suffices to find both a constitutional and a subjective basis for
this freedom of choice between public and private institutions—with a touch of
tradition and sentiment. There is a rational foundation as well—not always for
the particular choice exercised (which is constitutionally unimportant) but for
the opportunity to choose. Jencks and Riesman stress two differences that are
not social: one, that private colleges and universities can be and are far more
selective in their admissions policies; the other, that they can be and typically
are more selective in the allocation of resources.\textsuperscript{37} Flexibility with resources
comes about because private institutions do not have to submit line-item budgets
to executive budget divisions and legislatures, but have much larger pools of
unrestricted funds—even when they are substantially poorer and needier, over-
all, than their state-supported counterparts. This means there is likely to be
much more innovation in the private sector, greater readiness to adopt or try
out new methods and materials, and better ability to deal promptly with new
demands and challenges such as those from minority groups.

There is another set of interests underlying the independence of private
institutions. Judge Friendly observes that many private donors contribute to
all sorts of private institutions—not only to colleges and universities—principally
to preserve a diversity they deem important.\textsuperscript{38} If public and private institutions
became indistinguishable, an important source of support for the whole field of
endeavor would be jeopardized.

Alumni and friends of state universities do, of course, give generously to
the public sector, as do corporations and foundations. And there is little evidence
that a rise in government aid necessarily dries up private sources of support—as

\textsuperscript{35} Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Lest it be thought the religious
affiliation of the institution named affected the outcome in any way, the companion case
involving the Hill Military Academy, a private nonsectarian school, was resolved by the
same opinion. The principles on which the decision rest clearly transcend particular guarantees
of religious liberty—which were, in fact, still some years away from being incorporated or
absorbed in the fourteenth amendment.

In Pierce, the Court relied quite heavily upon Meyer v. Nebraska, 262 U.S. 390 (1923),
in which the Court had invalidated a state law forbidding the teaching of foreign languages
to children below the eighth grade. Though acknowledging the legitimacy of the state's inter-
est in breaking down the language barriers that divided its citizens, the Court concluded that
"the means adopted . . . exceed the limitations upon the power of the State and conflict
with rights assured to" the foreign language teacher who had brought the case up—without
ever defining very clearly just what were those "rights." Id. at 402.

\textsuperscript{36} Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

\textsuperscript{37} See C. Jencks & D. Riesman, supra note 1, at 283-84.

\textsuperscript{38} H. Friendly, supra note 9, at 29-30.

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witness the high correlation, year after year, between the lists of top private recipients of federal funds and leading solicitors of private gifts. Yet this really misses the point: What is at stake here is the same freedom of choice to give or leave one’s money to a private institution or a public one, for reasons that may be no more rational and no more a matter of governmental concern than is the parent’s and student’s choice of Denver over Boulder. The ability to choose is an important interest, which in both cases has constitutional stature.

In its starkest form, the question comes down to this: Would the intervention of the federal courts in private university disciplinary proceedings jeopardize these vital interests? A word is necessary about what is not involved. The question here is not whether the courts may inquire at all into expulsion of students by private institutions, for the state courts may and sometimes do review proceedings in colleges less governmentally involved than Alfred, Columbia, Tulane and Denver. Nor is the question whether courts may inquire into the racial, ethnic or religious balance in the student body of such institutions—a matter on which Judge Friendly has expressed much concern. There is no warrant for such an inquiry even in public colleges. No court has yet assumed or intimated the power to ask whether there are too many Mormons at the University of Utah, too many Catholics at U. Mass. at Boston, too many Jews at City College, or too many blacks at Compton or Merritt. To this extent, diversity is as much a perquisite of public as of private higher education, at least where the state system comprises more than a single institution.

Nor is there any threat that judicial review will cause a legal metamorphosis of private higher education. That is simply not the way the law of state action operates. When a court finds that a large private shopping center, for example, may not constitutionally bar pickets, there is no suggestion that if a picket is injured on the premises, he should either look to the state for redress or that his suit against the proprietor would be barred by sovereign immunity. To say that a private entity “acts for” or “stands in the shoes of” the state for fourteenth amendment analysis, surely does not mean it “becomes” the state for any other purpose.

40. There are, of course, some clear constitutional limits on the donor’s power in this regard—although the Girard College litigation has painfully shown the difficulty of defining them. For the latest phase of this reinterpretation of the wishes of Stephen Girard in light of the fourteenth amendment, see Commonwealth v. Brown, 392 F.2d 120 (3d Cir. 1968); cf. Commentary, The Girard Trust—Past, Present and Future, 20 Ala. L. Rev. 307 (1968). At the same time, it is well to bear in mind Mr. Justice Douglas’ assurance in Evans v. Newton, 382 U.S. 296, 300 (1966), that “[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered.” For reasons that we shall survey shortly, this essentially parenthetical observation may prove embarrassing when the question is squarely presented. Cf. Dorsen, Racial Discrimination in “Private Schools,” 9 Wis. & Mary L. Rev. 39 (1967).
41. See H. Friendly, supra note 9, at 11-12.
42. Far from probing these subtle questions of balance within the student body, the courts are still back with the much more basic issues of virtually complete racial segregation
Equally irrelevant here is the fear that courts will probe too deeply into the inner affairs of colleges and universities if once the door is opened. However valid may be such concerns, they are inapposite here because the courts have already opened the door of public institutions of higher learning. The central question here is whether private universities are significantly less able than state universities to afford their students fair hearings or to adopt rules that respect free expression and political activity. There may well be, as we shall suggest later, certain special interests of the private sector affecting the scope of judicial review. But there appear to be no insuperable reasons why public and private institutions cannot be judged by a single standard of fairness and equity toward students.


Some governmental surveillance of enrollment balance may result from the figures collected annually to determine institutional compliance with Title VI of the Civil Rights Act of 1964. But these data—gathered from the roughly 2000 institutions of higher learning that receive federal funds—make no distinction between public and private colleges. While it is quite likely that any threatened terminations of funds for noncompliance would begin in the public sector, it is significant that the concern of HEW about “separatism” on campus has come in private institutions. See references in note 32 supra.


Eighty years ago, a Pennsylvania trial court reviewing the decision of a private college to suspend a student for infraction of its rules found no threat to institutional autonomy in the inquiry there undertaken. The court was also unconcerned about the prospect of a wave of litigation invited by its decision:

Nor, if such a practice were adopted (judicial review of disciplinary proceedings), would it have any tendency to limit the patronage of the colleges and universities.

Offenses, for which sentences of dismissal may be affixed, are not so frequent that it will impose any great hardship upon faculties to duly inquire into the guilt of the accused, nor will their action be so often questioned as to entail any considerable additional burdens on the courts.


There is one possible difference that at least bears on this issue. The American Council on Education has recently completed a study of various aspects of campus disorders. One finding is relevant here: "Private universities are the most likely to have violent or disruptive protest . . . . [The study] said that 34.4 percent of the private universities had experienced violent protests, and 70.5 percent had had disruptive protests. Public universities were next in line with 13.1 percent experiencing violence and 43 percent undergoing disruption. Private two-year colleges had neither violence nor disruption last year . . . ." Chronicle of Higher Ed., Sept. 15, 1969, p. 8. It does not follow, however, that private institutions should acquire an immunity from judicial review simply from the fact that they may more likely be sued, or will be brought to court in a proportionally greater number of cases. Cf. Cooper v. Aaron, 358 U.S. 1 (1958).
processes of state universities are subject to all sorts of political pressures, from legislators, regents or trustees, and local government officials, compelling the promulgation of rules that are of doubtful constitutionality. Such pressures are generally absent in the private sector, even where conservative alumni bring their wealth and influence to bear on internal matters. Moreover, a private university should be, if anything, better able to produce on short notice the funds necessary to pay a court stenographer or make other provision for a concededly expensive adversary hearing. Thus the whole debate about the desirability of judicial review and its effect upon higher education seems unrelated to any difference between private and public sectors.

Further, there are very practical reasons why this issue is inapposite. Even under the strictest standards applied by the federal courts, there are really very few cases that must be handled by formal, full-dress adversary hearings. In the cause célèbre, the potential docket may be shortened somewhat by a grant of amnesty. And when the institution blows apart, as at Columbia in 1968 or Harvard in 1969, with hundreds of students cited for rule violations, internal political pressures will probably compel formal hearings even if the specter of federal court review does not.

Finally, nothing about judicial review inherently threatens the academic integrity of private universities. Courts are understandably loath to review failing grades or dismissals based on poor class work, whatever the nature of the institution. Only where, for example, a student alleges that an instructor failed him because he was black, or Jewish, or a political activist, will the court even hear the case.45 Where the complaint questions only the soundness of the professor’s judgment, or his professional competence, any court will wisely dismiss, feeling that such questions of evaluation must remain with the faculty. If state colleges and universities can live with such a standard of review in cases involving academic sanctions, it is hard to see why private institutions need greater immunity.

Two propositions emerge from this discussion. First, the freedom of choice which a dual system of higher education ensures to parents, students, donors and others is not only deeply rooted in American tradition but is itself a constitutional right. Thus any action by the courts seriously impairing that freedom would be as suspect as the New Hampshire legislation held invalid in the Dartmouth case, or the Oregon law struck down a century later. The second proposition is, however, reassuring: None of the special interests of private universities that justify this freedom of choice appear jeopardized by federal judicial review of disciplinary proceedings. To the extent that judicial review is controversial, the dispute involves matters which transcend the public-private distinction. The essential diversity which is the life of our dual system should be unaffected by

45. See Connelly v. University of Vt., 244 F. Supp. 156 (D. Vt. 1965); compare Wright, supra note 3, at 1069, with Developments in the Law—Academic Freedom, supra note 6, at 1139.
intervention of the federal courts for the limited purpose of investigating alleged
denials of due process and free expression.

III. THE PUBLIC CHARACTER OF PRIVATE HIGHER EDUCATION

If we agree that the diversity of American higher education would not be
destroyed by judicial review of private university disciplinary proceedings, we
are brought back to the question whether such proceedings constitute "state
action." This question is essential for two reasons. First, the fourteenth amend-
ment applies only to acts performed by the state or somehow attributable to it;
and second, the statutes under which such cases might be brought require that
the challenged action be "under color of state law." It is well to review briefly
the present scope and understanding of this concept.

The phrase "state action" is really a misnomer. When the state acts directly,
there is no question about the applicability of the fourteenth amendment. Doubts
arise only when the state or local government is not the actor—when nominally
private action is claimed to warrant the extension of constitutional limitations
applicable to government conduct. The state action concept is therefore a sort
of legal fiction, which for this purpose alone attributes governmental responsi-
bility to non-governmental entities. Yet the concept is as significant as it is
elusive. "[T]he state action problem," Professor Charles Black has written
recently, "is the most important problem in American law."^48

The Supreme Court has frequently defined the core concept of state action:
"Conduct that is formally 'private' may become so entwined with governmental
policies or so impregnated with a governmental character as to become subject
to constitutional limitations placed upon state action."^47 The scope of the doc-
trine is broad if its contours are sometimes imprecise: "[T]he Fourteenth Amend-
ment forbids States to use their governmental powers [for discriminatory pur-
poses] where there is state participation through any arrangement, management,
funds or property."^48

The grounds for finding state action are many and varied. Three lines of
decisions, however, dominate. First, there are cases in which private conduct is
subject to the fourteenth amendment because of governmental aid and support
—through cash payments, donations or loans of land or buildings, special tax
exemptions, or some combination of these ingredients. Second, state action may
be found without any public financial support where a private entity holds an
inherently governmental power—with the control that a company town,^50 an

49. See Sams v. Ohio Valley General Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Eaton
v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323
F.2d 959 (4th Cir. 1963); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945);
exclusive bargaining agent, or a political primary in a one-party state possesses over those persons whose lives are significantly affected by it. Sometimes such power is exercised merely by governmental acquiescence; where government has actually delegated the power to the private actor, or mandated its use by him, a lesser impact will warrant a finding of state action. Finally, one recent case suggests the fourteenth amendment will reach private action which is merely encouraged, condoned or reinforced by government without financial support, delegation, or exercise of quasi-public power.

Beyond the cases, it has been argued persuasively that other types of institutions exercise sufficient power to meet the same tests of state action. A. A. Berle has long maintained that large corporations should be subject to the fourteenth amendment simply because of the vast influence they have over the lives of persons who work for, buy from and deal with them. Once the Court has extended the state action concept to company towns, exclusive bargaining agents, and political primaries, Berle and others insist the same reasoning should carry over into the corporate context.

The case for extending the fourteenth amendment to the private campus relies upon an application of these precepts. It focuses specifically upon two pervasive attributes of private higher education—substantial governmental involvement through financial support and regulation, and the exercise of essentially governmental or public powers. This thesis presupposes that John Marshall entertained an inaccurate view of private colleges—both in finding the private sector so readily separable from the public, and in characterizing the mission of Dartmouth College as an essentially private responsibility. The section which follows will suggest that public and private components have been so intermingled in private colleges and universities that they are no longer realistically separable; and that the function of private higher education is so essentially public that a governmental standard should judge its performance.

A. The Unity of a Dual System of Education

Alfred University may well be unique, but only because of the manner in which public and private elements are combined. The condition of interdepen-

dence is pervasive in contemporary American higher education. Public support for private institutions—not only colleges and universities—has grown apace in the last decade. Meanwhile, private support for state colleges and universities has also grown dramatically. The result has been a thoroughly mixed economy of higher education, with the institution that depends exclusively upon public or private support the rare exception. This sharing of responsibility for an activity that is essential to public and private sectors alike makes increasingly difficult the drawing of any functional line between the two.

One might think the mixed economy a recent phenomenon. Yet historically this was the original model of American higher education. Jencks and Riesman have recounted the early years:

The colonial college was neither 'public' nor 'private' in the modern sense. It was seen as a public trust, subject to state regulation. Chartered by the state, its board of trustees often included public officials ex officio, and sometimes other public appointees. On a year-to-year basis the colonial college was usually expected to balance its books without tax assistance, but when it needed a new building or had other 'special' expenses it often appealed successfully for legislative help. Its activities and solvency were viewed as public rather than private questions, yet it was not an arm of the state in the same sense that a modern state university is. Its position was in some ways analogous to that of a modern private university vis-à-vis the federal government: dependent, but not wholly so; responsive, but not wholly so.58

Gradually, during the first half of the nineteenth century, government withdrew its support for these hybrid institutions—partly because the *Dartmouth College* case seemed to bar state control accompanying state support; and partly because the mounting pressures against public aid to religious institutions, often reinforced by constitutional provisions, made most of the colonial colleges ineligible for public assistance.

Meanwhile the states founded colleges and universities of their own, initially to meet special needs the private universities did not serve, but later for the more general aims of higher education. By the start of the Civil War, there were already in existence twenty-one state colleges and universities, of which at least one (Michigan) was an institution of stature, and several others were rapidly moving toward distinction. For a time, the complete bifurcation of higher education—the development of quite distinct and independent public and private sectors—seemed probable.69

The last century has, however, partly restored the colonial pattern. One contributing factor has certainly been the gradual secularization of the large private universities, which renders them once again legally eligible for public largess. No one seriously suggests that Boston University cannot receive state

58. *C. Jencks & D. Riesman, supra* note 1, at 257.

or federal funds simply because its President must be a Methodist, or North-western because a majority of its Trustees must be of that same faith.

A second factor has been the great excess of demand for higher education over both the abilities of the states to build new public institutions and the capacities of the private institutions to respond within their own limited resources. Two patterns of government response to these pressures have blurred the public-private distinction in many states. On the one hand, states have taken over failing private urban universities like Buffalo, Houston or Kansas City, and simply absorbed them into the state system; or have provided such nearly complete support, as in the case of Temple and Pittsburgh, that the institutions remain private in form only. At the same time, states have increased direct support to private colleges and universities through a variety of channels that we shall survey shortly.

The third factor in the metamorphosis, of course, has been the role of the federal government. The greatest impact of federal funds has come only in the last decade; total federal support to American colleges and universities rose from $1.4 million in 1963 to $3.3 million in 1967. But the federal involvement began over a hundred years before, with the passage of the Morrill (land-grant) Act. Although that law was designed chiefly to assist the embryonic state colleges and universities, several states made the permissible decision to include private institutions among the recipients. Yale and Brown once received land-grant funds, though they do not any longer. M.I.T. has been a land-grant college for over a century, and still gets a small share of its federal funds from that source. Allan Nevins has reminded us of the major contribution Morrill Act funds made to the following and early history of Cornell—which, like M.I.T., still receives some federal support through this channel. Thus from the outset federal support has been available to private higher education as well as public, and has contributed to the blurring of the line that distinguishes the two.

If it was difficult to differentiate public from private in colonial times, the task is even harder today. A brief examination of the several institutions that have figured in recent federal court cases will suggest how wide is the range of models. At one end of the scale there is Howard University—for all practical purposes a federal university like the service academies although it retains its private shell and governing board. Most of Howard's annual operating budget

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61. See Pennsylvania Weighs New Private-College Aid Plan, Chronicle of Higher Ed., May 31, 1967, p. 3. For recent indications of how dependent these institutions have become upon the state, and how particularly vulnerable they are to cutbacks in state support for higher education, see Chronicle of Higher Ed., Oct. 13, 1969, p. 8.
64. See H. Babidge & R. Rosenzweig, supra note 9, at 10-11.
66. This contention seems now to have been accepted by the Court of Appeals, although
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(almost $22 million last year) and a large share of the capital construction funds come directly from Congress; the administration is subject to extensive regulation by the Department of Health, Education and Welfare; faculty appointments are processed on regular civil service forms; the University is frequently listed in official documents as a federal government agency, and so on.67

At the other end of the scale is Puerto Rico Junior College, which is privately administered and supported chiefly by private sources.68 About 13% of the annual operating budget derives from government funds in the form of student scholarships, paid directly to the individual students. Apart from that, the college receives in a typical year 2.6% of its operating budget and 2.1% of its plant development costs from government appropriations. Neither Federal nor Commonwealth government is otherwise involved in or responsible for the college’s affairs or program.

It would be tempting to mark the outer limits of the inquiry by saying that Howard is clearly “public” and Puerto Rico Junior College is “private.” But such a classification would be premature at the very least, and at worst would break the commitment we have made to avoid convenient handles of this sort in seeking solutions to a problem that does not readily invite simple classifications. All we can safely conclude for the moment is that government is more involved with Howard, or that Howard is more dependent upon the government, than Puerto Rico Junior College. Between them are myriad models of support and governance that are much harder to categorize.

Tulane University69 and the University of Tampa70 have also been before the federal courts in recent cases. Both institutions illustrate a quite different pattern. Tulane was originally a completely public institution, but has since become predominantly private not only in its governance, but also by achieving substantial independence from government appropriations for operating and capital budgets. Tampa too has now assumed an essentially private character, but owes its founding quite largely to the use of a surplus municipal building and the leasing of other city land for university purposes.

Columbia University71 and the University of Denver72 are more representative of contemporary private higher education. Both have private, self-perpetuating boards of trustees, and derive the bulk of their operating budgets and capital construction funds from student tuition, endowment income, and gifts from a

67. For a convincing demonstration of the essentially governmental character of Howard University, see Note, Reasonable Rules, Reasonably Enforced—Guidelines for University Disciplinary Proceedings, 53 MUNN. L. REV. 301, 308 n.44 (1968).
70. Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965).
variety of private sources, including corporations, foundations and alumni. Yet both receive substantial funds from the federal government, about $56 million in the case of Columbia and $6.5 million in the case of Denver for fiscal 1967.73 Columbia, in addition, receives some $10 million from the City of New York, and beginning this year will get a million or more from the State. The rub, of course, is that these are principally research funds, rather than appropriations for use in the general educational work of the recipient institution; most of Columbia's federal money comes from the Defense Department, the Public Health Service, and the National Science Foundation, with a smaller amount from the Atomic Energy Commission. Denver gets its federal funds chiefly for defense contracts and public health research. Columbia's large city appropriation is earmarked almost entirely for the operation of the embattled Harlem Hospital. Thus one might conclude that funds of this sort are irrelevant to the character and support of the university, since they are restricted for special purposes, chiefly scientific or medical research. Yet that position is as insensitive as would be the superficial judgment that Columbia is an arm of the federal government because half its total annual budget comes from Washington. Is it so clear, for example, that Columbia and Denver are not enabled to undertake various activities closely related to their academic programs, which would be impossible without the "earmarked" federal research and development funds?74 To say that the government does not directly pay the bills for the educational program of a private university—or even that the university may not use its government funds for general educational needs—does not settle the question of "governmental involvement."75

Other indicia of governmental involvement in private higher education compound still further the difficulties of classification. During the fiscal year just ended, the federal government provided some form of financial support or assistance to 2056 institutions of higher learning, roughly 80% of the total number of colleges and universities of all types.76 The place of the private universities is

74. For some suggestions of ways in which research policies and priorities of the federal government affect the university, see Yost, Federally Sponsored Scholarly and Creative Work at Academic Institutions: Project and Institutional Grants, 55 AAUP Bull. 353 (1969). Recent cutbacks or major shifts in federal research funds have had effects far beyond the laboratories and facilities directly supported. Recently the Vice Chancellor for Research of the University of California at Berkeley noted six areas in which reduction of federal science research funds would have important and deleterious effect: (1) "reduction of the amount of financial support available for graduate students in science;" (2) "fewer opportunities for graduate students to do research;" (3) "thinning out of research staffs;" (4) "increased difficulty in finding research funds for new scientists;" (5) "a possible 'overpopulation' of scientists in some areas where employment opportunities for researchers will be limited;" and (6) "a future decline in the number of scientists in some fields, such as the biological sciences." Daily Californian, Oct. 17, 1969, p. 1.
75. It is worth recalling here, just for the record, that the definition of "public college" includes institutions "operated wholly or predominantly from or through the use of government funds or property, or funds or property derived from a governmental source"—with no specification that the funds or property must be available for general institutional needs. § 401(c), 78 Stat. 247 (1964), 42 U.S.C. § 2000c-1(c) (1964).
impressive: four among the top ten, and ten among the top twenty, institutional recipients of all forms of federal funds are private. In fact, the private institutions receive roughly twice the dollar amount of federal support per student as their public counterparts. Overall, private institutions derive a slightly higher share of their total annual operating budgets from federal agencies—24% as against 19% for the public sector.

To date the bulk of governmental support for private higher education has come from the federal government, rather than the States, and this balance will undoubtedly continue for some time. But there are important signs of change. Not only have states begun to absorb once private universities directly into state systems of higher education—as in the case of Harpur, Buffalo and the Upstate Medical Center in New York; Temple and Pitt in Pennsylvania; and the Universities of Houston and Kansas City, but, even more important, there is a renewed interest in and use of direct state support to colleges and universities outside the public system. In 1966 Pennsylvania began what was then a unique program to allocate some $38 million of state funds directly to 16 private colleges and universities for general uses. For large, still nominally private, institutions like Carnegie-Mellon and Drexel Institute, this program makes available two or three million dollars annually; to smaller but needier institutions like Jefferson Medical College, it brings a similar amount, while smaller and healthier private colleges draw correspondingly smaller shares.

New York soon followed the Pennsylvania example, on what promises to be an even grander scale. A special panel appointed by Governor Rockefeller in 1967 and chaired by McGeorge Bundy recommended early in 1968 a program of aid to private colleges involving a substantial and accelerating state commitment. The proposals were readily accepted by the legislature. The 1970 budget included an initial appropriation of $20 million for this purpose, to be distributed in proportion to the number of degrees awarded by each of the eligible recipient institutions.

There is, however, a high degree of concentration in the distribution of these funds; the 100 largest recipients accounted for just under 70% of the total amount distributed in fiscal 1967.

77. In the last year for which the figures were broken down on this basis, the dollar amounts of federal funds to public and private institutions were very nearly equal. Toward A Long-Range Plan for Federal Financial Support for Higher Education 43 (1969). The total number of students attending public colleges and universities is more than double the number now enrolled in the private sector. In fact, estimates for fall 1969 enrollments place the ratio at about 5:2. Chronicle of Higher Ed., Sept. 15, 1969, p. 4.


79. See Nelson, supra note 27, at 179-80.
83. N.Y. Times, July 28, 1969, at 1, col. 5. Under the initial allocation—going to 52 eligible institutions throughout the state—New York University will receive $4.4 million, Columbia $3.2 million, Syracuse $2.5 million, and Cornell $1.2 million. Church-affiliated
Meanwhile, Maryland continues to make specific appropriations of public funds to designated private institutions.\(^8^4\) Elsewhere, state funds have been used for essentially patchwork or rescue purposes, as with Ohio's special 1969 grant to the Case-Western Reserve University Medical School.\(^8^5\) Strong pressures in Texas,\(^8^6\) Illinois\(^8^7\) and several other states suggest that the Pennsylvania and New York approach to direct support of private higher education may be widely emulated, at least in the East and Midwest. (Other models are used in the West. The California legislature in 1969 provided tax credits for gifts to public or private institutions without distinction.\(^8^8\) Private colleges and universities in the state already benefit substantially from the state scholarship program, which provides up to $2000 annually in tuition and fees at either a public or private institution. Fifty-one percent of these scholarships are used at the private institutions, which account for only 12% of California's students; the University of Southern California alone receives some $800,000 each year through this channel.\(^8^9\)

So much for the private side of the line. If the distinction has been blurred from that side, there has been no less erosion from the other side. It is true that Harvard has the largest endowment in the country, but the University of Texas runs a strong second, well ahead of Yale.\(^9^0\) When it comes to annual giving by private sources, the University of California is consistently among the top five recipients; other state universities, notably Texas, Illinois and Minnesota, usually place in the top twenty recipients, well ahead of such prestigious private colleges as Brown, Williams, and all the Seven Sisters.\(^9^1\) The rapid and disproportionate rise in tuition charges suggests another way in which public institutions are in fact becoming increasingly dependent upon the private sector for support. From 1960 to 1965, average tuition and fee charges in the public sector increased annually by about seven percent, significantly higher than the rise in other components of support.\(^9^2\) But the real escalation came in the fall of 1969. In just one institutions are not included in the original distribution, for the question of their eligibility remains unresolved.

84. The Maryland tradition of special grants to private institutions, usually for construction purposes, is perhaps the oldest in the country. A recent challenge to several such grants under the establishment clause brought the issue to the Maryland Court of Appeals for a thorough review of the relations between the state and private higher education, Horace Mann League v. Board of Pub. Works, 242 Md. 645, 220 A.2d 51 (1966). A similar challenge has recently been mounted in Connecticut by a group of taxpayers, supported by the American Jewish Congress and the American Civil Liberties Union. N.Y. Times, Sept. 27, 1968, at 1, col. 8.

89. Los Angeles Times, Sept. 17, 1969, Pt. 1, at 3, col. 1. A private college president observed that California state aid distributed in this form enabled the private institutions to attract more diverse student bodies than would otherwise be likely.
year, average tuition charges for the leading state universities rose 16.5 percent for resident students and 13.6 percent for nonresidents. Even these figures hide the dramatic jump in fees at the most prestigious public institutions. Between 1968 and 1969, for instance, fees increased 75 percent at Purdue and Indiana, 68 percent at public institutions in Iowa, and 50 percent for nonresidents at Ohio State. In this respect as in others, it is clear that public institutions are turning increasingly to the private sector to meet their current operating needs. The appeal of public institutions to private sources is modest only by comparison to the vast increase in state and federal support for private institutions of higher learning.

The result is a system characterized by Martin Meyerson and others as a "mixed economy of higher education." The trend seems as salutary as it is inevitable. For struggling private institutions, state support may offer the only alternative to closing down or being absorbed into the state system. For the wealthier private universities, state support may preserve a diversity of student body—by subsidizing the education of a larger number of poor students than scholarship funds would ordinarily carry—as well as diversity of academic program.

The benefits of private support to public institutions are comparable. At a time when political pressures alarmingly increase the risk of excessive dependence upon state legislatures, private funds offer to state colleges and universities the only hope for a modicum of independence, the only way to undertake controversial programs and activities that cannot be submitted in a regular budget request. Moreover, even where political interference does not accompany public support, there are many legitimate undertakings for which budget division approval is traditionally withheld or legislative support simply cannot be obtained. Such activities—special programs in the arts, lecture series, entertainment, foreign travel and the like—seem essential for a distinguished and diverse institution of higher learning. In the private university, support for them is assured through private funds. These "luxuries" are no less necessary for public universities that claim a stature equal to their private counterparts. Yet without substantial private funds, many such activities may simply be impossible for the public institution that must contend with budget examiners and legislators who typically hold an ascetic view of academic life. Whatever may be its limitations and drawbacks, therefore, the blessings of the mixed economy cannot be doubted.

B. The Public Purpose of Private Higher Education

Equally conducive to a finding of state action is the proposition that higher education is a public function, whether performed by institutions under private or state control. John Marshall believed that private colleges like Dartmouth

"do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant." If this was the case in 1819, it has not been so for most of the history of American higher education. Today, the converse seems much closer to the truth: Higher education is chiefly a public or governmental responsibility, which private institutions share and supplement in vital ways.

The public sector is numerically dominant today. Roughly two out of every three students enrolling in the fall of 1969 attended public institutions—that is, state colleges and universities clearly on the public side of any line. Almost all the growth in recent years has occurred in the public sector. The dominance of the state-supported institutions will almost certainly increase. Indeed, the trend may be accelerated by the absorption of other private universities into state systems on the Buffalo-Houston-Kansas City model; Alan Cartter has warned that unless the pattern of support changes substantially, "the toll of private universities is likely to continue to rise."

Numerical comparisons may, however, prove too much. If the argument were carried to its logical end, it would subject the actions of all private elementary and secondary schools to the fourteenth amendment, since the dominance of the public sector is vastly greater below the college level. That is clearly not yet the law, and there are probably persuasive reasons why it should not be. Yet government may, in recognition of the essentially public role that such institutions perform, provide limited public aid even to students attending parochial schools. On the other hand, such assistance is forbidden by the establishment clause of the first amendment to the extent it supports activities in which the government could not engage directly without violating the principle of separation between church and state. At least for some purposes and to some extent, the educational service rendered by private sectarian and non-sectarian schools is a public function. Whether this fact should suffice to bring constitutional constraints to bear upon private elementary and secondary schools is well worth considering, but cannot be explored here.

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97. There were modest increases in private college enrollment until the fall of 1968, when the figures for the first time showed an actual decline of some 11,200 students from the fall of 1967. Id. Presumably this is a temporary condition, given the continuing rise in demand for higher education.
99. Professor Dorsen has argued that receipt of federal aid by a private elementary or secondary school may well be a sufficient basis for applying the fourteenth amendment, at least where the issue is one of segregation or discrimination. Dorsen, supra note 40 at 48-50.
101. This explanation or rationale appears consistent with Professor Choper's proposed test of government aid to parochial schools: "[G]overnmental financial aid may be extended directly or indirectly to support parochial schools without violation of the establishment clause so long as such aid does not exceed the value of the secular educational service rendered by the school." Choper, THE ESTABLISHMENT CLAUSE AND AID TO PAROCHIAL SCHOOLS, 56 CALIF. L. REV. 260, 265-66 (1968).
This inquiry suggests that higher education carried out by private institutions is a governmental activity where it essentially parallels the higher education which the states provide through their own college and university systems. At least one court has recognized the relevance of this parallel. Judge J. Skelley Wright, then on the district bench in Louisiana, began his opinion in the Tulane case with a general observation:

At the outset, one may question whether any school or college can ever be so ‘private’ as to escape the reach of the Fourteenth Amendment... No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution... Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action...?

Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how ‘private’ they may claim to be.¹⁰²

The proof of Judge Wright's thesis lies in the realities of contemporary higher education. Undoubtedly the most important attribute of private colleges and universities is the power to grant or withhold a degree (or, in the case of the small number of non-degree granting institutions, to certify or withhold transfer credits that can be used to gain a degree elsewhere). This power alone seems at least as "governmental" as the power exercised by other private entities held to be subject to the fourteenth amendment—the company town, the shopping plaza, the labor union and the political primary.

The importance to the individual student of receiving (or being denied) a college education and degree can be measured in various ways. The fact that a typical college graduate will in his lifetime earn roughly $150,000 more than his counterpart who only completed high school¹⁰³ may reflect simply the fact that abler people with greater earning potential go to college. Yet, as Jencks and Riesman have observed: "The bulk of the American intelligentsia now depends on universities for a livelihood and virtually every would-be member of the upper middle class thinks he needs some university's imprimatur, at least in the form of a B.A. and preferably in the form of a graduate professional degree as well.¹⁰⁴ The New York Regents have built a similar assumption into the State's


In American society the college is the gateway to good employment. Every year the figure goes up that expresses the value of a college education in future earnings. Banks publish it, parents daydream about it. Depressed minorities view the college as the tunnel out of prison into economic freedom—it is the great equalizer, as Horace Mann once said of all education. But now nothing short of college is education.

master plan for higher education: “College attendance and a college degree are as necessary today as high school attendance and a high school diploma were in the past. The economic, social, and cultural forces in our society are all pushing in that direction.” As we move from an age of mass higher education to one of universal higher education, the growing importance of access to college and to a degree can hardly be doubted.

So much for the positive side of the equation: A college or graduate degree, and access to it, are clearly of critical significance. The negative side—the consequences of exclusion or expulsion—also deserves attention. Zechariah Chafee once wrote of the need for judicial redress of wrongful exclusion from certain kinds of voluntary associations: “Some associations have a stranglehold upon their members through their control of an occupation or property which can ill be spared. In such a situation there is operative a policy in favor of relief against wrongful treatment.” One need not stretch this concept too far to encompass a student’s interest in remaining at college or graduate school. The consequences of expulsion from the academic community are always drastic, if only because of the indelible stigma that attaches to the record of a student against whom severe sanctions are imposed. For the physically fit male student, except in those infrequent times of peace, expulsion or long term suspension is tantamount to an induction notice. For the professional student, the consequences are particularly harsh. Non-academic expulsion, Professor Martin Levine has observed, “is in many ways the equivalent of a license revocation proceeding; as a result of the school’s punitive action, the door to a profession is permanently closed.” Even for the undergraduate, he adds, the university can...
"render it impossible for the student to continue his education elsewhere... by its phrasing of the notation made on the... transcript...."

Clearly the "power" exercised by the private university in this regard is no less than that of the state institution. Indeed, as a practical matter, the smaller size and higher selectivity of the private universities suggest that the student dismissed from Stanford or Harvard will find more doors closed to him than will the student expelled from Berkeley or City College for the same offense. Moreover, the student severed from a private institution forfeits a much larger "investment" that he or his parents have made in his higher education; even after the recent sharp rises in public institutional costs, tuition and fees at the typical private college are still four times those of the state university.

If private academic communities have acquired an impact on their members that would have shocked John Marshall, the converse has equally come to pass: Government now regulates and controls the private universities to a degree commensurate with their public character. The power which New York's Board of Regents has over private institutions may be wider than that of any other public body, but the difference is essentially one of degree. Every private college in New York is chartered (and thereby accredited) by the Regents, whose approval must be obtained before any new degree can be awarded or major changes made in the curricula. The Regents and the State Commissioner of Education have broad powers of visitation, and may require written reports as often as they wish from the private as well as the public institutions comprising the University of the State of New York. Specific standards for the qualifications and compensation of faculty members are prescribed for all institutions. A private college may not close its doors without Regental consent. Thus, as a New York trial court recently concluded after careful analysis of the statutory framework, a private college in New York "can scarcely regard itself as free to conduct its affairs in such way as it may see fit, but must always work in close harmony with, and under the immediate and direct supervision and control of, State officers..." New York is the extreme case, to be sure; the degree of state control diminishes as one moves west. Yet there are few states—at least where private higher education plays any substantial role—without some such regulation. Moreover, legislatures angered by recent student demonstrations have shown a

readiness to make laws for private as well as public campuses. Lawmakers in several states, determined to ban firearms on college and university campuses, either overlooked the distinction between public and private institutions or—as in Texas and New York—deliberately wrote the law to cover both. If campus disorder continues to evoke repressive legislation, exemptions for private institutions are progressively less likely to be written unless a court decision has made them mandatory.

The character of private colleges and universities is thus largely determined by the power that government exerts over them, and the essentially governmental power they in turn exert over others. It requires no outlandish extension of accepted state action concepts to make the fourteenth amendment applicable to the private campus on this basis alone. As in the cases of the political primary in a one-party state, the union given exclusive bargaining rights, or the company town, the critical element is one of power. The power to grant or withhold academic degrees is most significant by itself. This power is also the basis for extensive state regulation and supervision of higher education, which underscores the essentially governmental character of the degree-granting institutions.

It will seldom be necessary, however, to rely exclusively upon the power or function of a private college. Typically there are other indications that the institution acts in the place of or with the aid of the state. It seems appropriate here to review these other ingredients, frequently found in contemporary private colleges and universities, which buttress the case based only on the public character of higher education.

1. Substantial Public Support for General Educational Needs. The first and simplest special factor is a monetary one—easily stated but not so easily applied. There are relatively obvious cases at both ends of the spectrum, of

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118. See generally H. Gonzalez, Jr., Legislative Response to Student Unrest and Campus Disorders, August 27, 1969 (Address to the National Student Association), collecting and commenting upon state legislation during the past several sessions.
120. There is one troublesome threshold question—whether or not an inquiry into governmental involvement may take account both of federal and state funds received by the defendant institution. It has been suggested that federal funds, no matter how large the amount, would be irrelevant for jurisdictional purposes under the statute, 28 U.S.C. § 1343(3) (1964), whatever might be their general import under the Constitution. The statute requires proof that the acts complained of were done “under color of state law” and, it is said, that means state but not federal. E.g., Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 547 (S.D.N.Y. 1968). This seems a strange doctrine, for it implies that a private institution is less amenable to suit in the federal courts when it is partially dependent upon federal funds than when it depends to the same degree upon state funds.

Although the jurisdictional statute does speak of action “under color of state law,” so literal a reading seems incompatible with the objectives of the original civil rights legislation. At least since Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) the courts have recognized a concept of “federal action” parallel to the more fully developed state action
course. At one end, the sheer extent and volume of public support for such universities as Howard, Pittsburgh and Temple would without more render the private shell irrelevant for constitutional purposes. Where the state or federal government meets the bulk of the institution's total needs with funds not earmarked for special or supplemental activities, that fact alone should be dispositive. At the other extreme is the institution like the Puerto Rico Junior College, which derives less than five percent of its revenues from all government sources.

The hard cases fall somewhere between—cases of institutions like Columbia and Denver, and most of the other large, prestigious private universities. Federal funds may constitute, as with Columbia and M.I.T., roughly half the total annual institutional budget. Clearly these appropriations are not intended for general educational purposes or activities. They are received on the explicit understanding that they be utilized for a quite specific (usually scientific research) purpose. Strict accounting procedures ensure compliance with the terms of the grants. Yet it is far from clear that such institutions do not profit greatly from this specialized form of interdependence—that they do not attract a higher caliber of faculty and students because of the facilities the federal government has enabled them to build on or near the campus; and that institutional funds have not been freed for general needs by reason of the federal beneficence. One possible solution to the accounting tangle suggests itself: Whenever it is shown that (1) a university receives as much as ten percent of its annual operating budget directly from government sources (that is, not indirectly through scholarships), and (2) those funds are assigned to activities not wholly unrelated to the general educational program, then the burden might well shift to the university to rebut an inference of substantial governmental involvement naturally arising from these facts. Where the private institution receives general institutional grants, as in Pennsylvania and now in New York, the degree of governmental involvement may make a prima facie case of state action on this basis alone.121

doctrine, and resting on the same policies. Since that time, the lower federal courts have quite regularly relied upon the presence of federal funds along with state or local funds to support a finding of state action, e.g., Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), and other cases following that one involving Hill-Burton aid to hospitals. Without deciding what would be the situation if only federal funds were involved—with no connection of any kind to state or local government—the presence of federal assistance in substantial amounts should surely be relevant when state support exists to carry the case across the jurisdictional threshold. Otherwise, a private institution whose budget came 10% from the state, and 70% from the federal government, would be unreachable in the federal courts—while an institution receiving 25 or 30% of its operating needs from the state government and nothing from the United States would presumably be held to engage in state action.

121. Professor Horowitz has recently analyzed this question along with many others bearing on the state action theme, and has formulated a standard which seems consistent with the one offered here. Horowitz, Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing, 52 Calif. L. Rev. 1, 16-17 (1964). For the suggestion that certain types of state and local aid should not weigh in the constitutional balance under a de minimis theory, see Comment, State Action Under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice, 50 Cornell L.Q. 473, 489 (1965). See also Note, The Scope of University Discipline, 35 Brooklyn L. Rev. 486, 491 (1969).
2. Other Fiscal and Economic Benefits. Direct grants are not, of course, the only relevant forms of assistance to private institutions. The cases we have already examined suggest two further examples. The University of Denver enjoyed under Colorado tax law a special exemption for all income, whether from educational or noneducational activities—a privilege not shared by other charitable corporations in the state.\textsuperscript{122} To the Tenth Circuit, this special bounty was troublesome, but in the absence of any other aid from the state seemed inconclusive.\textsuperscript{128} A similar dispensation in the Tulane case helped Judge Wright to reach the opposite result: Partly by reason of its public origins, the University retained a unique exemption on commercially leased property which had an annual value of about $200,000\textsuperscript{124} Such special, individualized benefits as these should of course be distinguished from the general tax exemptions which universities typically share with a host of other nonprofit institutions. The latter are not necessarily irrelevant, but they do not prove very much by themselves. The former are quite revealing indeed, and under some circumstances might be decisive.

There is another form of economic benefit that bears careful scrutiny—the use of private universities of “surplus” government land or buildings. It is one thing when a private university bids for the land, and pays the going market price; it was just such circumstances that legitimized Fordham’s acquisition of land in the Lincoln Square project despite the university’s clearly sectarian character.\textsuperscript{126} It is quite another matter when, as at the birth of the University of Tampa, the state or city donates surplus land or buildings to a private institution, or leases them at advantageous rental rates without inviting competitive bids. Special favors of this sort may well be dispositive, as they were to the Fifth Circuit in the Tampa case.\textsuperscript{126}

A final benefit which fits under this rubric is the power of eminent domain that private universities sometimes enjoy. The practice varies widely; some states reserve the power of condemnation for the government itself, and its branches; other states allow not only non-profit corporations but even private utilities to take land by eminent domain.\textsuperscript{127} Occasionally, as in California, the courts have sustained academic use of the power to condemn only on the questionable assumption that the university held open its doors to all applicants

\textsuperscript{122.} Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969).

\textsuperscript{123.} It is not clear to what extent the court was dissuaded from finding the exemption an indicium of state action by its resort to the same requirement that characterized the Columbia and Alfred cases: “[T]here is no suggestion that the claimed involvement is in any way associated with the challenge activity. . . . The benefits conferred, however characterized, have no bearing on the challenged actions beyond the perpetuation of the institution itself.” Id.


\textsuperscript{126.} Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965).

\textsuperscript{127.} See generally Comment, 4 So. Cal. L. Rev. 137 (1930).
without discrimination. This reasoning suggests an approach to the constitutional issue: In states where the power of eminent domain is deemed an essential attribute of government, the bestowal of that power upon private universities should without more justify federal court review of disciplinary proceedings.

3. Exercise of Delegated Governmental Powers. The discussion of eminent domain introduces the next special factor. Apart from the power of condemnation, universities enjoy various other specific governmental powers, either by express delegation or by acquiescence. This is particularly the case among the professional schools. Wisconsin statutes still provide, for example, the graduates of all accredited law schools within the state are automatically members of the bar, while attorneys coming from other states must take an examination. Accordingly, the Marquette University Law School faculty stands essentially in the shoes of bar examiners in most states (and state university law schools in the several other states where this arrangement persists). Can there be any doubt about the application of the fourteenth amendment to expulsion of a Marquette law student?

The rash of repressive laws enacted in response to recent campus disorders raises subtler problems of a different sort. Most notable is the clause in the Higher Education Amendments of 1968 which requires universities to terminate federal aid payments to students convicted of serious campus disruption. The proviso applies to all funds received and disbursed under the National Defense Education Act, federal work study, federal loan insurance and federal fellowship programs. The law clearly requires the university to serve as the government's agent: Termination is not decreed unless the institution at which the student is enrolled conducts a hearing to determine that the crime "was of a serious nature and contributed to a substantial disruption of the administration" of the university. Although the power thus delegated has been used quite sparingly, and some observers feel the whole procedure may be unenforceable where institutions decline to cooperate, there is little doubt that Congress has attempted a delegation of an important governmental role to public and private institutions alike.

129. Wis. STAT. ANN. ch. 256.28(1) (1957).
130. Delegation of governmental power or authority has been the basis for a finding of state action in several contexts. There are the two earlier cases involving bus lines exercising certain powers (e.g., with regard to seating arrangements) under an explicit delegation, Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Flemming v. South Carolina Elec. & Gas Co., 224 F.2d 752 (4th Cir. 1955). More recently the same principle has been applied to statewide professional associations that have power to nominate one or more public officials representing the constituent group, Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966); Bell v. Georgia Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964). Finally, there have been the cases involving athletic associations—private in name at least, but composed in fact chiefly of public school officials and exercising through those officials essentially governmental powers over the high school athletic program, Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).
The same result follows a bit less surely under a 1969 law enacted by the New York Legislature in response to campus malaise. This provision required the trustees of every college and university in the State chartered by the Regents to adopt "regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof."\(^{131}\) The rules were to be filed with the Regents 90 days thereafter; any institution which failed to meet the deadline would be ineligible for any state aid until it complied. Under the most basic precepts of constitutional law, there can be little doubt that New York's private colleges and universities henceforth engage in "state action" when they promulgate and enforce student conduct regulations.\(^{132}\)

The situation in Indiana is far less clear. Also in the spring of 1969, the legislature adopted a new trespass law specifically covering the property of any educational institution in the state, public or private. Most provisions of the law simply served to make clear the applicability of a criminal sanction that was previously in doubt. But the last section stipulated that nothing therein should affect the right of any educational institution to "discharge any employee, or expel, suspend, or otherwise punish any student, in accordance with its procedures for any conduct which may be a violation of any such rule or regulation of any such institution or rendered unlawful by this act or may otherwise be deemed a crime or misdemeanor."\(^{133}\) The last clause may give the case away. There is ample precedent for the view that Indiana has now made Notre Dame's enforcement of student conduct rules reviewable in the federal courts for this reason if for no other. When a state has merely "encouraged" or "authorized" private action that may infringe individual liberties, the fourteenth amendment arguably applies.\(^{134}\) This much Indiana quite clearly if unwittingly seems to have done here.

4. Special Governmental Regulation and Supervision. Much has already been said about the relevance of the kind of regulation that exists in New York. The Regents' powers to review and approve new degree programs and restrict the granting of degrees, determine faculty standards, and supervise other aspects of private higher education, would seem to blur the private-public line almost beyond recognition.

New York is unique in the degree of supervision its Regents exercise, but the difference from other Eastern states is only one of degree. Professor Martin Levine has surveyed the field: "In some cases they are chartered by a special act of the legislature, which includes a specific delegation of legislative power. 'Private' colleges may be subject to state supervision through authority reserved in their state charters. Several states have agencies to supervise the administra-
tion of 'private' colleges. Formal state supervision of some private colleges is at times so extensive that the state legislature has reserved the power to revise student regulations..."\textsuperscript{135}

There is one other particular indicium of state control: the presence of public officials on the university's governing board. The Governor of Louisiana, the State Superintendent of Education and the Mayor of New Orleans are still ex officio members of the Tulane governing board.\textsuperscript{136} Yale still must include the Governor and Lieutenant Governor of Connecticut as Fellows under the original charter. There may be other examples—resulting as much from an invitation by the university to the public official, as from the demands of government for perpetual representation on the private board.

5. Significant Degree of Interdependence Between Public and Private Sectors. Special note should be taken of affiliative arrangements such as those between the New York contract colleges and Alfred, Cornell and Syracuse. Each of the contract college hosts does, of course receive substantial state funds in recognition of its hospitality—the per capita payments for liberal arts courses taken by contract college students, and the pro rata share of general administrative costs. But there is much more to the arrangement than this, especially in Alfred's case. As we have already seen, the public and private partners both benefit from a growing interdependence that is educationally as well as financially rewarding for each. The state gets an attractive location and a good liberal arts college for its ceramics students, with recreational, athletic, social and other facilities which are lacking, for example, at the isolated Fashion Institute of Technology the state operates in Manhattan. Alfred gains a degree of prestige, a highly specialized professional group within its faculty, and an unusual attractiveness both for students wanting to major in ceramics and students seeking a liberal arts degree but wishing a few ceramics courses on the side. The benefits for both public and private sector are obvious and substantial. While the relationship may not be quite as close or as mutually beneficial at Syracuse (where the Forestry School is a much smaller component of the institution), or at Cornell (where there is wide diversity among the four contract colleges), the basic arrangement seems to justify the same conclusion.\textsuperscript{137}

There are other models of interdependence and sharing that appear to have constitutional significance. The five institutions in the Connecticut River Valley of Massachusetts—Smith, Mount Holyoke, Hampshire, Amherst and the Uni-
Private universities and public law

versity of Massachusetts—have evolved a cooperative arrangement far closer than typically exists among institutions that are merely good neighbors. At the graduate level, a similar consortium exists in the District of Columbia. In these and other instances, the time may well come, if it has not already, when the public and private members are educationally so interdependent that the same constitutional standards must apply equally to all.

6. Control or Sponsorship of Unique Educational Programs. Where a particular course of study or specialized degree can be pursued only at a private university, the argument for a finding of state action becomes even stronger. Typically, of course, there is a choice between public and private institutions, but that is not always the case. The college graduate who plans a career in certain branches of the foreign service may be effectively forced to a choice between the Fletcher School and Georgetown Foreign Service. One who wishes advanced work in hotel management is inevitably drawn to Cornell, where the Hotel School is on the “private side.” A student in Massachusetts who wants to study law without leaving the state has a wide choice of schools—Harvard, Boston University Boston College, Suffolk, Northeastern, and Portia—but they are all private. Clearly no state is constitutionally compelled to furnish specialized graduate education in any of these fields at public expense. But when the public sector does not afford the choice of an institution at which constitutional safeguards do apply, relevant decisions suggest that private beneficiaries of such a monopoly are themselves subject to the fourteenth amendment.138

7. Higher Education and the “Company Town.” Some private universities clearly exercise much wider effective control over the lives of their students than do others. The Columbia student is hardly dependent upon the University for his entertainment, recreation, cultural or social life. But it is otherwise at Stanford, Cornell or Brigham Young and a glance at the map of Hanover, Northampton, Pomona, Wheaton or Yellow Springs indicates that such dependency is not merely a function of institutional size, but rather of remoteness from major urban centers. Campuses which are isolated in this way do exercise a quasi-governmental power over the lives and activities of all members of the academic community.

In a few instances the case is even stronger. Stanford is the classic example. It is not merely a comprehensive and diverse university, with a full program of facilities and activities for its members; it is, quite literally, a governmental unit. Even more clearly than the company town in Marsh v. Alabama,139 Stanford exercises municipal powers. In addition to a campus security force (which most large colleges and universities possess today), the town of Stanford, California, has its own fire department, power plant and, for what it may be worth,

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Zip Code. Many members of the Stanford faculty lease housing from the University and thus live under the governance of the body that also employs them. What more could be needed to make Stanford as much a town as Chickasaw, Alabama?

If the first part of the foregoing discussion suggests that most private colleges and universities are public to some degree, the latter part clearly indicates that some are much more governmentally involved and affected than others. This institutional continuum ought to be relevant to the decision of constitutional questions about the status of private universities. The concluding section of this article will propose a framework for constitutional analysis, within which all the considerations we have discussed can play an appropriate role.

IV. A MATRIX FOR CONSTITUTIONAL ANALYSIS

When a suspended or expelled student brings suit against a private institution of higher learning, two elements—the nature of the institution and the relief sought—are highly relevant. Their interaction provides a framework within which the constitutional questions may be resolved.

We may begin with the nature of the institution, for it is to this matter that we have devoted most of our attention so far. The extremes of the spectrum are easy to define: Howard, Pitt, Temple and a growing number of other private institutions are so clearly public in substance if not in form that courts should have no hesitation treating them precisely the same as state colleges and universities.

At the opposite pole there are the small religious seminaries. Such institutions should be exempt from all federal judicial review for several reasons: First, because they do not in fact exercise a public function in the manner of most higher education; while the training of chaplains, ministers, rabbis and priests surely serves the public in important ways, it is a kind of education that the state cannot constitutionally provide and which must therefore be carried on in the private sector. Second, the constitution virtually guarantees that such institutions will receive no public funds for direct support; often they are even precluded from receiving indirect aids in the form of student scholarships and fellowships. Third, an inquiry into the rules and regulations of such institutions would necessarily inject the courts into religious controversies of a sort they have wisely declined in analogous instances to enter.140

Between the University of Pittsburgh and Pittsburgh Theological Seminary lie most of the private colleges and universities of the nation. They range from large to small, from those heavily dependent on public funds to those that receive almost nothing from government; from those with varied and complex curricula to those that offer a single degree or no degree at all. It stands to reason that some are more governmentally involved than others, and exercise

140. See Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440 (1969); 73 Harv. L. Rev. 1386 (1960).
greater power over their own constituencies and over society at large—though all are engaged alike in the single public function of providing higher education to American students.

The extent to which a federal court may inquire into the acts and decisions of a private institution of higher learning should depend upon the particular degree of its governmental involvement and/or interdependence.141 This is one dimension of the grid, upon which all institutions can be arranged according to the various specific factors we have examined here. The other dimensions consists of the relief sought, or the institutional decision under challenge. It does not take much to hold a college sufficiently "public" that it may not constitutionally refuse to admit an otherwise qualified black student solely because of race. It is not much harder to find unconstitutional a private university's rejection of an invited speaker because of his unorthodox political views.142 (Where the university does in fact dominate the community and is the major source of entertainment, culture and recreation, this result seems to follow quite directly from Marsh v. Alabama.143 It is a little less obvious in the case of the urban university or small private college where forums for unpopular speakers exist within easy reach of the faculty and student body).

After these two questions of access, one is tempted to suggest that employment policies should also be subject to federal review. Perhaps employment is simply another avenue of access, but the answer is less obvious. When a university employs janitors, or kitchen workers, or even faculty secretaries, it is not exercising the power or the function that makes it a uniquely public institution. When it hires or fires faculty, certain kinds of research personnel and possibly library staff, however, the public character of the institution is directly implicated. Thus academic employment policies should rank rather high on the list of matters open to judicial review; non-academic employment, by contrast, should be regarded in a college or university essentially as it would be treated in a large business firm, private hospital or foundation.144

We come at length to the hardest questions, those involved in student discipline proceedings. The issue might profitably be analyzed by using as a vehicle the case of the Catholic students expelled from St. John's University on the eve of graduation because they had served as witnesses for friends at a civil

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141. The Supreme Court cautioned in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961): "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."


The New York courts divided sharply on the judicial power to reach both procedural and substantive aspects of the reinstatement case. Two judges in the Appellate Division, and two more in the Court of Appeals, insisted that since "the University is a public institution" it could not "enforce against a student an ecclesiastical law, the breach of which is not immoral according to the standards of society in general. . . ." But the majority in both courts declined to intervene, feeling the institution a completely private one and the substantive question particularly delicate for judicial scrutiny.

In retrospect, it seems the St. John's controversy might have been resolved in any of five ways: (1) by dismissing the complaint without considering its allegations, on the ground that courts cannot review the acts of a private university; (2) by dismissing on the ground that the dispute was essentially an ecclesiastical one—the censure of Catholic students for violating a church precept—in which courts should not participate even if they had the power to do so; (3) by examining only the fairness of the procedures leading to the dismissal; (4) by examining both the fairness of the procedures and the equality of enforcement of the rule in question, without considering its reasonableness; and (5) by reviewing all aspects of the case, both substance and procedure.

This list of alternatives suggests that the courts might have gone a good deal further than they did without entering the extremely sensitive domain of a sectarian institution's control over the religious aspects of its students' lives. For instance, the procedures leading to the dismissal were clearly deficient; had the court remanded the case to the campus for a full and fair hearing, the university officials might either have (a) dropped the case entirely, or (b) submitted the issue to a faculty or student-faculty panel which would have vindicated the students. The court might also have decided the case in the students' favor on the ground that enforcement of such a rule only against Catholics was discrimination in violation of the equal protection clause. Neither approach would have necessitated an inquiry into the reasonableness or fairness of the rule itself, an inquiry the New York courts seemed reluctant to undertake.

This analysis of the St. John's case—harder than which they do not come—suggests guidelines for judicial entry into private campus disciplinary proceedings. First, as in all such cases, the courts should be concerned only with fairly serious sanctions. A reprimand or warning, at least in the absence of a prejudicial notation on the student's record, should not be sufficient to warrant review at all. Judicial intervention should be reserved for cases of dismissal, expulsion, or long-term suspension—where the injury to the student is quite clear.

Second, the court should begin by looking at the fairness of the procedures leading to the penalty. Several considerations suggest this priority: It is often

possible to resolve a case quite satisfactorily by going no further than to send the case back to the campus for the hearing that was never held, or at least for a fairer hearing than typically results when a student is hailed into the Dean’s office and dismissed after an informal conference behind closed doors. Moreover, the judicial standards for judging university procedures are far better developed than those dealing with substantive regulations; when entering a new domain, it seems appropriate for courts to approach by familiar paths. Finally, a careful examination of procedures reduces the likelihood that the court will have to invade the academic inner sanctum or put professors and administrators on the stand. This is often an issue that can be resolved on the pleadings, or by reference to supporting affidavits.

Finally, and inevitably, courts will come to questions of rules and regulations. As the St. John’s case suggests, it may be possible to avoid questions of reasonableness—difficult enough to state university cases—by concentrating upon equality. However reasonable the rule may be, its application should be suspect if it operates unequally upon a particular segment of the student body—illustratively, rules forbidding certain kinds of expression in the political context that are freely allowed on the football field, in dormitory windows, and on fraternity row. Inequities of this sort may result merely from uneven enforcement of rules, or they may inhere in the wording of the rules themselves; they are equally offensive in either case.

The ultimate issue, of course, is the role of the federal court where a rule is alleged to infringe freedom of expression or political activity. When such issues arise on state-supported campuses, courts have increasingly applied the standards that protect first amendment rights in public parks and the like—with the corollary that university libraries and hospitals deserve as much peace and quiet as similar facilities in the community, but no more. Yet even here courts have acknowledged certain special regulatory interests that may warrant different standards within the academic community. Clearly, for example, plagiarism can be punished even though it falls far short of what the general law proscribes as copyright infringement. A university may prohibit the reading in translation of assigned foreign language books, though surely the state and the city cannot deny their citizens access to the classics in English. During examination time, the university can forbid a level of noise in the dormitories that a private landlord or public housing authority would have to tolerate. In each instance, the rights of the students—even where they are fully entitled to constitutional protection—must yield to important regulatory interests unique to an academic community.

If such considerations limit the scope of judicial review of state college and university discipline, their applicability to private campus cases seems a fortiori. Surely the private university shares with its public neighbor the basic set of

147. This point is developed somewhat more fully in O’Neil, Reflections on the Academic Senate Resolution, 54 CALIF. L. REV. 88, 195 (1966).
regulatory interests deriving from its academic mission. In addition, private colleges and universities may have special needs and interests not found in the public sector. Rules and regulations reflecting these interests may be entitled to a deference that will affect the scope of federal judicial review and the governing constitutional principles.

Several illustrations will suggest the scope of this proposition. A state university cannot constitutionally forbid or punish expression that is otherwise protected simply because they fear it will anger legislators, alumni, trustees or the public. There is no special university interest in self-preservation even where university officials think that is at stake.\footnote{148} But is not the private university so vastly more dependent upon the good will of a small number of wealthy friends and benefactors that a different standard might apply? So long as the interest did not become an excuse for suppressing expression that is merely unpopular or offensive to the authorities, could not the private institution penalize a narrow class of acts directed against the trustees and principal benefactors?

Another possible distinction: A state-supported college cannot deny recognition to any lawful student political group that meets the formal requisites for acceptance.\footnote{149} Thus Queens or Brooklyn or City College must permit a campus Ku Klux Klan or Nazi Youth group, however offensive may be its tenets to the vast majority of students. But is it equally clear that Brandeis or Yeshiva must charter such an organization? Private colleges often seek a degree of homogeneity in the student body that public institutions cannot achieve, even if they were legally permitted to try. This important difference suggests that the private sector may have special needs warranting different rules, so long as the differences are not too great, and the Atheists are not turned away along with the Nazis.

A third consideration reflects the innovative potential of private higher education. Reed, Bard and Swarthmore are still undeniably different, however impressive the achievements of Old Westbury, Oakland and Santa Cruz. If the diversity that characterizes our dual system of higher education is to flourish, it may well be that private institutions should be given somewhat greater latitude to develop creative or experimental programs than the constitution permits in the public sector. Antioch’s black dormitory and black studies program suggest a possible example. Dr. Kenneth Clark has argued that Antioch’s tolerance of racial separatism is unwise—so unwise that he quit the Board of Trustees in protest. But unwisdom does not always denote unconstitutionality. Federal officials responsible for policing Title VI of the 1964 Civil Rights Act have come eventually to this view in the Antioch case, and have uneasily allowed the black studies program to go forward on an effectively segregated basis.\footnote{150}


\footnote{149} There do not yet appear to be any court cases on the issue of recognition or nonrecognition of student political and other organizations.

Rights Office of HEW has also permitted Northwestern to operate what amounts to an all-black dormitory wing.\textsuperscript{161}

Such practices as these would be very vulnerable in the public sector, at least as the fourteenth amendment is currently understood. But who is to say the courts may not someday decide that complete freedom of choice for blacks and other minority groups is closer to the purpose of the equal protection clause than is the neutrality on which we now insist? The outcome of that debate, into which we are just now moving, may depend very much on practical experience with just such voluntarily segregated programs as Antioch and Northwestern are now running. Since it is clear that the public sector cannot undertake such experiments, the laboratory must be the private campus. A too rigid application of the state action concept to private colleges and universities would preclude such innovation, even for benign purposes. Perhaps the solution is to have the federal courts ready and willing to review the case of an Antioch student expelled because he supports, or opposes, the black studies program; but not quite prepared to hold that Antioch cannot try the program at all simply because Kent State may not.
