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DOES THE CONSTITUTION CARE ABOUT COERCIVE FEDERAL FUNDING?*

*Kingman Brewster***

I CHOSE AS my topic the Constitution's concern, or lack of concern, about the coercive use of federal funding. It might have read, in the vernacular of law review jargon, "The American Bar Foundation Revisited." In 1975 I gave a talk to the American Bar Foundation entitled "The Constitution is Dead, Long Live the Constitution!"¹ It was a somewhat abrasive expression of concern about the "covert regulation" imposed on universities by attachment of conditions to federal grants, contracts, loans, and guarantees.

Those times still were under the shadow of the "enemies" paranoia of the Nixon Administration. It was not fanciful to imagine the withdrawal of federal support for vindictive political ends—the threatened cutoff of funds to nonconformist opponents of Administration policy. Indeed, it was reported that some vindictive White House zealots had sought to persuade the science-funding agencies to cut off the Massachusetts Institute of Technology because its President, Jerome K. Wiesner, opposed the antiballistic missile program. Just as Treasury Secretary George Shultz stonewalled efforts to use tax returns to harass "enemies," so too the science-funding bureaucracy refused to carry out the

* The text of this Article, with minor changes, was delivered as the Sumner Canary Lecture, Case Western Reserve University School of Law, Cleveland, Ohio, October 6, 1983.

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1. Delivered to the American Bar Foundation, Chicago, February 22, 1975 (printed in ANNUAL REPORT OF THE PRESIDENT OF YALE 1974-75, at 17-24).

White House suggestion. This seemingly incredible request became all too plausible in the wake of the Watergate hearings.

Indeed, President Nixon's reelection committee, better known as CREEP (The Committee to Reelect the President), recognized that the private as well as the so-called independent sector depended greatly on government largesse. The committee capitalized on this relationship by engaging in what I would call the "shakedown" approach to fundraising.

Well short of such nightmares and caricatures, however, was, and is, my conviction that there ought to be much more concern, political as well as legal, about permitting the withdrawal of eligibility for federal assistance to be used as a regulatory device. Obviously those dependent upon government generosity are reluctant to bite the hand they hope will feed them. It is not easy to persuade even the stoutest of hearts in the strongest of universities to challenge policies from which they benefit. The "independent sector" is not all that independent.

I. AN OVERVIEW OF THE FUND CUTOFF SANCTION

The fund cutoff sanction is perhaps best illustrated in the area of "affirmative action." These programs, requiring not only non-discrimination but affirmative measures to remedy the heritage of racial and gender disadvantage,² were the most burdensome and obtrusive policies utilizing the sanction. They carried with them a particularly strong inhibition to constitutional objection, for men and women of good will did not want to be seen thwarting policies whose goals they ardently believed in. At the same time, the administrative burdens which affirmative action imposes, and the inherent contradictions in a policy which advocates "special efforts" but no "preferences" based on race or sex, is, to say the least, awkward for both regulators and their victims. The programs entailed interminable negotiations with a series of federal officials, usually at the regional level, who were entirely unable to deal adequately with the hundreds of institutions within their area. When responsibility for administration of the policy shifted from the Department of Health, Education, and Welfare to the Labor Department, a whole new problem arose. People who had previ-

2. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1976 & Supp. V 1981)); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 Compilation), reprinted in 42 U.S.C. § 2000-e (1976).

ously worked in commercial or industrial contexts had to be introduced to the unique folkways of academe.

Faculties and even boards of trustees were widely and deeply split, depending on their attitude toward federal intrusion on the one hand and the strength of their feeling about doing something to correct gender and racial discrimination on the other. Then, of course, there were the followers of Sidney Hook,³ who were outraged by the tendency toward "reverse discrimination" which they felt was implicit in the whole concept of "affirmative action." Quite apart from this swirling riptide of conflicting values and emotions, there was no doubt in my mind that policies designed to further basic constitutional values did not offer the best launching pad for a challenge to the constitutional validity of what I would call "covert regulation" through the threat of withdrawal of federal funds.

At last an optimal context for a constitutional challenge was offered. Congressman Rogers of Florida had been pressured by constituents whose sons and daughters had failed to gain admission to American medical schools. In order to pursue their quest for a medical doctorate, these sons and daughters enrolled abroad, heavily concentrated in Bologna, Italy and Guadalajara, Mexico. Congressman Rogers introduced a proviso to the Health Manpower legislation, which required medical schools wishing to hold on to their federal capitation grants (that is, grants for general purposes measured by the number of students enrolled) to agree to take whatever number of American students wishing to transfer from foreign medical schools as might be designated by the Secretary of Health, Education, and Welfare.⁴

This requirement, unlike the affirmative action programs, was not in pursuit of a public purpose, let alone a constitutional purpose. It was legislation designed to favor a particular private group. It seemed to provide the ideal opportunity for persuading the federal courts to focus on the constitutional issues. It gave them a chance to constrain the free-wheeling way in which the threatened forfeiture of federal money was frequently used to coerce compliance with objectives unrelated to the purpose for which the grant was given.

3. See S. HOOK, *PHILOSOPHY AND PUBLIC POLICY* 138-50 (1980).

4. Health Professions Educational Assistance Act of 1976, § 502, Pub. L. No. 94-484, 90 Stat. 2293 (1976) (codified as amended at 42 U.S.C. § 295f-1(b)(3) (Supp. V 1981)) (adding § 771(b)(3) to Public Health Service Act). The capitation grants are authorized by 42 U.S.C. § 295f (1976 & Supp. V 1981).

Stanford, the Hopkins, and Harvard joined Yale in a collective attack on the constitutionality of the Rogers amendment. Of course we all wanted to find some procedural way to challenge this matter without forfeiting the funds. Our joint choice of counsel was Phillip A. Lacovara. He thought there might be some way of pursuing a declaratory judgment without having to forfeit the capitation grant. However, that procedural ingenuity was never tested. The offending amendment was withdrawn before the case was filed. The federal courts never had a chance to face the question of the constitutional limits, if any, on the use of federal fund cutoffs to achieve an unrelated purpose to aid a private group.

By that time I had left Yale for happy ambassadorial exposure to the contrasts between a system of parliamentary supremacy and our system of written constitutional constraints on both executive and legislative power, made effective by the right of judicial review.

Before my first year in London had come to an end, my attention was drawn to the British Government's attempted use of the fund cutoff sanction to secure compliance with its wishes. Prime Minister Callaghan and Chancellor of the Exchequer Dennis Healy attempted to coerce recalcitrant companies into compliance with executive wage norms which had been determined by the Cabinet but which had not been the subject of parliamentary enactment or even debate in the House.

As a very green ambassador and a thoroughly obsolete law professor, I was so bold as to instruct the Society of Public Teachers of Law in Great Britain that such executive free-wheeling without legislative authorization was unthinkably unthinkable under the United States Constitution.⁵ I repeated the same comment on constitutional contrast at the closing dinner address of the American Law Institute in Washington in 1978.⁶

Imagine my surprise when shortly thereafter I opened the morning paper to read that *my* President had issued an executive order withdrawing eligibility for government contracts from any firm refusing to comply with Professor Kahn's wage and price "norms."⁷ I still thought it was unconstitutional. So did the Dis-

5. Brewster, *The Rule of Law and The Voluntary Society*, 14 J. SOC'Y PUB. TCHRS. OF L. 286 (1979).

6. Brewster, *Address to the American Law Institute, Friday Evening Session, May 19, 1978*, 55 A.L.I. PROC. 505, 511 (1978).

7. Exec. Order No. 12,092, 3 C.F.R. 249 (1978), *revoked by* Exec. Order No. 12,288, 3 C.F.R. 125 (1981), *reprinted in* 12 U.S.C. § 1904 (1982).

strict Court for the District of Columbia, in the person of Judge Barrington D. Parker, when the AFL-CIO brought an action against Professor Kahn⁸ seeking declaratory and injunctive relief. The court ruled that in issuing the Executive Order, President Carter had acted "without statutory authority" and exceeded permissible constitutional limits.⁹

The Court of Appeals for the District of Columbia reversed.¹⁰ President Carter's Order was upheld on the ground that it was based on a broad presidential power to regulate all government procurement policies, authorized by the Procurement Act of 1949¹¹—a statute arising from the Concluding Report of Hoover's Commission on Organization of the Executive Branch of Government.¹²

Speaking through Judge Skelley Wright, a majority of five found that the President's authority to promote effective and efficient procurement policies and procedures justified the imposition of wage and price norms as a condition of eligibility for a government contract in excess of a stated figure. Needless to say, this extraordinary stretch of the statute has excited considerable criticism, not only from two dissenting judges but from commentators as well.¹³ But that question need not detain us here. For purposes of my argument, it is enough to note that everyone, including the government attorney, agreed that if there were no adequate statutory basis for the order it would fail on constitutional grounds.¹⁴

The threshold question for anyone who feels unjustly dealt with when funds are withdrawn for noncompliance with some condition is how to overcome the court's reluctance to entertain the action at all. First, there is the notion that no one has a

8. *AFL-CIO v. Kahn*, 472 F. Supp. 88 (D.D.C.), *rev'd*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979). Professor Kahn was President Carter's Chief Administrator of the Council on Wage Price Stability at the time.

9. *Id.* at 90.

10. *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979).

11. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of 40, 44 U.S.C. (1976 & Supp. V 1981)).

12. *Kahn*, 618 F.2d at 787 n.15.

13. *See, e.g.*, Note, *Judicial Review of Executive Action in Domestic Actions*, 80 COLUM. L. REV. 1535, 1550-51 (1980); Comment, *Using Federal Procurement to Fight Inflation: AFL-CIO v. Kahn*, 93 HARV. L. REV. 793 (1980).

14. *See Kahn*, 618 F.2d at 787. As support for this proposition, the court cited the failure of President Truman's steel seizure action to pass constitutional muster. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

“right” to do business with the government. Or, in the words of *Perkins v. Lukens Steel*, “the Government enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms and conditions”¹⁵

So the complainant may lack standing to sue. Even if he keeps his foot in the judicial door, he will face, as in *Lukens Steel*, judicial deference to a broad official discretion.¹⁶ However, these barriers to standing seem, in the words of Judge Wright, to have “withered.”¹⁷

II. A CONSTITUTIONAL MANDATE?

Assuming that there is a valid statutory basis for the imposed condition, does that end the constitutional matter? What constitutional inhibitions might constrain even an explicit legislative mandate to withhold or withdraw funds if various requirements are not met?

The first plausible question is whether the condition must be rationally related to the purpose for which the contract, grant, loan, or guaranty is made. It is the familiar test of pertinence and reasonableness. Or, as it sometimes seems, is it enough to say that the government is paying for the work it assists so it can attach any conditions it wants, whether or not they seem rationally related to the underlying contract or grant? This does seem to be the rationale of the *Lukens* case. There, Congress imposed the requirement that any contractor with the federal government had to pay wages no lower than the average minimum wage paid to workers in his area. It was an effort to set minimum wages for government contractors as a supplement to the Fair Labor Standards Act, which set minimum wages in interstate commerce generally.

The petitioner did not seem to argue that the condition was unconstitutional because it had no reasonable relevance to the underlying contract, but instead argued, in the spirit of those primitive anti-New Deal days, that all citizens had a sort of free market right to deal with their government without obstruction. It was this line of argument which apparently provoked the ringing rhetoric about the government’s right to choose with whom it will

15. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

16. *Id.* at 125.

17. *Kahn*, 618 F.2d at 794 n.55. Judge Wright noted that despite the breakdown of standing barriers, the government’s power to contract as enunciated by the *Perkins* Court remained viable. *Id.*

deal, and on what conditions. In addition, any charge of unfairness was tempered by the elaborate hearings which the Secretary of Labor was required to hold in her determination of what was an average minimum wage in the area.

The petitioners had no basis on which to complain that they had been deprived of procedural due process. For the same reason, they could not claim excessive delegation of legislative power, since both the standards and the procedures for their exercise were set forth with some particularity. Nevertheless, the statute did, and was intended to, expand the scope of federal minimum wage regulation by reaching those contracting with the government who might not be reached by the basic minimum wage law. Given the doubts about the scope of the commerce clause in those days, from a political point of view this was a sensible supplement to the federal reach. Also, of course, there was a plausible line of argument that the federal interest in the quality of the work performed provided a rational basis for setting minimum wages to those performing it. This somewhat casuistic argument never surfaced, however, since the claim that "the government can set any conditions it wants" sufficed.

III. INDIRECT LEGISLATION

This brings us to the second line of plausible constitutional inquiry: Can Congress regulate by indirection what it could not regulate by direction? By this I mean can it impose requirements on federal contractors, grantees, and borrowers which it could not impose by direct regulation?

I have already suggested that activity can be reached under *Lukens* which could not be reached by the direct regulation of interstate commerce. Given the attenuation of the commerce clause for regulatory purposes, this is no longer a wide margin of expansion afforded by the federal dollar. But what about the substance of regulation? A fine example is found in Senator Buckley's imposition of a requirement of disclosure of records to students where the educational institution, primary, secondary, or higher, is receiving federal funds.¹⁸

At first blush I would doubt whether warrant could be found

18. Family Educational Privacy Act of 1974, § 513, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended at 20 U.S.C. § 1232g (1976 & Supp. V 1981)); see Comment, *The Federal Constitutional Spending Power: A Search for Limits*, 70 Nw. U.L. REV. 293, 310-17 (1975).

in the Constitution for legislation directly regulating access to student records in local schools, colleges, and universities. Yet it was possible for Senator Buckley to attach such a condition to federal aid to education by amendment introduced on the floor without any prior hearings. It sailed through both houses substantially without debate. It later caused considerable consternation when it was found to dry up sources of credible, candid letters of recommendation to college, graduate, and professional school admissions officers. By interpretation, the access to records which Buckley provided was assumed by some institutions to be subject to waiver if the student desired. Amendment to that effect was later passed on Senator Buckley's initiative.

Or take another example. Happily, it never reached legislative maturity, but Senator Edward Kennedy once proposed that the best way to achieve a better distribution of medical doctors, particularly to serve the urban and rural poor, was to threaten to withdraw or withhold the so-called capitation grant to medical schools.¹⁹ They would lose their grants if they did not designate a stated proportion of each graduating class to serve in areas where doctors were in short supply as determined by the Secretary of Health, Education, and Welfare. It would have been a blatant attempt to make the schools draft some proportion of their students for involuntary service, presumably by lot, if persuasion failed. Were it not for the cash nexus of the capitation grant, one might wonder whether the Constitution would support such a requirement if imposed by direct mandatory regulation. Happily this did not come to pass. But you can imagine the chill that it sent up the spines of college presidents and medical deans.

For the purposes of my argument, the Kennedy proposal and the Buckley amendment serve to highlight the question of whether the scope of constitutionally permissible federal regulation is different when the sanction is the withdrawal of federal funds rather than the imposition of fines or administrative penalties.

IV. LIMITS OF DELEGATION

A third constitutional constraint which is obviously and traditionally relevant to the constitutionality of direct regulation is the limitation on the permissible scope of discretion which Congress

19. The proposal is found in Senator Kennedy's speech of December 2, 1974, delivered at the Yale Medical Center. See 48 *YALE J. BIOL. & MEDICINE* 1 (1975) (report of speech).

can delegate to the Executive. The basic milestones are familiar to all students of constitutional law. Limits on legislative delegation played an important part in the judicial veto of the National Industrial Recovery Act.²⁰ There, however, was broad delegation to private code-making authorities, with little official supervision and no right of appeal.²¹ When comparable economy-wide regulation was challenged in the *Yakus* case against the Office of Price Administration in World War II, the statutory arrangement was upheld.²² A somewhat wishful Court found sufficient guidelines and standards in the admittedly vague legislative charges. Perhaps more importantly, the statute sought to protect the law's victims against abuse of discretion by providing channels of appeal, culminating in the special Court of Price Appeals drawn from a panel of federal circuit court judges. Still, many commentators read *Yakus* to ring the death knell on the doctrine of limits on legislative delegation.²³ The requirement of legislative specificity, however, took on new life in *National Cable Television Association v. United States*, where, in order to avoid constitutional doubts about the breadth of legislative delegation, the Court construed the statute more narrowly.²⁴

The recent judicial rejection of the legislative veto on constitutional grounds²⁵ would seem to indicate that the Court is still sensitive to the separation of powers as a serious element of constitutional scruple. Also, by implication, striking down the power of legislative veto imposes, as a practical matter, higher standards of initial consideration and precision in the drafting of legislation. In short, legislative buck-passing will not be as easy as it was with the legislative veto. By the same token, of course, it may inhibit congressional willingness to act at all in some areas.

But the issue here is not to determine the pulse or blood pressure of the legislative delegation doctrines in the area of direct regulation, but to determine to what extent they are alive and well

20. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The National Industrial Recovery Act, passed to encourage economic recovery, gave the President wide discretion to act in whatever manner he deemed necessary to effecuate the policies underlying the law. *Id.* at 537-38. The Court held such a delegation of legislative power to the Executive unconstitutional. *Id.* at 541-42.

21. Professor Jaffe emphasized this point in his classic article, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561 (1947).

22. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

23. See *Kahn*, 618 F.2d at 791 n.51 (citing 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 149-223 (2d ed. 1978)).

24. 415 U.S. 336, 342 (1973).

25. *Immigration & Naturaliz. Serv. v. Chadha*, 103 S. Ct. 2764 (1983).

when regulation is indirect. That is, do they apply when the regulation is sought to be accomplished by withholding the federal financial carrot rather than applying the federal punitive stick.

This question was raised by Judge MacKinnon in his thoughtful dissent in *AFL-CIO v. Kahn*.²⁶ There, even if the statute was construed to comprehend the setting of wage norms, there was absolutely no standard set, no guidelines, and no procedure for review. In short, even the minimal standards of legislative guidance and procedural protection were lacking.

Lack of legislative guidelines, in fact, was one of the most exasperating aspects of the enforcement of affirmative action as a condition of receiving educational support. The Executive Order was vague,²⁷ as was the enabling statute.²⁸ The regulatory agencies, first the Department of Health, Education, and Welfare and later the Department of Labor, spent considerable time and anguish developing guidelines in an attempt to secure compliance by more institutions than they could possibly reach with individual investigations. In a conscientious effort to avoid the imposition of quotas which the Executive Order seemed to forbid, but in an equally well-intentioned effort to require more than "business as usual," they evolved the ambiguous substitute of "goals and targets." Then, in pursuit of these fuzzy objectives, schools, colleges, and universities were asked to frame statistical goals for their faculty recruitment policies. All the while we were reassured by Washington; we, in turn, tried to reassure our faculty departments and schools that we did not expect a double standard. Although I do remember one conversation with a Labor Department representative who let slip the remark "a black woman counts twice!" Even that inherently contradictory standard or guideline was not laid down by Congress.

I do not fault the enforcement agencies. In a way, I do not fault Congress. They wanted more than nondiscrimination, but they did not want "reverse discrimination." The delicate nature of the issues provided a natural invitation to buck-passing. And, as every presiding officer knows, when you are sitting on top it is called "delegation." Down the line it is called buck-passing. There appears to be no limit to legislative delegation when compliance is sought by the imposition of conditions rather than by

26. 618 F.2d at 797-815.

27. See *supra* note 3.

28. See *id.*

direct regulation. This seems to me one of the paramount unresolved constitutional issues in the area of regulation by withholding the federal carrot.

V. INTERPRETING THE STATUTE

Finally, there is the question of canons of construction. It has long been a truism to say that laws are to be construed narrowly if a broader construction would raise constitutional doubts. This was recently reiterated by the Supreme Court in *National Cable Television Association v. United States* in order to avoid the question of the possibly unconstitutional breadth of the legislative delegation.²⁹ Does this canon apply when the regulatory power is exercised by conditioning the eligibility for federal funds rather than by overt regulatory exercise of the police power? This question, too, seems to remain unanswered.

Another canon of statutory interpretation is that a criminal law is to be construed narrowly. I have always assumed that this is for three reasons. First, it is out of respect for fairness to the law's victims. They have a right to be informed with definiteness and certainty as to what is permitted and what is forbidden. Second, it is to give a reviewing body some clear guidance in determining whether the prosecuting authority has overstepped the bounds of his mandate. Third, perhaps it is a specially useful and warranted discipline on the legislature. It tells Congress that if they mean to impose the awful sanction of the criminal law, they had better be careful, not careless; precise, not ambiguous; scrupulous, not casual.

Do either or both of these canons of construction apply when the regulatory sanction is not penal in form, but is rather the economic sanction of withholding or withdrawing federal financial support?

The district court in *AFL-CIO v. Kahn* had no doubt about the mandatory, coercive nature of the sanction imposed on those who became ineligible for government contracts because they would not abide by President Carter's wage and price "norms."³⁰ The government argued that

[o]f course, firms that do not observe the standards will be unable to bid on government contracts or first-tier subcontracts in excess of \$5 million. This may or may not be an important

29. 415 U.S. 336, 342 (1973).

30. 472 F. Supp. at 99-100.

consideration for an individual company. In any event, no company has a legal right to a government contract, and none can be heard to complain if it voluntarily takes actions which the company, on balance, believes to be advantageous, but which renders it ineligible for certain government contracts.³¹

Judge Parker replied tartly: "For the defendants to urge this position is simply to blink at reality. . . . It would be difficult to convince a business executive or anyone faced with a decision to comply or lose a substantial government contract that such a program is voluntary."³²

Judge Robb in his dissent on appeal was even more succinct when he said: "Contractors who fail to comply are threatened with the loss of contracts for the payment of millions, perhaps hundreds of millions of dollars. No amount of sophisticated or metaphysical argument can convince me that compliance under threat of massive economic sanctions is voluntary."³³

Judicial alertness to the realities rather than the form of regulation by the imposition of coercive conditions is not new. Thus, in *Frost & Frost Trucking Co.* the Supreme Court said that the state could not do indirectly what it could not do directly.³⁴ It noted:

If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. . . . In reality, the [victim] is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions

31. *Id.* at 101.

32. *Id.*

33. 618 F.2d at 816-17.

34. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.³⁵

It will not surprise you that I have a special sensitivity to the activities of thought, assembly, and expression which are themselves the subject of special constitutional protection. Academic freedom and institutional self-determination rely on all three. There is even some suggestion in the eloquent words of Justice Frankfurter in the *Sweezy* case that the freedom of universities themselves are the subject of special constitutional concern.³⁶

If, for example, Congress were to legislate that federal assistance funds were not to be available to any institution which permitted classroom criticism of the doctrines of Milton Friedman (or Maynard Keynes, for that matter), I have no doubt that this would be stricken down as an unconstitutional condition. That such a condition is unimaginably unimaginable is a fair sign of the health of the Republic. The Constitution is good politics!

However, the broader and far more practical question is whether constitutional alertness should be more sensitive when academic life and institutions are involved than when state, municipal, or private commercial activity is sought to be made to conform to federal dictates. Is there a special constitutional sanctuary for the academy? I would suggest that there is. Chief Justice Warren, speaking for the plurality of his colleagues in the *Sweezy* case, dealt more explicitly with the special value to society of staying the hand of government intrusion into the life of the academy:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding;

35. *Id.*

36. *Sweezy v. New Hampshire*, 354 U.S. 234, 262-63 (1957) (concurring opinion).

otherwise our civilization will stagnate and die.³⁷

Does the special sensitivity to the fragile life of the free academy invoke special constitutional inhibitions when government seeks to impose broad mandates as a condition of its bounty?

I would argue that such considerations tip the scales when a court is asked to interpret ambiguous statutory or administrative language. Whether a condition attaching to programs or activities supported by federal funds makes the entire institution subject to compliance has been the subject of litigation with results which seem to conflict.³⁸ The *Grove City College* case,³⁹ now pending in the Supreme Court, of course raises an even more remote federal nexus. There, the institution, which refused to sign a pledge of compliance with Title IX (gender discrimination) because it received no federal funds, was told by the Department of Education that students receiving government grants or guaranteed loans would have to forfeit their federal subvention if they attended Grove City.

The constitutional issue arises not in the form of alleged unconstitutionality of the condition, but in the guise of statutory interpretation. It is not implausible to argue that when dealing with universities and students, freedom of choice with respect to each other is a sound basis from which it is possible to assert a preference for a narrow construction of any statute which would interfere with such private choices. Far be it from me to prescribe the outcome of a case pending before the High Court! But I do say that these issues have a great deal more to do with the quality of our pluralistic society and our government's accountability to a rule of law than they are popularly perceived to have.

A recent study by the Urban Institute⁴⁰ reveals, somewhat to

37. *Id.* at 250.

38. See *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982).

39. *Grove City College v. Harns*, 687 F.2d 684 (3d Cir. 1982). On February 28, 1984, the Supreme Court decided *Grove City College v. Bell*, 52 U.S.L.W. 4283 (1984). The Court held that Title IX applies to Grove City College since some of its students receive federally-funded Basic Educational Opportunity Grants. *Id.* at 4287. As such, the Court concluded that the Department of Education may demand an Assurance of Compliance with Title IX regarding the College's administration of the federal financial assistance program. *Id.* at 4289. However, most significantly, the scope of the decision was program-specific, for the Court declined to implement Title IX coverage on an institution-wide basis. *Id.* at 4288.

40. L. SALAMON & A. ABRAMSON, *THE FEDERAL BUDGET AND THE NON-PROFIT SECTOR* (1982).

my surprise, that the so-called independent sector is far more dependent on government than it is on private sources of financing. Of course this is in large part because of the growth of government support over the postwar years of social and community as well as educational and health care programs. It is also interesting to note that some spokesmen for independent institutions have confessed a preference for government funding rather than private funding. Also, journalistic comment indicates that the ideological motivation has led to some of the selective, crippling cutbacks of support of independent institutions, especially those assisting minorities and those felt to be leftward leaning.⁴¹ So the problem of covert regulation and the coercive potential of the threatened withdrawal of funds remains very much alive in the so-called independent sector.

However, it is also my belief, not statistically documented, that the shadow of covert regulation is now cast more widely on the so-called private sector than ever before. It is hard to come by statistics, since most economic description slices the economy with a bright line differentiating between the public and the private sectors. What I am talking about, however, is the extent to which the industry or the service, although performed by the private sector, is in whole or in part dependent upon public support. In the case of procurement this is easy, and is dramatically illustrated and analyzed in countless studies beginning with Eli Ginzberg's⁴² in the sixties. However, in the case of other subsidies, especially those that are "off-budget," such as loan guaranties, measurement of the scope of dependence on government is not as simple. It is fair to say, however, that the potential for covert regulation is far more pervasive than is the incidence of direct regulation.

Now, I submit, we are well beyond the threshold of the publicly dependent private economy. The so-called independent sector is particularly vulnerable, since it cannot pass on its costs to the customers when the government imposes new requirements. Financial dependence is far more likely to describe the relation between the citizen, including the corporate and institutional citizen, and his government, than is the regulatory billy club. Yet we are a long way from making discretionary federal spending power subject to the rule of law.

Under President Wilson's New Freedom, and later under

41. See Saasta, *Tying Charity's Hands*, N.Y. Times, Aug. 2, 1983, at A19, col. 2.

42. E. GINZBERG, G. HIESTAND & B. RUEBENS, *THE PLURALISTIC ECONOMY* (1965).

President Franklin Roosevelt's New Deal, the regulatory state was born and evolved. With it doctrines of administrative law evolved to try to trim the balance between administrative necessity in the face of enlarged government responsibility for the public interest on the one hand, and claims of fairness and redress for the citizen against official abuse on the other. Administrative law was born and took its place in law school curricula. Eventually, an attempt was made to give it statutory form by the passage of the Administrative Procedure Act.⁴³ Champions hailed that Act as a new charter of freedom for the regulated. Opponents saw it as a straightjacket which would stultify effective administration. It has proved to be a little of both, but far from the euphoric expectations of its supporters or the calamitous howling of its opponents.

The Constitution may have been cabined by judicial deference to legislative will and administrative discretion. But in letter as well as in spirit, the values of constitutional government are more sorely needed now than ever before as we try to find the right balance between the needs of government and the claims of the citizen in the era of the entitlement state.

43. Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in scattered sections of 5, 7 U.S.C. (1982)).