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Evolution and Development of College Law

*Thomas E. Blackwell**

COLLEGE LAW is a comparatively new area of specialization in our system of jurisprudence. The first meeting of the National Association of College and University Attorneys was held at the University of Michigan in 1961 with thirty-two institutions represented. The 1970-71 issue of the directory of the NACUA lists four hundred twenty-nine member institutions. One of the larger state university systems is represented by fourteen attorneys.

For many years the number of court decisions involving institutions of higher education was small. The college campus was an oasis of peace in the modern world. Very few institutions retained full-time counsel. Confronted with litigation, the governing board would authorize the retention of counsel only until the court had handed down a final decision.

Times have changed! The resident counsel has become the rule rather than the exception for the larger institutions. Some of the legal problems of the colleges are similar to those of other organizations. The majority, however, can be explained and discussed only in the light of the corporate status and structure of the institution and the specialized functions and objectives of higher education.

The history of the development of higher education has received adequate and comprehensive treatment in many texts. However, a brief review of those facets of its evolution which relate to the subject of corporate structure is in order.

The Medieval University

By the fourteenth century in Europe, a university had come to be a community of teachers and scholars whose corporate existence was recognized and sanctioned by ecclesiastical or civil authority or by both. In its earliest stage of development, the university had neither campus nor buildings; it was merely a scholastic guild similar to the craft guilds of the thirteenth and fourteenth centuries in large European cities.

As the medieval universities began to grow in size and influence, a long struggle developed between the faculties of universities and the officials of the church as to which group had the authority to grant academic degrees. The degree was, in effect, a license to teach, and the power to determine who could teach was of great importance. The struggle between the faculties and the church was particularly acute

* Of Santa Monica, California; retired Vice-Chancellor of Washington Univ.; author of books on college law; Publisher of *The College Law Digest*; member of Natl. Assn. of College & University Attorneys; etc.

at the University of Paris. Pope Gregory IX issued a bull confirming the principle that university faculties were autonomous bodies and that they should be free to govern themselves.

The Governing Board

Another principle still used by modern colleges and universities, that of control by an external board, evolved somewhat later and seems to have been practiced first in Italian universities. The University of Leyden, established in 1575, adopted this plan of government and so did the University of Edinburgh, organized in 1582. Since Yale and Princeton, two colleges established in Colonial times, used Scotland as a model for their organization, they incorporated the principle of external control, setting the precedent for future organizational structure of higher education in this country.

The governing board of a nonpublic college or university in America has almost plenary authority, limited only by the provisions of its charter, the laws of the land, and public opinion. Since the legality of corporate action is dependent upon compliance with the provisions of the corporate charter and bylaws, it is essential that their contents be reviewed at suitable intervals to make certain that they facilitate rather than impede good administration. If revision is indicated, the drafting should be done by legal counsel or under his direction.

The Dartmouth College Case

In the early days there was considerable uncertainty as to the corporate status of colleges, as illustrated by the controversy over the precise character of the charter granted to Dartmouth College in 1769 by George III. In 1816, the Legislature of New Hampshire acting on the assumption that the charter granted by the British Crown had created a public institution, proceeded to reorganize the college so as to bring it under state control. The original Board of Trustees was made subservient to a Board of Overseers composed of public officials and appointees of the governor. The institution was renamed Dartmouth University.

The newly appointed board occupied the college buildings and took possession of the records of the college and its corporate seal. The college trustees brought an action in the state court to recover physical possession of the college property. The state court upheld the action of the legislature and the college trustees appealed on a writ of error to the Supreme Court of the United States. Daniel Webster, an alumnus of the college, served as their chief counsel. The opinion of Chief Justice Marshall is famous in legal history. He declared:

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the pur-

pose of perpetuating the application of the bounty of the donors . . . ; that its trustees . . . are not public officers, nor is it a civil institution, participating in the administration of government.¹

Corporate Status of American Colleges

According to the principle of law enunciated in this celebrated decision, a college or university founded by private enterprise and endowed or supported by private donations is a private eleemosynary institution, that is, a charitable corporation. Today, the converse is true: A college or university is deemed to be public in character if its primary support is derived from public funds. If it was organized and established by the legislature and if it is supported primarily by taxation, it is treated as a public corporation or as an agency of government.

The concept of an institution of higher education as an instrumentality of the state was slow in evolving in the public consciousness. The courts, during the early period of our history, tended to consider them in the same light as hospitals and other private charitable corporations, chartered by the state but controlled by their own governing boards. This attitude of the courts is understandable in view of the fact that higher education as a public purpose was, in itself, a novel idea. The medieval universities of continental Europe and England were not considered to be integral parts of the framework of civil government. Education, even at the primary and secondary levels, was thought to be the responsibility of religious or private institutions and individuals, not that of the state. The use of public funds, raised by taxation, for the support of higher education was challenged in the courts of this country even during the present century where, under constitutional restrictions on legislative action, public funds must be used solely for public purposes.²

The First State University

The University of North Carolina was founded in 1789 and endowed by the state legislature with a grant of "all property that has heretofore or shall hereafter escheat to the state." In 1800 the legislature decided that it had been too generous and repealed this grant of public property. The new act provided that all escheated lands not already sold by the university should revert to the state. The trustees of the university refused to comply with the provisions of the act, contending that the institution had acquired vested rights under the act of 1789 which could not be impaired by subsequent action of the legislature. The state supreme court upheld this contention and declared

¹ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

² Higgins v. Prater, 91 Ky. 6, 87 S.W. 1125 (1890); Marsee v. Hager, 125 Ky. 445, 101 S.W. 862 (1907); James, Auditor v. State University, 131 Ky. 156, 114 S.W. 767 (1908).

that the property of the university was as completely beyond the control of the legislature as that of a private person.³ It should be noted that this decision, treating a state university as a private, rather than a public corporation, antedated the Dartmouth College case by fourteen years. One of the North Carolina judges dissented. He was of the opinion that the university corporation was a mere agency of the state and that its property was at the unfettered disposition of the legislature. His view was accepted by the same court nearly fifty years later when it was decided that "the university is a public institution and body politic, and hence, subject to legislative control."⁴

The courts in several jurisdictions continued for many years to look upon state universities as private corporations, with certain rights beyond the reach of legislation.⁵ The Indiana Supreme Court, as late as 1887, ruled that the state legislature, in creating the Trustees of Indiana University and their successors "a body politic" had not thereby created a public corporation. In the words of the court:

The corporation thus organized has none of the essential characteristics of a public corporation. It is not a municipal corporation. Its members are not officers of the government, or subject to the control of the Legislature in the management of its affairs and the university fund . . . does not belong to the State . . . The university, although established by public law, and endowed and supported by the State, is not a public corporation, in the technical sense.⁶

The University of Virginia, chartered in 1819, was the first state university to be made subject to public control from the date of its establishment. Thomas Jefferson was its sponsor and its first rector. He had intended to convert the College of William and Mary into a state university and introduced bills for this purpose in the state assembly, but the friends of the college were too powerful, politically, to permit the passage of the proposed legislation.

The act of 1819 established a corporation known as "Rector and Visitors of the University of Virginia." Since its form of organization, with a board of control appointed by the legislature, became the prototype of many other state universities in this country, the following excerpt from the act is of interest:

And the said Rector and Visitors shall, at all times, conform to such laws as the legislature may, from time to time, enact for their

³ Trustees of University of North Carolina v. Foy, 5 N.C. 58 (1805).

⁴ University of North Carolina v. Maultsby, 43 N.C. 257 (1852).

⁵ State ex rel. Linley v. Bryce, 7 Ohio (Pt. II) 82 (1836); Board of Education v. Greenbaum & Sons, 36 Ill. 610 (1864); Orono v. Sigma Alpha Epsilon Society, 105 Me. 214, 74 A. 19 (1909); Regents of University of Maryland v. Williams, 9 Gill & J. 365 (1838); City of Louisville v. President and Trustees of University of Louisville, 54 Ky. (51 B. Mon.) 642 (1854).

⁶ State v. Carr, 111 Ind. 335, 12 N.E. 318 (1887).

government. And said university shall, in all things, at all times be subject to the control of the legislature.

The Supreme Court of Alabama was the first to recognize and to enunciate the doctrine that a state university is a public corporation. In a case involving the corporate status of the University of Alabama, it declared in 1833:

While we would unhesitatingly maintain the doctrine that an act establishing a private corporation forms a contract by which the state is bound, we have no doubt that the President and Trustees of the University of Alabama constitute a public corporation and that its charter may be altered, amended or repealed by the General Assembly, at pleasure.⁷

Today, the majority of tax-supported colleges and universities are considered to be public corporations. Some courts prefer the term "quasi-corporations" to describe this type of legal entity. However, in a few instances, publically controlled colleges and universities have been denied the dignity of corporate status.⁸

The Constitutionally Independent Corporations

A few institutions of public higher education in this country enjoy a very privileged legal status by virtue of having been created and established under specific provisions of their state constitutions. These fortunate few possess a sphere of authority within which neither the legislative nor the executive divisions of state government may interfere. They are, in substance, coordinate with the legislative, executive, and judicial branches and thus represent a fourth arm of state government.

The University of Michigan was the first to be granted this area of independence by vote of the people. The constitution of 1850 declared: "The Board of Regents shall have the general supervision of the University and the direction and control of all expenditures from the University Interest Fund." Despite this direct mandate from the people, the legislature continued to interfere with the internal administration of the institution. It was not until 1896 that the state supreme court handed down its definitive ruling on the constitutional status of the board. The following is from the opinion of the court:

The board of regents and the legislature derive their power from the same supreme authority, namely, the constitution . . . They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that

⁷ Trustees of the University of Alabama v. Winston, 5 Stew. & P. 17 (1833); see also Annot., 29 L.R.A. 378 (1915).

⁸ Weary v. State University of Iowa, 43 Iowa 335 (1876); Neil v. Trustees, 31 Ohio St. 15 (1876); State v. Stover, 47 Kan. 119, 27 P. 850 (1891).

either can encroach upon or exercise the powers conferred upon the other.⁹

The citizens of Michigan, evidently well satisfied with the excellent record made by the University of Michigan after it was granted its freedom from legislative and executive interference, decided to grant a similar status to the Michigan State College, now the Michigan State University, and to Wayne State University.

Constitutionally independent status has been conferred upon the following: the University of Arizona;¹⁰ the University of California;¹¹ Regents of the University System of Georgia;¹² the University of Idaho;¹³ the University of Minnesota;¹⁴ the University of Nevada;¹⁵ the Oklahoma Agricultural and Mechanical Colleges and the Oklahoma State University;¹⁶ and the University of South Dakota.¹⁷ The University of Missouri¹⁸ and the University of Utah,¹⁹ although mentioned in their state constitutions, failed to achieve this degree of independence.

Interference in the Internal Administration of Institutions of Higher Education

Legislators have, over the years, not hesitated to substitute their judgment for that of the governing boards charged with responsibility for the administration of state colleges and universities. The trend toward centralization of function has increased the scope of authority of state budget officers, auditors, comptrollers, and purchasing agents. Members of governing boards, in resisting these intrusions, have built up a vast accumulation of court decisions defining their proper scope of authority. A decision of the Supreme Court of Appeals of West Virginia is an example of the refusal of the courts to permit state administrative officers and agencies to go too far in their attempts to substitute their judgment for that of educational officers. The vice president and comptroller of West Virginia University signed several

⁹ *Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896).

¹⁰ *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P. 2d 854 (1959).

¹¹ *Wall v. Board of Regents of University of California*, 38 Cal. App. 2d 698, 102 P. 2d 533 (1940).

¹² *Villyard v. Regents of University System*, 204 Ga. 517, 50 S.E. 2d 313 (1948).

¹³ *Dreps. v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P. 2d 467 (1943).

¹⁴ *State ex rel. Sholes v. University of Minnesota*, 236 Minn. 452, 54 N.W. 2d 122 (1952).

¹⁵ *King v. Board of Regents of University of Nevada*, 65 Nev. 533, 200 P. 2d 221 (1948).

¹⁶ *Trapp v. Cook Construction Co.*, 24 Okla. 850, 105 P. 667 (1909).

¹⁷ *Worzella v. Board of Regents*, 77 S.D. 477, 93 N.W. 2d 411 (1958).

¹⁸ *State v. Board of Curators*, 268 Mo. 598, 188 S.W. 128 (1916).

¹⁹ *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 295 P. 2d 348 (1956).

requisitions, drawn on a special fund, for the purpose of paying certain invoices covering the cost of hospitalization and medical treatment of a student injured while participating as a member of its football team in an intercollegiate game. The fund on which the requisitions were drawn was derived from general admission charges to the games, compulsory student athletic fees, and guarantees paid on behalf of competing teams.

The state auditor refused to honor these requisitions on the ground that there was no balance available in the fund, since the reported profit for the year for intercollegiate athletics was not a true profit in view of the fact that the salary of the athletic director and those of the coaches were not charged against this fund but were paid, in part, from the budget of the department of physical education. The Board of Governors of the university petitioned the court to issue a peremptory writ of mandamus to compel the auditor to pay the claims. The court, in granting the writ, commented in its syllabus of the case:

In the absence of an abuse of discretion on the part of the Board of Governors of West Virginia University, the auditor of the State of West Virginia has a mandatory duty to honor requisitions of the board to cover payment of the cost of medical and hospital services rendered to a student athlete injured in an intercollegiate contest.²⁰

State Systems of Higher Education

When the encroachments upon the powers and duties of the governing boards are clearly motivated by political pressures, public opinion and the courts are usually on the side of the boards of control. However, with the constantly increasing burden of taxation has come an insistent demand from the taxpayers for greater economy and efficiency in government, at all levels and in every division, including public higher education. Surveys and studies have brought to light the high cost of uncoordinated decisions. While consolidation of power and authority does not, in itself, result in greater efficiency and economy, some unification of effort is clearly called for in education as in other functions of government.

These considerations led the voters of South Dakota, by the adoption of the constitution of 1889, to establish a Board of Regents of Education, with control of all educational institutions "sustained either wholly or in part by the state." According to the 1969-70 issue of the Higher Education Directory prepared by the National Center for Educational Statistics, there are now forty-six statewide boards of higher education. This demand for coordination was described in 1950 by the

²⁰ Board of Governors of West Virginia University v. Sims, 134 W. Va. 428, 55 S.E. 2d 505 (1950).

Council of State Governments as "one of the most spectacular trends in state administrative reorganization of the last decade." It is important to emphasize the distinction between coordination and control. Statutes frequently place greater emphasis on the obligations of the state boards to govern rather than to coordinate.

Interstate Compacts

One of the most interesting developments of the last two decades has been the use of interstate compacts to reduce costs and improve facilities in public higher education. Section 10 of Article I of the federal Constitution reads, in part, as follows: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . ."

The first use of this device for the advancement of public higher education created the Southern Regional Education Board. The compact was drafted and signed by the governors of fifteen Southern states on February 8, 1948, subject to the approval of their respective legislatures. The board is a nonprofit, tax-exempt public agency. According to its bylaws, "the membership of the board shall consist of the Governor of each State which has approved the Compact, *ex officio*, and four additional citizens of each Compact State, to be appointed by the Governor thereof, at least one of whom shall be selected from the field of education, and at least one of whom shall be a member of the legislature of that State."

The Western Regional Education Compact was formulated at the Western Governors' Conference in 1949 and became effective in 1951. In 1957, a resident and taxpayer of the State of Washington brought an action to restrain the state auditor from issuing a warrant upon the state treasurer for the purpose of defraying Washington's share of the operating costs of the Western Interstate Commission for Higher Education as authorized by the state legislature in 1955. The taxpayer challenged the validity of the act of the legislature on the grounds that it was in violation of Article VII, Section 5, of the state constitution which provides that "the credit of the state shall not in any manner, be given or loaned to, or in aid of, any individual, association, company or corporation."

The Supreme Court of Washington, in upholding the constitutionality of the legislation in question, had this to say:

The legislature of this state has undertaken to carry out a part of its duty to educate our children residing within its borders by a reciprocal arrangement with its sister states. In return for this state's share of the operating costs of the interstate commission, it receives benefits in educational facilities for the residents of this state. The legislature, in the proper exercise of its discretion, has deemed the benefits received to be a sufficient consideration for

the funds expended . . . The expenditure of funds for such purpose does not constitute the giving or loaning of the credit of this state . . . We do not find in the state constitution any limitation upon the power of the legislature to contract with its sister states.²¹

The New England Board of Higher Education was established in 1955 under the provisions of the New England Higher Education Compact, approved by Congress in 1954. In 1965 a general planning conference for the drafting of the Compact for Education to facilitate cooperation at the national level was attended by nineteen governors and representatives from every state, the Commonwealth of Puerto Rico, and the territories of American Samoa and the Virgin Islands. The compact, now ratified by the legislatures of thirty-four states, created the Education Commission of the States.

Control of the Quality of Higher Education by Accrediting Agencies

Visitors from overseas have often expressed surprise at the lack of official state and federal control of the quality of higher education in this country. This function, performed by a governmental agency in practically every other country, has been, in effect, delegated to what the courts have erroneously termed "voluntary associations." There are now six regional accrediting associations in the United States. In addition, practically every professional school is subject to inspection by various organizations which, since about 1930, began to pressure colleges and universities to meet standards which, in the opinion of some educators, were unrealistic and conflicting. Increasing friction between accrediting organizations and institutions prompted the American Council on Education to hold conferences in 1939 and 1940, and again in 1949 to discuss the need for coordination of their activities. In 1950, the National Commission on Accrediting adopted its present organization.

The agencies have no inherent legal power to control the operations of institutions of higher education. In practice, they exercise a very powerful influence upon the choice of students in selecting the college or university they will attend. Accreditation, or the lack thereof, determines eligibility for participation in financial aid programs of the federal government.

In 1938 the State of North Dakota, at the instigation of its governor, brought suit in a federal district court to enjoin the North Central Association of Colleges and Secondary Schools from removing the University and State Agricultural College of North Dakota from its list of accredited colleges, or from "interfering with or obstructing the administration, operation and maintenance of the public school system of

²¹ State ex rel. Tattersall v. Yelle, 52 Wash. 2d 856, 329 P. 2d 841 (1958).

the State of North Dakota." The court declined to grant the injunction requested, reasoning that:

Voluntary associations have the right to make their own regulations as to admission or expulsion of members and one who becomes a member, by his membership, assents to the constitution and rules of procedure adopted by such an association. The constitution, by-laws and rules, knowingly assented to, become, in effect, a civil contract between the parties, whereby their rights are fixed and measured. Consequently, in the absence of fraud, collusion, arbitrariness or breach of contract, such as to give rise to a civil action, the decisions of such voluntary associations must be accepted in litigation before the court as conclusive, for the members of the organization have made them binding by contract.²²

The state appealed the decision, but the federal district court of appeals upheld the decision of the district court.²³

In a case involving Parsons College, the same federal district court expressed the view that institutional membership in an accrediting association was purely voluntary and that a court should not question their decisions unless they were so clearly arbitrary as to be "contrary to rudimentary due process."²⁴

In 1964, the Federation of Regional Accrediting Agencies adopted a resolution that henceforth they would limit eligibility for accreditation to nonprofit institutions. The Marjorie Webster Junior College has been owned and administered by members of the Webster family for many years. When the Middle States Association of Colleges and Secondary Schools refused to accept its application for inspection for accreditation, its attorney filed suit in a federal district court, charging the association with "conspiracy in restraint of trade," a violation of the Sherman Act of 1890. In ordering the association to evaluate the college on the same basis as nonprofit institutions, Judge Smith said:

Educational excellence is determined, not by methods of financing, but by the quality of the program. Middle States' position, moreover, ignores the alternative possibility that the profit motive might result in a more efficient use of resources, producing a better product at a lower price . . . Defendant's assumption that the profit motive is inconsistent with quality is not supported by the evidence and is unwarranted. There is nothing inherently evil in making a profit and nothing commendable in operating at a loss.²⁵

²² *State v. North Central Association of Colleges and Secondary Schools*, 23 F. Supp. 694 (E.D. Ill. 1938).

²³ *Ibid.*, 99 F. 2d 697 (7th Cir. 1938).

²⁴ *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

²⁵ *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools*, 302 F. Supp. 459 (D.C.D.C. 1969); rev'd, 39 U.S.L. Week 2021 (U.S., July 14, 1970), --- F. 2d --- (June 30, 1970).

This decision was reversed on appeal and the Supreme Court will be asked to review the litigation. Several who have studied the problem are of the opinion that the decisions of all accrediting associations should be subject to the same degree of judicial review as that of governmental agencies.

Academic Freedom and Tenure

A faculty member's security against dismissal without cause may be for a fixed term or for the span of his professional life. In the former case, his tenure is said to be "limited"; in the latter it is "indefinite," "continued" or "permanent." Status of tenure may depend upon the specific terms of the employment contract, or it may rest upon the principles of employment and tenure adopted and approved by the governing board of the institution. Many colleges and universities have adopted the "1940 Statement of Principles of Academic Freedom and Tenure" formulated by the American Association of University Professors in cooperation with the Association of American Colleges. The following is an excerpt:

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or, under extraordinary circumstances, because of financial contingencies.

The American Association of University Professors has played a significant role in formulating and implementing the concept of permanent tenure and academic freedom. John Dewey and A. O. Lovejoy called for a meeting in 1915 which resulted in the formation of the AAUP. A statement of principles was drafted which asserted that scholars, having dedicated a lifetime to research, should be permitted to express the resulting conclusions to the classroom and in public. This, they declared, was a duty they owed to society. In order to discharge this duty, free of economic pressure, they had to be secure in their positions. Should the question arise of termination of their appointments, the issue should be decided by their professional peers *i.e.* a faculty committee, not by members of the governing boards of their institutions.

Having enunciated the right of faculty members to speak and to write on controversial subjects without fear of loss of employment, the AAUP prepared to defend that right. If investigation revealed that an institution had not granted academic freedom to members of the faculty, the AAUP placed that institution on its "non-recommended list." In order to avoid this possibility, many institutions brought their personnel procedures into full conformity with the "1940 Statement of Principles." The AAUP's "List of Censured Administrations" was first

published in 1931. The average time required to obtain removal of censure is approximately five years.

The *Worzella* case, decided by the Supreme Court of South Dakota in 1958, involved the constitutional question: Can the governing board of a state college, charged by the state constitution and by statute with responsibility for the government and control of that institution, lawfully delegate that power or any portion thereof to a faculty tenure committee? Dr. W. W. Worzella was discharged by the State Board of Regents of Education from his position as professor of agronomy at the South Dakota State College of Agriculture and Mechanic Arts in 1958. He petitioned the court for a writ of mandamus to compel the board to reinstate him, contending that he had acquired permanent tenure under a faculty tenure policy approved by the board. The board maintained that the tenure policy did not, and could not, abrogate its constitutional and statutory power to dismiss all officers, instructors, and other employees under its control. The court declined to grant the writ stating:

The exact meaning of this so-called tenure policy eludes us . . . Apparently the Board could not discharge or remove a faculty member with tenure for any reason if the President failed to, or refused to recommend dismissal. We believe this to be an unlawful abdication of the Board's exclusive prerogative and power.²⁶

The *Keeney* case enunciated the interesting doctrine that tenure rules, adopted by the governing board of a publicly controlled college or university, become, by a process of sublegislation, a law of the state, with the force and effect of an act duly adopted by the legislature. Consequently, a member of the faculty had the protection of the tenure policy, despite the fact that the board, in tendering him his contract, had deleted that portion of the tenure clause which stated that "re-appointment after three years service shall be deemed a permanent appointment." The court declared:

Striking the regulations from the contract could have no more effect than the striking of a provision of a statute, and the petitioner's acceptance of the contract would no more constitute a waiver of the regulation than it would constitute a waiver of the statute.²⁷

Justice Morris, in his dissenting opinion, took judicial notice of the fact that an attorney, with the permission of the court, had filed a brief on behalf of the American Civil Liberties Union. Clark Byse and Louis Joughin prepared a report in 1959 on tenure in American

²⁶ *Supra* n. 17.

²⁷ *State ex rel. Keeney v. Ayers*, 108 Mont. 547, 92 P. 2d 306 (1939); see also *State ex rel. Richardson v. Board of Regents of University of Nevada*, 70 Nev. 144, 261 P. 2d 515 (1953).

higher education,²⁸ financed by a grant from the *Fund for the Republic*. In the chapter entitled "Tenure and the Law," the distinction is made between the legal enforcement of tenure in a state-financed and in a "private" college or university. In a public institution, the teacher who has been dismissed in violation of the tenure plan in force at his institution is advised, in effect, to present the argument that, since the tenure plan promulgated by the governing board as an instrumentality of the state is a form of sublegislation, as enunciated by the court in the *Keeney* case, the court should uphold and enforce the law by ordering the board to reinstate the teacher.

College Restrictions and the Rights of Students

The power which the officers of a college may lawfully exert to restrict and to control the actions of its students was, for many years, based upon the doctrine that the college stands in the same position to its students as that of a parent—in loco parentis—and it can be therefore direct and control their conduct to the same extent as a parent can and should.

This ancient principle of law was well stated by a court in a case involving Berea College in 1913. The college issued a regulation prohibiting its students from entering public eating houses in the community. The owners of a nearby restaurant, dependent chiefly on student patronage, sought an injunction to compel the college official to rescind this regulation. The court refused to grant the petition and sustained the right of the college to control its students in the following words:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of pupils. For the purposes of this case, the school, its officers and students are a legal entity, as much so as any family, and, like a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it; where they may go and what forms of amusement are forbidden.²⁹

In a recent case involving the suspension of students charged with possession of marijuana, a federal district court stated that a college does not stand, strictly speaking, in loco parentis to its students.³⁰ A California Court has declared that, for constitutional purposes, this ancient doctrine must be repudiated.³¹

²⁸ Clark Byse and Louis Joughin, *Tenure in American Higher Education* (Cornell University Press, 1959).

²⁹ *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913).

³⁰ *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725 (D.C. Ala. 1968).

³¹ *Goldberg v. Regents of University of California*, 57 Cal. Rptr. 463 (1967).

Another traditional doctrine frequently invoked by the courts to justify the suspension or expulsion of a student reasons that a student is bound by the terms and conditions of his contract of enrollment, as set forth in the published regulations of the institution. This concept was set forth in 1891 by the Supreme Court of Illinois as follows:

The will of the student is subservient to that of those who are at the time being his masters. By voluntarily entering the university, or being placed there by those having the right to control him, he necessarily surrenders very many of his individual rights . . . and yet, were it not for the fact that he is under the government of the university, he could find ample provision in the Constitution to protect him against the enforcement of all rules abridging his personal liberty.³²

This contractual theory has been eroded by the courts in their zeal to protect the constitutional right of individuals to procedural due process in public institutions. However, a private college or university may still rely upon it even though the institution is supported in part by public funds, as shown by a recent case involving Howard University. The court said:

It would be a dangerous doctrine to permit the Government to interpose any degree of control over an institution of higher learning, merely because it extends financial assistance to it . . . Higher education can flourish only in an atmosphere of freedom, untrammelled by Government influence in any degree. The courts may not interject themselves into the midst of matters of school discipline. Such discipline cannot be administered successfully in the same manner as governs the trial of a criminal case or a hearing before an administrative agency.³³

For years, the courts were willing to justify the imposition of rules and regulations upon students in public institutions on the theory that attendance thereat was a privilege, not an inherent right. In 1913 the Supreme Court of Mississippi sustained the action of the Trustees of the University of Mississippi requiring all matriculants to sign a promise to obey a state statute prohibiting membership in secret societies in its tax-supported institutions of higher education.³⁴ The issue was carried to the Supreme Court of the United States, and the action of the state court was affirmed. In his opinion, Mr. Justice McKenna declared:

It is trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its University, that while a

³² North v. Board of Trustees of Illinois, 137 Ill. 296, 27 N.E. 54 (1891).

³³ Greene v. Howard University, 271 F. Supp. 609 (D.C.D.C. 1967).

³⁴ Board of Trustees of the University of Mississippi v. Waugh, 105 Miss. 623, 62 S. 827 (1913).

student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment . . .³⁵

Recently, a federal district court of appeals expressed some uncertainty on this question of privilege:

We are not certain that it is significant whether attendance at such a college, or staying there once one has matriculated, is a right rather than a privilege. Education, of course, is vital and valuable, . . . and remaining in college in good standing, much like reputation, is also something of value . . . So, too, is one's personal freedom. But one may act so as constitutionally to lose that freedom. And one may act so as constitutionally to lose his right or privilege to attend a college.³⁶

Campus Security

The New York Supreme Court in 1969 affirmed the long-standing principle that college and university officials have an inherent authority to maintain order on the campus, to insure freedom of movement, and to discipline, suspend, and expel students whose conduct is disruptive. The court said that these officials may exercise this authority so long as there is an absence of arbitrary or capricious action on their part.³⁷ A federal court expressed this same concept as follows:

A state college or university must necessarily possess a very wide latitude in disciplining its students and . . . this power should not be encumbered with restrictions which would embarrass the institution in maintaining good order and discipline among members of the student body . . . It is a delicate matter for a court to interfere with the internal affairs and operation of a college or university . . . and such interference should not occur in the absence of the most compelling reasons.³⁸

The occupation by force of certain buildings at Columbia University by students and others, and their eviction by the police in April of 1968 was headline news throughout this country. After their eviction, five students, the pastor of a nearby church, the president of a local chapter of the Congress for Racial Equality, and an alumnus and a faculty member requested a federal court to enjoin the university from proceeding with disciplinary action against those participating in the disturbances. The court held that the fact that a private university receives public funds and performs the public function of education does not render its conduct "state action" so as to render it subject to federal constitutional restraints. The following are excerpts from the opinion of the court:

³⁵ *Waugh v. Board of Trustees of the University of Mississippi*, 237 U.S. 589 (1915).

³⁶ *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (D.C. Mo. 1969).

³⁷ *Schuyler v. State University of New York at Albany*, 297 N.Y.S. 2d 368 (1969).

³⁸ *Knight v. State Board of Education*, 200 F. Supp. 174 (D.C. Tenn. 1961).

It is surely nonsense of the most literal kind to argue that a court of law should subordinate the "rule of law" in favor of more "fundamental principles" of revolutionary action designed to forcibly oust governments, courts and all . . . The core theory of the suit is that the plaintiffs (or those they purport to represent) had a "right" under the First Amendment to occupy University buildings, including the President's office, and "non-violently" imprison a Dean to dramatize their views and positions concerning fundamental problems affecting society. From this they reason that anything which would inhibit or "chill" this enterprise offends the Constitution . . .

The Plaintiffs devote many pages to a misconceived argument that students facing disciplinary charges are being deprived of substantive due process because Chapter XXXV:352 of the University statutes is vague and overbroad . . . No case, anywhere, and no acceptable extension of any pertinent principle, indicates that a university like Columbia is engaged in "state action" when it takes such measures and conducts such procedures as those here in question.³⁹

Conclusion

It is obviously impossible, within the space limitations of a law review article, to give more than a general over-view of the development and scope of college law. It is our hope that your interest in this new area of specialization has been aroused and that you will expand your reading in this field.

³⁹ Grossner v. Trustees of Columbia University in the City of New York, 287 F. Supp. 535 (D.C. N.Y. 1968).