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THE AUTONOMY OF AMERICAN COLLEGES

The autonomy of the US institutions of higher education is one of their most distinctive features. Both private and public institutions have been protecting their autonomy for decades, explaining that without it neither knowledge nor education could flourish in the country. The autonomy was challenged by federal and state governments; recently, changing patterns of financing higher education and growing participation of the federal government have obliged colleges and universities to follow many, sometimes very detailed, regulations. At the beginning of the 21st century this is the question institutions of higher education try to answer: what is the real meaning of autonomy today.

Academic freedom and institutional autonomy has been for many years one of the hottest topics in American higher education. Freedom of research and of disseminating the results seems to be necessary for the advancement of knowledge; the right of colleges and universities to act as independent institutions, not only as federal or state agencies, guarantees closer cooperation with communities. Academic freedom is closely connected with particular persons involved in the research-teaching process (e.g. professors, instructors, etc), and institutional autonomy reflects the governance and activity of a college or a university as a whole.

An impressive number of books and articles have discussed the nature of institutional autonomy and academic freedom; new regulations and court rulings have shaped and re-shaped the boundaries of the autonomy. In 1957 the Supreme Court of the United States was faced with the question whether the Attorney General of New Hampshire could prosecute a professor for his refusal to answer questions about the lecture he delivered at the state university. Since that was the time of McCarthyism the demand of the Attorney seemed to be understandable, while on the other hand the question itself was of great importance for all American academia. The Supreme Court in the *Sweezy v. New Hampshire* case ruled in favor of the professor and the Court gave an extremely important opinion:

> 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 straitjacket 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. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.[1]

[1] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

The concept of academic institutional autonomy and academic freedom was even more accurately defined by Justice Felix Frankfurter. In his concurrent opinion he cited a scholar from South Africa to give the proper definition: "It is an atmosphere in which there prevail 'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[2] The definition of Justice Frankfurter has very often been used by scholars researching US higher education and has remained one of the touchstones of academic freedom and institutional autonomy worldwide.[3] More than 40 years later these very same words were used in the *Board of Regents of University of Wisconsin System v. Southworth* case. Justice David Souter reminded the court that Felix Frankfurter had explained the importance of a university's ability to define its own mission, which is vital for institutional autonomy.[4]

Authorities, faculty members and students of both private and public higher education institutions (HEIs) consider autonomy as one of the core values of the US higher education system that has for many years attracted scholars from foreign countries and led to the technological development of the state. This is autonomy that secures another core value: freedom of research and of disseminating and expressing the results of research. Autonomy was not granted once and for all at the beginning of American higher education. This was an idea quite often questioned and challenged by founders, federal, state, and local governments.[5] On one hand, the idea of autonomy is perceived as the necessary condition for creating entrepreneurial universities that could use funds more effectively and could provide better and more inclusive education.[6] On the other hand, the growing support from the federal government forced HEIs to accept many regulations that could at least challenge their autonomy in the decision--making process.[7]

The history of American higher education reflects discussions on the nature of the autonomy of the institution that should serve the world outside: students, employers, and governments. Autonomy supported in various aspects of teaching, research and everyday operation was at the same time restricted in some other aspects by the federal and state authorities. The autonomy is not the ultimate good and goal of the American higher education system, especially as faced with the protection of students and parents as consumers as well as promoting social inclusion (e.g. affirmative action). American higher education, which is ranked the best in the world, could pro-

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[2] Ibidem.

[3] J.S. Brubacher, *Bases for Policy in Higher Education*, New York: McGraw-Hill Book Company, 1965, pp. 90–92; *1982 Recommended Institutional Regulations on Academic Freedom and Tenure*, American Association of University Professors, [in:] M.W. Peterson (ed.), *ASHE Reader on Organization and Governance in Higher Education*, Needham Heights: Ginn Presss, 1988, pp. 281–287; *The Crisis of the Publics. An International Comparative Discussion on Higher Education Reforms and Possible Implications for U.S. Public Universities*, C.J. King, J.A. Douglass, I. Feller (eds.), Berkeley: University of California, 2007, p. 28.

[4] *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

[5] W.A. Kaplin, *The Law of Higher Education. A Comprehensive Guide to Legal Implications of Administrative Decision Making*, San Francisco: Jossey-Bass Publishers, 1985, pp. 3–4.

[6] S. Vincent-Lancrin, "Building futures scenarios for universities and higher education. An international approach," *Policy Futures in Education*, 2 (2), 2004, pp. 245–262.

[7] S. Hook, *Intellectual Freedom and Government Sponsorship of Higher Education*, [in:] R.E. Meiners, R.C. Amacher, *Federal Support of Higher Education. The Growing Challenge to Intellectual Freedom*, New York: Paragon House, 1987, p. 10.

vide an insight into the nature of academic freedom and institutional autonomy. After a brief history of federal policy and activity in the field of higher education, the state--HEIs relation will be discussed and finally recent challenges faced by US colleges and universities will be presented.

The history of the struggle for the autonomy of American colleges is as old as the history of the higher education itself. Some authors claim that the establishment of Harvard College is the first example of this complex relationship between HEIs and the world outside, represented by the colonial government. October 28, 1636 the General Assembly and the Court of Massachusetts Bay agreed to give 400 pounds to found a "school or college." Eventually the college was located in Newtown, soon renamed Cambridge. In 1638 the school took the name of John Harvard, a man who in his will gave his whole library and half of his estate in support of this new school. Harvard College, considered to be the first private HEI in British North American, was founded rather as a public college to serve the newly established colony. The idea of 'serving' is quite opposite to the idea of institutional autonomy or freedom. Harvard was founded to advance the religious beliefs of the group and to train ministers of the denomination, which is far from free enquiry and investigation.[8]

Before the American Revolution there happened the first wave of privatization of American colleges. The majority of institutions (founded on a basis similar to Harvard) became private, denomination dependent, and free from the direct influence of local governments. It was still hard to say that colleges promoted free inquiry, but it was rather the result of a lack of tradition than of the accepted regulations. Schools were poorly equipped; professors hardly ever held a Ph.D. degree and new research was demanded by nobody. One of the interesting exceptions of that time was the College of New Jersey (now widely known as Princeton University): although founded by a religious group of Presbyterians influenced by the Great Awakening, the college was the first institution that abandoned faith examination as a part of entrance procedures.[9]

Federal Government and Higher Education

In the 18th century the federal government of the independent United States was not focused on HEIs and such a situation is not astonishing since the word "education" does not appear in the Constitution. Therefore, since the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," education was at first exclusively under the states' authority. The Congress, however, by tying educational mandates to the receipt of federal funds, was able to act over the states' power and based such activity on Article I, Section 8, of the Constitution that obliged

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[8] D.D. Gehring, "The Frog in the Pot: External Influences on Higher Education," *New Directions for Student Services*, no. 82, Summer 1998, p. 3; L.A. Cremin, *College*, [in:] L. F. Goodchild, H.S. Wechsler (eds.), *The History of Higher Education; Second Edition*, Needham Heights: Simon and Schuster Custom Publishing, 1997, pp. 43–44.

[9] J. Herbst, *From Religion to Politics: Debates and Confrontations over American College Governance in Mid-Eighteenth Century America*, [in:] L.F. Goodchild, H.S. Wechsler (eds.), op.cit., p. 62; F. Rudolph, *The American College & University. A History*, Athens: The University of Georgia Press, 1990, pp. 11–15.

Congress to "provide for the common defense and general welfare of the United States."[10]

The Land Ordinance of 1785 was the first federal document that mentioned education and tried to provide support for the advancement of learning. According to this regulation every township in the new northwestern territories of the United States was to be divided into thirty-six one-square-mile lots. The lot number sixteen, located in the center of the townships, had to be used for the creation of a school: "There shall be reserved the lot No. 16 of every township, for the maintenance of public schools within the said township."[11]

The situation was further changed just two months before the Constitution was adopted and the federal government started to use education (in general terms) as an instrument of policy. The Northwest Ordinance of 1787 provided in Article III that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged."[12] As a result of the Ordinance two townships near the center of the states were to be reserved for the support of "literary institutions." In 1836, Congress changed that system a little, demanding that one township had to be the seat of a "seminary of learning," and the other had to be used for the establishment of the first public university in a state.[13]

The results of the federal policy toward higher education could be noticed very soon. In the State of the Union Address of 1810 President James Madison discussed the role of education for the further advancement of the United States and its citizens:

> Whilst it is universally admitted that a well-instructed people alone can be permanently a free people, and whilst it is evident that the means of diffusing and improving useful knowledge form so small a proportion of the expenditures for national purposes, I can not presume it to be unseasonable to invite your attention to the advantages of superadding to the means of education provided by the several States a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction, the expense of which might be defrayed or reimbursed out of the vacant grounds which have accrued to the nation within those limits.
> Such an institution, though local in its legal character, would be universal in its beneficial effects.[14]

The nature of the federal government's involvement in higher education changed substantially during the Civil War, with the absence of the Southern states. In 1862 Congress passed the Morill Land Grant Act of 1862. The Act combined three main

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[10] G.N. Rainsford, *Congress and Higher Education in the Nineteenth Century*, Knoxville: The University of Tennessee Press, 1972, pp. 34–35.

[11] "An ordinance for ascertaining the mode of disposing of lands in the Western Territory, (Land Ordinance of 1785)," *Journals of the Continental Congress*, v. 29, p. 923.

[12] "An ordinance for the government of the territory of the United States, North-west of the river Ohio (Northwest Ordinance of 1787)," *Journals of the Continental Congress,*" v. 32, pp. 334–343.

[13] R.L. Williams, *The Origins of Federal Support for Higher Education. George W. Atherton and the Land-Grant College Movement*, University Park: The Pennsylvania State University Press, 1991, pp. 35–36.

[14] J. Madison, *The State of the Union Address*, [in:] *The Project Gutenberg EBook of the State of the Union Address by James Madison*, 15 November 2008, http://infomotions.com/etexts/gutenberg/dirs/etext04/sumad11.htm.

goals: the use of federal land, support for higher education, and support for further economic growth of the states and territories. This was the first time that the federal government really interfered with education: it took responsibility for shaping the program of studies (support was given only to the colleges teaching agriculture and mechanics) and for influencing the target cohort of students: farmers and industrial classes. Having given support for the colleges, the federal government no longer tried to steer the boards of trustees or presidents of newly established schools. The land grant institutions were obliged, however, to provide training in military tactics as a part of their curriculum.[15]

The outcomes of the Morill Land Grant Act made Congress eager to accept once again the idea of using federal land to advance some social groups by means of higher education. In 1890 Congress passed the Second Land Grant Act, this time intended to provide academic education to the African-Americans. The Act forbade financial support to any state or territory where "a distinction of race or color is made in the admission of students," although it allowed the creation of separate colleges for the races on a "just and equitable" basis. The Second Land Grant Act was a clear example of the use of higher education as the instrument of federal policy.[16]

Two other important acts were connected with war preparation and war effort of the USA. In 1916 the National Defense Act was passed, thanks to which the Reserve Officer Training Corps (ROTC) were created on campuses across the states. The goal of this Act was to prepare officers for possible future military actions. The war passed but ROTC can be found in the majority of American campuses. The Servicemen's Readjustment Act of 1944 (widely known as the GI Bill) was enacted to help veterans to be fully included in post-war activity. The act enabled them to establish small enterprises, to get vocational training or to go to college. More than 2,300,000 veterans used the latter option. The GI Bill helped not only to prevent post-war depression but it was an important stimulus in the rapid economic growth of the United States when the war was over.[17]

In 1958 the Soviet Union launched its first satellite; *Sputnik* made the US federal government fear they were losing the "space race," and Congress enacted the National Defense Education Act to encourage more students to study foreign languages, mathematics, and the sciences and to promote research in these areas. This time the government not only secured some programs of study and financial assistance to some groups of students. The most important outcome of the National Defense Education Act was capital investment in research laboratories.[18]

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[15] G.N. Rainsford, op.cit., pp. 29–54; D.D. Ghering, op.cit., pp. 5–6. On the one hand, the lesson taught by the Dartmouth College case was remembered; on the other, the federal government started to take the responsibility for the programs of studies and quality of higher education. It also marked the beginning of providing federal support to accomplish some government objectives.

[16] Ibidem, p. 5; E.L. Johnson, *Misconceptions about the Early Land-Grant Colleges*, [in:] L.F. Goodchild, H.S. Wechsler (eds.), op.cit., pp. 226–227.

[17] Servicemen's Readjustment Act of 1944, Public Law 78-346, 58 STAT 284; D.E. Heller, *The Changing Nature of Public Support for Higher Education in the United States*, [in:] P.N. Teixeira, D.B. Johnstone, M.J. Rosa, H. Vossensteyn (eds.), *Cost-Sharing and Accessibility in Higher Education: A Fairer Deal?*, Dordreeht: Springer, 2006, pp. 133–134.

[18] J.R. Thelin, *A History of American Higher Education*, Baltimore: Johns Hopkins University Press, 2004, p. 280.

The most significant legislation since the Land Grant Act that affected colleges and universities was the Higher Education Act of 1965. This comprehensive law regulated various issues: from faculty development to student grants and loans to construction loans. The Higher Education Act served as a way to effectuate the earlier federal non-discrimination policy by eliminating the financial barriers to higher education access.[19] Only during the first year of the Higher Education Act $25,000,000 was spent on the financial support of the education and in the following decade the amount of federal aid steadily grew.[20]

Higher Education and the States

The growth of higher education in the independent United States was possible not only thanks to the influence of the Land Ordinance and the Northwest Ordinance or the activity of the federal government. The independent United States very soon faced *college movement*: state-wide activity of establishing new HEIs, sponsored by various denominations and state governments, which led to the creation of public higher education. The growing number of colleges, facing new problems and challenges, saught to answer the question of what the relationship between the colleges and external world should look like: are HEIs only to serve the founders or have they enough freedom and autonomy to govern themselves, defining their goals and means? Some of the states tried to make colleges fully follow state regulations and policies, seeing education as the means of promoting economic growth. This activity led eventually to the famous Dartmouth College case in 1819 (*Trustees of Dartmouth College v. Woodward*).[21]

Dartmouth College was chartered during colonial times by George III in 1769 and it was based on the foundation of the school created in 1754 by Eleazar Wheelock, who "at his own expense, on his own estate and plantation, set on foot an Indian charity school." According to the royal document: "there shall be in the said Dartmouth College, from henceforth and forever, a body politic consisting of trustees of said Dartmouth College." The board of trustees consisted of "the president, tutors and other officers and ministers of said Dartmouth College" and had the exclusive right to employ people working at the college, including the president himself.[22] More than 30 years after the American Revolution the state government of New Hampshire tried to reinstate the previously deposed president of the College and to change the charter. This new charter vested the power to appoint the president in the hands of the governor. If the plan of New Hampshire had been carried out, the private, independent institution would have become a kind of state institution, financed, however, from private funds.[23]

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[19] D.D. Ghering, op.cit., p. 6.

[20] Higher Education Act of 1965, Public Law 89-329, 79 STAT 1219.

[21] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819); R.L. Church, M.W. Sedlak, *The Antebellum College and Academy*, [in:] L.F. Goodchild, H.S. Wechsler (eds.), op.cit., p. 134; J.R. Thelin, op.cit., pp. 70–73; W.A. Kaplin, op.cit., pp. 17 and 35.

[22] *Charter of Dartmouth College*, December 13, 1769, Dartmouth College Government Documents, http://www.dartmouth.edu/~govdocs/case/charter.htm (November 5, 2008).

[23] L.A. Glenny, T.K. Dalglish, *Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline*, Berkeley: Center for Research and Development in Higher Education, 1973, p. 15.

Daniel Webster, alumnus of Dartmouth College, argued the case against the state--approved secretary of the board of trustees. Webster's famous and passionate speech about "a small college" advocated for the autonomy of the private institution. The decision of the Supreme Court in 1819 invalidated the act of the New Hampshire legislature, and Chief Justice John Marshall stated in his ruling that the college was a private and independent institution; the autonomy of which had been secured by the sanctity of a contract signed 50 years earlier by the King.[24] The Court's decision did not grant an absolute autonomy to all institutions of higher education in the United States. As it was explained by John S. Whitehead, the Court made an important distinction between private and public (or state-granted and state-governed) institutions. The dependency of public colleges was considered to be legal, not only in terms of the financial connections but of the activity, policy and performance of any given HEI.[25]

After the Dartmouth College case the states clarified the legal status of public HEIs and the relation between state authorities and HEIs. State governments have rather general than limited powers (that is not denied by the federal Constitution or own state constitution). The states enjoy the greatest reservoir of authority over higher education. The question is whether particular power and authority are lodged in the legislative, executive branch or sometimes in other constitutionally autonomous boards or agencies.[26]

The public system of higher education can be organized in different ways: it may be established by the state constitution (e.g.: California, which includes even private institutions), by legislative acts (HEIs created this way are called statutory institutions), or by a combination of the two. Every state has also at least one designated body that is responsible for the public higher education statewide. These bodies are known as: Board of Higher Education, Commission on Higher Education, Board of Regents, Board of Governors, etc. The majority of these bodies are involved in planning, program review, budget development and financial control. Depending on the authority and functions of these bodies, they can be divided into two groups: governing and coordinating. The first ones are responsible for the management and operation of the controlled institutions. Coordinating bodies have lesser responsibilities; they work directly with the institutions for which they are responsible, quite often as an advisory agency for the legislature or the governor of a given state.[27] The legal status of institutions within the public system varies from state to state and from institution to institution as well. There are HEIs established directly by a state constitution, which usually enjoy greater authority than HEIs established by statute that have less autonomy from state legislatures and governing bodies.[28]

Although public colleges and universities are founded and supervised by states it does not mean that they are completely dependent and must follow all decisions of state authorities concerning planning, coordinating, regulating, and funding. These functions performed by agencies and boards of various types may not easily infringe

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[24] W.A. Kaplin, op.cit., p. 17.

[25] J.S. Whitehead, J. Herbst, *How to Think about the Dartmouth College Case*, [in:] L.F. Goodchild, H.S. Wechsler (eds.), op.cit., pp. 162–172; D.D. Ghering, op.cit., p. 3.

[26] W.A. Kaplin, op.cit., p. 441.

[27] Ibidem, pp. 442–443.

[28] Ibidem, p. 444.

upon the autonomy of state institutions. The *Moore v. Board of Regents of University of the State of New York* case is a very interesting example of rulings in favor of the autonomy of the institution. In this case the trustees and the chancellor of the State University of New York sought the confirmation that only the trustees are responsible for providing standards and regulations for a university's program of studies (in this particular case – doctoral program of studies). Before the ruling two arguments were used: Moore, representing the trustees, stated that if the state board won, the institution would be subjected to external intervention; on the other hand the Board declared that a different ruling would place the university beyond public control. Eventually, the Court decided in favor of the trustees and explained:

> The Commission on Independent Colleges and Universities notes that since 1787 the regents have registered programs and since 1910 they have conducted such registration through the commissioner. In construing the statute to allow the regents, through the commissioner, to register programs, the court relies not only on the historical grants of extensive power to the regents, but also on the rule that a long continued course of action by those administering a statute is entitled to great weight. Moreover, it would appear that the legislature has recognized the existence and exercise of this authority.
> (...) In 1961, chapter 388 of the Laws of 1961 gave the Board of Trustees of the State University of New York the authority to administer the internal affairs of the State University. Nothing contained in that statute, or in the legislative history leading to its passage, indicates that the State University was to become *sui generis* and not subject to the same requirements imposed by the regents and commissioner on private institutions of higher education in this state.[29]

The case reflected the situation of the statutorily based institutions. Public institutions established by state constitution are characterized as a "public trust," a "constitutional body corporate" or an "autonomous university." Constitutional institutions are challenged from time to time by state authorities that would like to enjoy greater control and to use HEIs as a means of public policy.

An example of the struggle is the *Regents of University of Michigan v. State of Michigan* case. Article 13 of the state constitution of Michigan, entitled *Education*, is a basic law concerning schools of all types and gives basic provisions on the governing boards of the University of Michigan system. The Michigan constitution provides basic rules for transfers to the University of Michigan from Land Grant institutions.[30]

Three HEIs of Michigan (University of Michigan, Michigan State University, and Wayne State University; all of them "constitutional universities") challenged various regulations of the legislature. The court affirmed that the legislature of Michigan could impose conditions on appropriations to the institutions but must not "interfere with the management and control of those institutions."[31] The basic question asked by the University of Michigan is the right of the State Board to approve changes to the programs of studies and new capital investment in the university. The Supreme Court of Michigan decided that the State Board of Education has advisory authority only.

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[29] *Moore* v. *Board of Regents of University of the State of New York,* 390 N.Y.S.2d 582 (Sup. Ct. 1977), affirmed, 59 A.D. 44, 397 N.Y.S.2d 449 (1977), affirmed, 44 N.Y.2d 593,407 N.Y.S.2d 452, 378 N.E.2d 1022 (1978).

[30] *Regents of University of Michigan* v. *State of Michigan,* 395 Mich. 52,235 N.W.2d 1 (1975); W.A. Kaplin, op.cit., p. 447.

[31] Ibidem, p. 448.

The institutions are required to inform the board of the program changes, not to ask for acceptance of the changes. Thus, the Court ruled in favor of HEIs' autonomy and exclusive authority over their own operations.[32]

Court decisions made it clear that even public HEIs, although founded by state authorities and supervised by state bodies, enjoy considerable autonomy. The most important is the founding charter or act of an institution, defining its mission. The state has very little authority to change a contract once it is signed. On the other hand – HEIs could demand from the state to fulfill the promises once made.

Court Decisions Concerning Institutional Autonomy

Since the adoption of the Land Grant Act there has been an almost constant struggle to define and interpret the nature and boundaries of institutional autonomy of both private and public HEIs, especially as related to the federal government and Congress. The returning question was simple: what colleges and universities can do within their own authority and what can be decided by external bodies: federal, state, and local government. Financial assistance of the federal government turned out to be a double-edged sword (as some of the university professors had warned before). The federal government asked for accountability and transparency in colleges and universities because it wanted to control the spending of public money on various educational activities and initiatives.

The regulations aiming at opening the doors to previously disadvantaged groups are some of the most important regulations affecting HEIs. After the adoption of the Civil Rights Bill, Title VI of the Education Amendments of 1972 of the Higher Education Act regulated and protected equality in US colleges and universities. It prohibits discrimination on the basis of sex in educational programs and other activities, including extracurricular ones, in every program receiving federal support. Section 504 of the Rehabilitation Act of 1973, that must be observed by colleges and universities, prohibits discrimination against "otherwise qualified handicapped" persons.[33]

This important change, making American higher education more inclusive, was partially against the doctrine of institutional autonomy as expressed in the concurring opinion of Justice Felix Frankfurter in the *Sweezy v. New Hampshire* case: the freedom of the institution "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." The federal regulations were definitely against the fourth academic freedom: to decide who may be admitted to study. Part of the admission offices' decisions became dependent on the external; that is, federal policy. The federal law had some unpredicted effects. In 1996 the Supreme Court of Ohio ruled (thus changing the previous judicial decision) that a blind person cannot be treated as "otherwise qualified" to attend a medical school's program of studies, because "an 'otherwise qualified' handicapped person is one who is able to safely and substantially perform an educational program's essential requirements with reasonable accommodation." The Court explained that no matter how talented the applicant is, in his future job he will need to use the judgment of an

[32] *Regents of University of Michigan* v. *State of Michigan,* 395 Mich. 52,235 N.W.2d 1 (1975).
[33] Rehabilitation Act of 1973 (29 U.S. 749).

assistant in evaluating X-Ray scans, so his future medical decisions will be dependent on the abilities and skills of his collaborators, not of his own.[34]

The other very important regulation interfering with the autonomy of universities and colleges is the *Family Educational Rights and Privacy Act* (FERPA, also referred to as the Buckley Amendment). In 1974 the original *Elementary and Secondary Education Act* of 1974 was amended by Senator James L. Buckley, who wanted to "set out requirements for the protection of privacy of parents and students."[35] State and federal courts believe, however, that the Buckley Amendment was not aimed at the protection of the privacy of students but "to stem the growing policy of many institutions to carelessly release educational information."[36] In the *Bauer v. Kincaid* case, the editor-in-chief of the student newspaper "Southwest Standard," Traci Bauer, filed against various officials of her school – Southwest Missouri State University. The starting point of the case was the policy announced by Paul Kincaid to keep security's "incident reports" closed to the public. Bauer claimed that she was entitled to access the reports under the Missouri Sunshine Law that demands that "all public records of public governmental bodies shall be open to the public for inspection and copying."[37] The United States District Court decided in favor of Bauer, stating that there is nothing in "legislative history which indicates that student criminals, witnesses or victims should be granted special privacy privileges" and ordered that "the plaintiff's request for a declaratory judgment is granted" since the criminal investigation and incident reports are not educational records.[38]

In 1976 Congress decided that HEIs must provide all current and prospective students with information concerning tuition, cost of books, transportation, housing and even names of teachers of courses to be attended by applicants. This law further amended Title IV of the Higher Education Act of 1965. The 101st Congress decided that the information provided by colleges and universities must contain graduation rates because it "would help prospective students and prospective student athletes make a uniformed judgment about the educational benefits available at a given institution of higher education."[39] This act of Congress, known as the Student-Right-To-Know, mandates that institutions' security reports must be provided not only to students but to all employees as well, and a summary must be given to every prospective student and employee–anybody who inquires about admission or employment, not only those who asked about this kind of security information.[40]

These steps made by the federal government in reducing the autonomy of HEIs seem to be relatively less important as compared to the impact of the *Grove City College v. Bell* case. Relatively small liberal arts Grove City College of Pennsylvania, refused to use any federal grants and contracts, demanding in turn the right to reject all federal regulations concerning higher education. The federal government threatened the college to terminate all federal programs of tuition assistance for the students. It is important to notice that the College did not want any direct federal contracts or grants,

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[34] 666 N.E.2d 1376 (Ohio Sup Ct. 1996).
[35] 34 C.F.R., sec. 99.2.
[36] D.D. Ghering, op.cit., p. 7.
[37] Missouri Open Records Act, (Chapter 610 RSMo).
[38] *Bauer v. Kincaid*, 759 F. Supp. 575.
[39] 20 U.S.C. §§ 1070-1099; P.L. 101-542, sec. 102, Nov. 8, 1990.
[40] Ibidem.

but Jim Carter's administration targeted the threats against students of the College receiving federal assistance. The decision of the federal government had a deep impact on the school, since many prospective students did not want to apply to a school where they would not be eligible for federal student grants and loans programs. In these circumstances Grove City College sued the government.[41]

In 1984, after four years of battle, the Supreme Court decided eventually that under the civil rights laws, regulations applied only to the College admission office, not to the rest of the institution. This decision of the Court was at first supported by the public whose sympathy inclined toward the little college seemingly fighting against the federal leviathan. However, very soon some of the civil rights organizations challenged that ruling again by saying that this decision allows the college to discriminate against groups of students. One of the most articulate supporters of the federal government was the National Organization of Women.[42]

In 1988, after another four years of quarrels and disputes, Congress passed the Civil Rights Restoration Act (known as the Grove City Bill), over President Ronald Reagan's veto.[43] According to the new law "all of the operations" of any state or local agency, educational system or institution were covered if any unit thereof received any federal financial assistance. All private or religious HEIs receiving any federal aid directly or indirectly (e.g. by means of the G.I. Bill, tuition grants or subsidized student loans) must follow all federal regulations. This marked the beginning of the doctrine that one penny of federal support makes the institution (not only educational) subject to all the federal regulations.[44] After the adoption of the Higher Education Act in 1965 some regulations became very specific and detailed. In the years 1965–1976 the number of pages in the *Federal Registry* devoted to higher education increased more than tenfold: from 92 to 1,000. In 1977 alone the government published ca. 1,000 pages monthly.[45]

Autonomy versus Control

Since the passing of the Higher Education Act in 1965 institutional autonomy has been challenged on an unprecedented scale, especially by the federal government. The quest for accountability made the national legislature eager to pass new regulations to avoid wasting the money of American taxpayers. Scholars examining the activity of federal and state governments in higher education came to the conclusion that three powers are most important: *money power*, *commerce power*, and *securing civil rights* of US citizens.

Money power (or spending power) is the right of the government to spend money on the activities considered to be useful for social and economic development of the

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[41] *Grove City College v. Bell,* 465 U.S. 555 (1984).

[42] H.D. Graham, "The Storm over Grove City College: Civil Rights Regulation, Higher Education, and the Reagan Administration," *History of Education Quarterly*, vol. 38, no. 4, Winter 1998, p. 408.

[43] The Civil Rights Restoration Act of 1988, (PL 100-259); Congress overrode the president's veto by comfortable margins of 73-24 in the Senate and 292-133 in the House.

[44] H.D. Graham, op.cit., p. 424; D.D. Ghering, op.cit., p. 9.

[45] H.D. Graham, op.cit., p. 411. The *Federal Register,* published daily since 1933, records all presidential proclamations, executive orders, and agency regulations; these are then codified annually in the *Code of Federal Regulations* (CFR).

state. This is the privilege to found new institutions, to sponsor new programs or to finance new research. By giving money and signing a contract with a college or a university, the government decides what should be done in the institution, and sometimes decides what should be taught and who should be admitted to the program. This is intended to support higher education, even to make it stronger, but it is done by infringing institutional autonomy: the actual decision is made by the government, not by the HEI. The use of public money calls for accountability, also controlled and regulated by the government.[46]

The second power is based on the widely accepted assumption that the government (especially federal) must secure equality in trade and commerce. The 20th century made students not only people that learn but consumers with their own rights. Therefore some regulations were imposed on HEIs just to be sure that all students and applicants are treated fairly. This is the reason why the Student-Right-to-Know Act was passed which forced colleges and universities to publish information that sometimes HEIs would like to keep secret.[47]

The most important and influential is the third regulatory power of the government – to secure civil rights. This authority substantially changed the American higher education system. The *Grove City College v. Bell* case is just an example that civil rights regulations made a deep impact on HEIs and their policies, including admission policy. Institutional autonomy seems to be of lesser importance as compared to overcoming social injustice and to supporting social advancement.[48]

The civil rights power of the government would not have any importance without money power. The ability to sponsor new programs, and to fund new activities of the HEIs plays a vital role in changing the attitude toward institutional autonomy. Colleges and universities could accept the position and activity of the state and most of all, the federal government because the approval of the regulations means more money to spend.[49]

In the 21st Century US colleges and universities must compete for students, applicants, faculty members, and research and capital investment grants. It is no longer possible to reject the support provided by federal and state governments. Therefore HEIs accept the offer: they use public money and in return they accept regulations infringing their independence in adopting missions, accepting students, and making other decisions. All this has caused the nature of institutional autonomy to change very much.[50]

Colleges and universities could no longer be "ivory towers," separated from the world outside; HEIs must be open to the challenges of modern society, otherwise higher education would easily become an irrelevant and costly institution. There is, however, the other side. The governments (especially federal) tend to impose much too detailed regulation, as if they have forgotten that: "To impose any straitjacket

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[46] L.W. Bender, *Federal Regulation and Higher Education*, Washington: American Association for Higher Education, 1977, pp. 1 and 20.

[47] D.D. Gehring, op.cit., p. 8; *Reauthorizing Higher Education Act. Issues and Opinions*, T.R. Wolanin (ed.), Washington: The Institute for Higher Education Policy, 2003, p. 129.

[48] D. Bok, op.cit., pp. 34–50; H.D. Graham, op.cit.

[49] L.W. Bender, op.cit., p. 35.

[50] D.D. Gehring, op.cit., p. 5; J.D. Jorgensen, L.B. Helms, "Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance," *The Review of Higher Education*, 32, 1, pp. 1–24.

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. Scholarship cannot flourish in an atmosphere of suspicion and distrust."[51] Thus, the governments must trust HEIs and not treat them as if they cannot make the right decisions and should always be led by hte hand.

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[51] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

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