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Constitutional Law--Does a Private College's Response to State Legislation Constitute State Action?

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But freedom of the press, precious and vital through it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task. 28

Roger D. Graham

11. Prenatal Examinations (Report of laboratory), W. VA. Code ch. 16, art. 4A, § 3 (Michie 1966);
12. Prostitution (Procuring female for house of prostitution W. VA. Code ch. 61, art. 8, § 7 (Michie 1966); (Marriage of prostitute and accused), W. VA. Code ch. 61, art. 8, § 8 (Michie 1966).
13. Public Assistance and Relief (Lists and records), W. VA. Code ch. 9, art. 11, § 16 (Michie 1966);
14. Records and Papers (Confidential records), W. VA. Code ch. 5, art. 8, § 13 (Michie 1966);
15. Religious Organizations (Communications to clergy), W. VA. Code ch. 50, art. 6, §§ 10, 11 (Michie 1966);
16. Sales Tax (When information obtained is confidential), W. VA. Code ch. 11, art. 15, § 27 (Michie 1966);
17. Tax Commissioner (No disclosure as to individual business information), W. VA. Code ch. 11, art. 1, § 4a (Michie 1966);


Constitutional Law—Does A Private College's Response To State Legislation Constitute State Action?

"College authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and . . . to that end they may . . . make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose."71

Wagner College, a privately supported Lutheran-affiliated liberal arts institution, expelled twenty-four of its students for refusing to vacate the office of the Dean. Plaintiffs were members of "Black Concern", a campus group organized to promote the interests of black students. Plaintiffs visited the Dean's office to arrange a meeting with Wagner College's president. When they failed to ar-

range a meeting the students refused to respond to the admin-
istration’s repeated demands that they leave the Dean’s office im-
mediately. Finally the Dean of Students in charge of student dis-
cipline delivered an ultimatum: unless the students (who were al-
ready suspended) released the Dean and vacated his office, they
would be expelled. The Dean was subsequently released, but the
students did not leave. Following several hours of “occupation”,
plaintiffs left the office after consulting with their attorney. There-
after, the plaintiffs were expelled from the college. Although the
notices of expulsion failed to specify the rules violated, the proce-
dures for appeal to the faculty council were explained. Unable to
convince the administration that it should suspend the expulsions,
plaintiffs were ejected from the campus prior to their appeal.

Plaintiffs then initiated an action in federal district court
alleging that Wagner College’s expulsion procedures violated pro-
cedural due process; and that Wagner’s hostility to blacks (exhibit-
ed by its failure to expel white students under similar circum-
stances) denied them equal protection. The district court denied
injunctive relief and dismissed the complaint for lack of juris-
diction. On appeal, plaintiffs asserted the disciplinary actions of
Wagner College (notwithstanding its affiliation with a religious
denomination and its almost complete reliance on private finan-
cing) were state actions, since the rules governing student behav-
ior were made in compliance with state law. Held, reversed and
remanded to the district court for a hearing on the question of
whether this compliance constituted state action in the disciplinary
policies of private colleges and universities. Coleman v. Wagner
College, 429 F.2d 1120 (2d Cir. 1970).

Wagner represents a unique twist to the expanding spectrum
of “state action” cases. The court found it vexing to agree with the
plaintiffs that state action existed because of the difficulty in
determining which state action theory applied. Judge Kaufman,

\[2\] Plaintiffs sought an injunction requiring Wagner College to reinstate
the expelled students pending a hearing, to conduct a hearing in conform-
ity with procedural due process, and to stop discriminatory expulsions of
blacks. The district court apparently limited its decision to whether the state
was responsible for the imposition of discipline by Wagner against the plain-

\[3\] See Note, Developments in the Law—Academic Freedom, 81 Harv. L.
Rev. 1045, 1056-64 (1968), for an explanation of the different theories the
courts have used in expanding the state action concept in civil rights cases.
The note writer grouped the various approaches into three categories: state
control (financial, administrative, or regulatory), indicia of control, and the
public function doctrine.
CASE COMMENTS

the author of the Wagner opinion observed that a common test employed to establish state action was whether "a private organization has undertaken to perform functions peculiarly 'public' in nature and traditionally entrusted to the state." However, the "public function" doctrine was not useful in Wagner because the preservation of internal order has customarily been a function of private colleges and universities. The Wagner court was concerned with whether state intrusion into this traditional sphere by requiring private colleges to formulate disciplinary regulations constitutes sufficient meddling to move private colleges within the ambit of the fourteenth amendment.

In light of plaintiff's affirmative assertions on this issue, the court noted that plaintiffs were not contending that all of the actions of Wagner College's administration constituted state action, but only those acts taken by Wagner in response to the state's legislation requiring colleges to formulate disciplinary regulations. The primary authority relied upon by plaintiffs was Judge Friendly's dictum in Power v. Miles: "state action would be . . . present [in a case involving campus demonstrations] if New York had undertaken to set policy for the control of demonstrations in all private universities." Does a response to a general order by the legislature to private individuals (i.e., colleges) constitute state action when the specific act was not subject to state approval. The court analyzed the nature of the alleged state action, comparing it with Public Utilities Commission of District of Columbia v. Pollak.

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6 Note that the West Virginia Board of Regents has deemed it necessary that the state owned and supported colleges and universities should have a codified policy regarding student rights and responsibilities. POLICIES, RULES, AND REGULATIONS REGARDING STUDENT RIGHTS, RESPONSIBILITIES, AND CONDUCT IN WEST VIRGINIA STATE UNIVERSITIES AND COLLEGES (1970).
7 N. Y. EDUCATION LAW §6450 (McKinney 1969) provides that:
1. The trustees or other governing board of every college chartered by the regents . . . shall adopt rules and regulations for the maintenance of public order on college campuses . . . and provide a program for the enforcement . . . (including penalties for violating those rules).
2. If the trustees . . . fails [SIC] to file the rules and regulations . . . (on time) such college shall not be eligible to receive any state aid or assistance . . .
8 407 F.2d 73 (2d Cir. 1968).
9 Id. at 81.
10 343 U.S. 451 (1952). Pollak represents the state action which results when a public agency of the government regulates a private business or individual. Here a public commission investigated and approved the installa-
and with *Smith v. Allwright*,\(^{11}\) two cases clearly involving state action. In *Pollak* the public commission that licensed and regulated the transit company had investigated the challenged practices and granted approval.\(^{12}\) However, in *Wagner* the court recognized that no state official or agency had ever expressed approval of Wagner's specific policies concerning its disciplinary procedure. Nor, as in *Smith*, was the expulsion of students by a private college an encroachment in an area normally reserved for state regulation. The analogy between *Wagner* and *Pollak, Smith* and other state action cases falters because the court in *Wagner* conceded that the use of the word "regulation" of order on campuses was meaningless since New York failed to declare itself a "reviewer" of private college regulations. The amended education law merely required all colleges to draft regulations dealing with campus order and to register them with designated state officials. The court did not conclude that *Wagner* acted as an agent of the state. Armed only with Judge Friendly's dictum in *Powe*, the majority sidestepped the issue of whether sufficient state involvement to make the specific art of disciplining errant students state action when the legislature generally required all colleges to adopt more stringent policies towards student demonstrations, without requiring approval by the state of those policies. The majority merely said that although the education law did not create state action on its face, it would be "cognizant of the possibility"\(^{13}\) that the legislature intended through the spirit of the law to gather private colleges and universities within its control and supervision.\(^{14}\)

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\(^{11}\) 321 U.S. 649 (1944). A state granted a political party the authority to control primary elections. The party's unconstitutional denial of the right to vote to Negroes was found to be state actions by proxy.

\(^{12}\) The commission had the preogative to approve or disapprove the playing of radio programs in the transit company's streetcars and buses. The commission could prohibit such activity if the conditions were considered unsafe, uncomfortable or inconvenient.

\(^{13}\) We are however, cognizant of the possibility that the statute may have been intended, or may be applied, to mean more than it purports to say. More specifically, (the education law) may be intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students.

\(^{14}\) The court noted that the legislature and the governor were anxious for passage of this education bill because of the unrest and disorder on college
While the majority in Wagner declined to rule that state action was present, Judge Friendly in a concurring opinion was not reluctant to go beyond his dictum in Powe and assert that Wagner involved state action. Judge Friendly believed that if the legislature wanted to deter campus disorder by requiring colleges to promulgate rules and regulations then the state should be responsible for “deterrence by excessive sanctions and lack of fair procedure for enforcement.” Judge Friendly was also concerned with the “symbolic appearance” of disciplinary regulations formulated by colleges in response to a state directive rather than on their own initiative. The legislature ordered all colleges to formulate rules to maintain order on campuses but did not require those rules to be approved by the state. However, if a college failed to file these rules, it would lose its eligibility for state aid. Although, Wagner College was free to formulate specific rules concerning the maintenance of order on its campus, Judge Friendly reasoned that it was a “significantly different symbolic appearance” for Wagner College to formulate its rules in compliance with a state order. Thus, Judge Friendly concluded that although Wagner College had complete freedom to devise the rules governing order on its campus, state action might exist if citizens reasonably believed Wagner College was acting pursuant to the state’s command.

Wagner is an example of the lower federal courts applying the state action concept to private colleges and universities. The procedural safeguards and privileges guaranteed to the individual by the United States Constitution are directed only against governmental action, not private action. If conduct by a college constitutes state action, students are entitled to the same constitutional right protected by the procedural safeguards of due process as is campuses. It quoted partially from Governor Rockefeller’s memorandum: “the intolerable situation on the Cornell University Campus dramatizes the urgent need for adequate plans for student-university relations and clear rules governing conduct on the campus.” 429 F.2d at 1124 citing 2 McKinney’s 1969 session Law 2546. 16 429 F.2d at 1126. 17 Judge Friendly illustrated this concept of “symbolic appearance” by remarking that Wagner College’s regulations were preceded by a statement that they were formulated in accordance with the amended New York Education Law, including section 6450 which was quoted in full. Id. at 1126. 18 E.g. Powe v. Miles, 407 F.2d 73 (2d Cir. 1969); Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968). 19 Civil Rights Cases, 109 U.S. 3 (1883).
every citizen. Although private colleges perform a public function, it does not logically follow that they either stand in the same position as the public schools or are subject to constitutional restraints on governmental action to the same extent as private persons who govern a company town; control a political party; operate a city streetcar and bus service; lease a restaurant in a city parking lot; or own a shopping center parking lot used as the community market place. Whether a private college is always "private" is not easily determined.

Howard University, which received a large percentage of its revenues from annual appropriations made by Congress, was held to be a private university notwithstanding the amount of governmental aid.

On the other hand state action clearly existed when the state legislature required Tulane University, a private university, to refuse admission to qualified blacks.

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20 Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).
26 The courts have generally found it difficult to distinguish the private action of private colleges from the public action of private colleges or the action of public colleges. E.g., cf. Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); and Hammond v. The University of Tampa, 344 F.2d 951 (5th Cir. 1965). Legal scholars, on the other hand, have recommended that this distinction be dropped. See, e.g., Goldman, The University and the Liberty of Its Students—a Fiduciary Theory, 54 Ky. L. J. 643, 650 (1966); Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 349 (1964); Van Alstyne, The Judicial Trend Toward Student Academic Freedom, 20 U. Fla. L. Rev. 290, 291-92 (1968).
27 Greene v. Howard University, 271 F. Supp. 609 (D.D.C. 1967), rev'd without reaching constitutional questions, 421 F.2d 1128 (D.C. Cir. 1969). In Greene, the court held that Howard University was not a governmental body irrespective of 1) the annual appropriations made by Congress; 2) the right of the Secretary of HEW to inspect and control Howard's spending of government funds; and 3) the requirement that Howard University's president and directors file an annual report with the Secretary.
In Grossner v. Trustees of Columbia University and Powe v. Miles, both decided prior to Wagner, state action advocates raised the issue of when private colleges and universities can be brought within the scope of the fourteenth amendment.

In Grossner, the plaintiffs who had actively participated in the 1968 riots at Columbia University, sought to enjoin the university from carrying out disciplinary actions. Plaintiffs relied on the Civil Rights Act of 1871 in alleging the federal courts had jurisdiction to enjoin Columbia University, a private institution. The court rejected plaintiffs' assertions that Columbia acted "under color" of state law and that state action was present, although Columbia received substantial government grants for research and development. Plaintiffs recognized Columbia was not a part of the state government but asserted that the "private" conduct of Columbia, which ordinarily is outside the scope of the fourteenth amendment, may be state action when there is sufficient state involvement. However, the court distinguished Grossner from Burton v. Wilmington Parking Authority because the state was not involved in any way with the disciplinary measures taken by Columbia.

In Powe v. Miles, the court found state action, but the plaintiffs were denied relief, since they had not been deprived of any constitutional rights following their violation of the university's dem-

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30 407 F.2d 73 (2d Cir. 1968).
31 Civil Rights Act of 1871, 42 U.S.C. (1964): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or proper proceeding for redress.
32 Plaintiffs relied upon the guidelines for state "involvement" formulated by Justice Clark in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1960), i.e. "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some extent the State in any of its manifestations has been found to have become involved in it." The Grossner court rejected the plaintiffs' notion of state involvement because, of the millions of dollars of government funds received by Columbia, only 20 percent originated from the State of New York. Moreover, the court asserted that the "receipt of money from the state is not, without a good deal more, enough to make the recipient an agency or instrumentality of the government." 287 F. Supp. at 547-48.
34 407 F.2d 73 (2d Cir. 1968).

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onstration guidelines. In *Powell*, Alfred University was under contract with the state of New York to operate the state ceramics college. The plaintiffs, students of the ceramics college, were dismissed for participating in an anti-war demonstration on the football field during a "parent's day" ROTC military review. Although the court held that the disciplinary proceedings conducted by Alfred University constituted state action, the University's demonstration guidelines as adopted and enforced by the Dean were not found to be an unreasonable denial of plaintiffs' fundamental rights. In response to the question of Alfred University's authority to restrict student demonstration on campus, the court noted that "London does not make all of Hyde Park available for speechifying."

The courts have been reluctant to interfere in the relationship between a student and a private college. Traditionally, private colleges have been free to regulate the academic and non-academic conduct of its students. If campuses continue to be marked by disorder, state legislatures may be tempted to enact legislation requiring colleges to adopt rules designed to maintain order on the campus. Whether a general order by a state legislature requiring private colleges to adopt rules, without expressly retaining the authority to approve them, constitutes state action is still unsettled. Wagner suggests there may be sufficient state involvement to constitute state action and thus, bring private colleges within the ambit of the fourteenth amendment.

William Charles Garrett

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*35 Students had the express right to demonstrate peacefully providing they adhered to certain guidelines including, *inter alia*, the allowance of access to and from exits of offices and buildings, avoidance of physical harassment and verbal abuse, avoidance of class disruptions, observance of the right of guest speakers to speak, and notice to the dean of students forty-eight hours in advance of any proposed demonstration.

*36 The student demonstrators were warned by the Dean of Students that they were violating Alfred University's policy on demonstrations and told that if they did not leave they would be disciplined. Plaintiffs failed to leave and were "provisionally suspended" pending a hearing to be held the following day.

*37 Alfred University's demonstration policy provided that only the Dean of Students had the authority to make initial judgments as to whether the guidelines were being observed. If the Dean suspended students for not following the guidelines, then those suspended had a right to an immediate hearing with a review board. Each side was permitted to present three witnesses with the right to cross-examine, and the only issue to be considered was whether the demonstrators had followed the guidelines.

*38 407 F.2d at 85.*