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The Hidden Research Regulator: How Federal Funding Shapes Academic Freedom

By: Anna Pociu

I. Introduction

Ia. Harvard v. HHS: A Flashpoint for Federal Funding in Higher Education

In June 2025, the US Department of Health and Human Services' Office for Civil Rights (OCR) announced that Harvard University violated Title VI of the Civil Rights Act of 1964 by "acting with deliberate indifference toward harassment of Jewish and Israeli students by other students and faculty from October 7, 2023, through the present."¹ Title VI prohibits discrimination "on the basis of race, color, or national origin,"² which the agency clarified includes bias based on "actual or perceived Israeli or Jewish identity or ancestry."³

The investigation concluded that "Harvard has been—and is—deliberately indifferent to the severe, pervasive, and objectively offensive harassment of Jewish and Israeli students by its own students and faculty."⁴ OCR's findings came from Harvard's internal policies, its Task Force on Combating Antisemitism and Anti-Israeli Bias, a congressional task force report, and media documentation of incidents of vandalism, harassment, and physical violence over a 19-month period at the university. Director Paula Stannard criticized Harvard's limited response, asserting that "Harvard's public pledges to improve its disciplinary framework for harassment and misconduct are inadequate to meaningfully address these serious findings."⁵ OCR further noted that between fiscal years 2023 and 2025, "Harvard and its subrecipients have received over \$794 million in Federal financial assistance from HHS."⁶

OCR proceeded to refer Harvard to HHS's Office of the Assistant Secretary for Financial Resources for suspension and debarment proceedings, citing the need to "safeguard both taxpayer investments and the broader public interest."⁷ As OCR explained, "Congress has empowered Federal agencies to pursue Title VI compliance through formal enforcement mechanisms, including the termination of funding or denial of future Federal financial assistance, when voluntary compliance cannot be achieved."⁸ This referral opened the door to an

¹ U.S. DHHS, "HHS' Civil Rights Office Finds Harvard University in Violation of Federal Civil Rights Law," HHS.gov, June 30, 2025, <https://www.hhs.gov/press-room/hhs-finds-harvard-in-violation.html>.

² U.S. Department of Justice, "Title IX of the Education Amendments of 1972," Justice.gov, August 6, 2015, <https://www.justice.gov/crt/title-ix-education-amendments-1972>.

³ U.S. DHHS, "HHS' Office for Civil Rights Refers Harvard University for Suspension and Debarment Proceedings | HHS.gov," Hhs.gov, September 29, 2025, <https://www.hhs.gov/press-room/ocr-refers-harvard-suspension-debarment.html>.

⁴ Supra note 1.

⁵ Ibid.

⁶ Ibid.

⁷ Supra note 3.

⁸ Ibid.

extraordinary possibility: the exclusion of Harvard University—one of the largest recipients of federal research funding and top research institutions worldwide—from future federal contracts and grants.

Ib. The “Soft Power” of Federal Research Funding

While framed as a civil rights enforcement action, the Harvard case reveals a deeper regulatory dynamic: the federal government’s power to govern universities through the conditionality of research funding. The OCR’s actions underscore that universities’ legal obligations are not enforced solely through courts or statutory mandates, but through administrative leverage over financial aid, research grants, and institutional eligibility.

The Harvard–HHS conflict serves as a publicly exposed inflection point in the evolution of federal research oversight. Through funding conditions, agencies like HHS and the Department of Education now influence not only compliance outcomes, but also internal policies, disciplinary systems, and speech norms of academic institutions. The threat of suspension or debarment functions as a regulatory instrument—one that can compel universities to conform to administrative expectations without new legislation or judicial rulings.

Federal research funding has become a latent regulator of university behavior in ways that challenge core academic freedom principles. Legal protections exist but are fragmented: a more coherent doctrine /guardrails are needed to protect academic freedom and institutional autonomy. This “hidden regulator” dynamic raises foundational questions about the balance between federal accountability and academic autonomy. When compliance with civil rights laws becomes intertwined with the financial survival of research institutions, universities may be forced to internalize priorities of current administrations in ways that reshape their governance, culture, research projects, and mission. Understanding the gravity of this possible transformation is essential to preserving the integrity of both fair and lawful federal oversight and the independence of American higher education.

II. The First Amendment and Academic Freedom

The First Amendment’s protection of free speech and expression establishes the constitutional foundation for academic freedom in American universities. When federal research funding is conditioned on institutional behavior or on policy changes, First Amendment concerns arise about whether the government is impermissibly leveraging financial dependency to regulate speech and inquiry at academic institutions.

IIa. *Keyishian v. Board of Regents*

The Supreme Court first articulated the constitutional dimension of academic freedom in the landmark case *Keyishian v. Board of Regents*, declaring that academic freedom “is a special

concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. P. 385 U. S. 603”.⁹ In this case, English instructor Harry Keyishian and four colleagues at the State University of New York at Buffalo challenged New York's Feinberg Law, which required faculty to sign loyalty oaths certifying they were not members of the Communist Party and threatened dismissal for "treasonable or seditious" speech or acts. Writing for the majority, Justice Brennan struck down these provisions as unconstitutionally vague, holding that “when one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone....”¹⁰ He expanded to warn that this chilling effect threatens not just university faculty but society itself, as academic freedom serves values that are “transcendent” and “of transcendent value to all of us and not merely to the teachers concerned.”

This decision recognizes an important principle to consider throughout this note: universities function as unique forums where free exchange of ideas is essential, as it is in a democratic society. The court states, “the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ United States v. Associated Press, 52 F. Supp. 362, 372.”¹¹

Iib. *Rust v. Sullivan*

The tension between government funding conditions and First Amendment protections comes into focus when considering precedent from *Rust v. Sullivan*, a case during which the Court upheld regulations that prohibited doctors in federally funded family planning clinics from counseling patients about abortion. Chief Justice Rehnquist's majority opinion held that when the government funds a specific program, it may define the scope of that program without violating the First Amendment. The opinion reasoned that the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."¹² Importantly, the Court acknowledged an exception to this for universities. Even while upholding content-based funding restrictions in the family-planning clinic context, the Court made sure to caution by citing Keyishian and adding that “we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”¹³

The Court's comparison of public forums and universities as both deserving of special protections reflects the constitutional recognition that both are zones where people should be free

⁹ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹³ *Ibid.*

to exercise their First Amendment rights without governmental viewpoint discrimination. This emphasizes that universities are constitutionally distinct in their role of generating knowledge through free inquiry, unlike government programs designed to convey specific governmental messages, and should be treated as such by applying heightened discretion to funding conditions which affect that freedom.

III. Architecture of Federal Research Funding in the United States

IIIa. The Basic Structures of Federal Research Funding

The federal government plays a very central role in the US higher education ecosystem, channeling billions of dollars of direct and indirect support for university research through major agencies including the National Institutes of Health (NIH), the National Science Foundation (NSF), and the Department of Defense (DoD). During the 2023 fiscal year, higher education institutions reported \$108.8 billion in research and development expenditures, with the federal government funding 55% (~ \$60 billion) of the total cost.¹⁴

These federal funds cover two very broad cost categories for research: direct costs, including expenditures that can be traceable to a single project and are budgeted with a high degree of accuracy (faculty and graduate student salaries, lab equipment and materials, travel costs for conferences) and indirect costs, which are also called facilities and administrative costs and support multiple projects and core institutional functions necessary to conduct research on specific projects (building operations, data storage, administrative services, safety and compliance oversight).¹⁵ Universities often negotiate indirect cost reimbursement rates with the federal government, typically ranging from 30% to 70%. In the first half of 2025, the NSF released policy changes implying they would look to levy a 15% indirect cost reimbursement rate for all R&D awards as part of sweeping research cuts by the Trump Administration to create “operational efficiency” at funded institutions and create opportunities for savings for federal agencies.¹⁶

IIIb. The Dependency of American Innovation on Federal Research Funding

The importance of funds in research is reflected in how critical indirect support is to research operations. A statement from the Association of American Universities (AAU) President Barbara R. Snyder following NSF’s announcement of indirect cost rate cuts illuminates this: “Indirect costs – are real and necessary costs for conducting the scientific research that benefits all Americans. A cut to the F&A reimbursement rate for NSF grants and cooperative

¹⁴ Michael T Gibbons, “Higher Education R&D Expenditures Increased 11.2%, Exceeded \$108 Billion in FY 2023 | NSF - National Science Foundation,” Nsf.gov, 2023, <https://nces.nsf.gov/pubs/nsf25313>.

¹⁵ MIT, “Direct and Indirect Costs | MIT Research Administration Services,” ras.mit.edu, February 24, 2025, <https://ras.mit.edu/grant-and-contract-administration/sponsored-projects-basics/direct-and-indirect-costs>.

¹⁶ Supra note 14.

agreements will mean, quite simply, fewer scientific innovations and breakthroughs for the American people – and all Americans will lose as a result.”¹⁷

University research is not just an academic luxury, it is a core driver of economic growth, technological leadership, and global competitiveness for the US. According to the AAU, research conducted by its member institutions produced more than 600 startups and nearly 5,000 patents in 2022 alone, and federally-funded university research supports over 500,000 businesses across the country. At the same time, the AAU reports that proposed federal research cuts (for example, a 22% reduction in total research funding and a 34% cut in basic research funding) threaten to reverse this engine of innovation.¹⁸

One analysis indicates that with the federal science funding that once fueled US dominance in patent output, journal publications, and key technologies under strain, the US share of global science funding and output has declined significantly. These funding strains also contribute to a “brain drain” in STEM education and the workforce that undermine the US's ability to compete globally, raising the spectre that America could cede technological leadership to rising competitors like China.¹⁹ Given that many universities rely heavily on federal funding for labs, faculty salaries, graduate programmes, and institutional infrastructure, these threats are not abstract: they represent tangible risks to the innovation pipeline, economic growth, and even national security.

IV. Mechanisms for Regulatory Control in Federal Research Funding

There is a clear structural reliance of universities on federal research funding, but this alone does not explain the impact of funding on academic freedom. To explore this, one must examine the ways in which funding becomes a tool of regulatory control.

Foundational legal frameworks, the so-called “hard” mechanisms for regulatory control, provide the groundwork on which Congress and Federal agencies embed conditions in the grant process. The regulatory character of funding emerges through not only these formal frameworks and through agency and grant-level conditions attached to awards, but through institutional responses to funding dependency that shape policy, research agendas, and governance. By tracing the doctrine of conditional spending, the administrative architecture of grant compliance, and the influence of funding dependence on institutional behavior, we can see how funding operates as a subtle but powerful regulator of academic life. This “soft power” of funding extends far beyond traditional legislation or oversight.

¹⁷ Barbara R. Snyder, “Statement of AAU President Barbara R. Snyder on Cuts to NSF Facilities & Administrative Research Costs | Association of American Universities (AAU),” Association of American Universities (AAU), May 2, 2025, <https://www.aau.edu/newsroom/press-releases/statement-aau-president-barbara-r-snyder-cuts-nsf-facilities-administrative>.

¹⁸ AAU, “Federal Research Cuts Threaten U.S. Innovation and Leadership | Association of American Universities (AAU),” Association of American Universities (AAU), July 23, 2025, <https://www.aau.edu/key-issues/federal-research-cuts-threaten-us-innovation-and-leadership>.

¹⁹ Julia Busiek, “Cuts to Federal Science Spending Will Cost Every American,” University of California, June 26, 2025, <https://www.universityofcalifornia.edu/news/cuts-federal-science-spending-will-cost-every-american>.

IVa. Precedent Establishing Limits for Hard Regulation of Federal Funds

IVa.1. The Morrill Act of 1862: The Federal Government takes a stake in higher education

The Morrill Act of 1862, formerly known as “An Act Donating Public Lands to the Several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts”, became the first major federal law to link federal resources to higher education in the United States. Under the Act, each eligible state received a “land scrip” of 30,000 acres of federal public land for each senator and representative in Congress, which were to be sold for the benefit of the states.²⁰

“SEC. 4. And be it further enacted, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.”²¹

The Morrill Act shows that federal funding has historically been a mechanism for the federal government to shape higher education. It created a clear model of federal funding being tied to institutional purpose, as the states only received the land grant if they accepted the conditions of the act, which included the creation of a qualifying institution and funds for a future endowment to continue the college. Although this act involved land rather than direct grants to universities, it establishes the principle of federal benefits being conditioned by certain actions: establishing a college, maintaining certain curriculum offerings, and even providing an annual report to the government as detailed below.

“Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other

²⁰ Act of July 2, 1862 (Morrill Act), ch. 130, 12 Stat. 503.

²¹ Ibid.

matters, including State industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail [free] by each, to all the other colleges which may be endowed under the provisions of this act, and also one copy to the Secretary of the Interior.”²²

As this note progresses, it will become clear that the Morrill Act foreshadows how institutions become intertwined with federal objectives when they accept federal support. In effect, the Act creates an historical regulatory precedent that institutions accepting federal benefits and funds are bound by federally-mandated obligations, much like the conditional federal research grants. Given that universities today depend on large volumes of federal resources, they implicitly and explicitly accept conditions, following the same pattern that evolved from Morrill. While attaching conditions to grants is a necessary and prudent precaution to both ensure the funding is used for its intended purpose and institutions operate within federal mandates, federal overreach and influence with political or policy-minded motives rather than for the non-partisan benefit of education could become a risk.

IVa.2. The Administrative Procedure Act

Enacted in 1946 and codified in 5 U.S.C. §§ 551–559, the Administrative Procedure Act, governs how federal agencies create and implement regulations, establishing safeguards that constrain agency discretion when they attach conditions to federal funding. In essence, the APA serves as a constitution for administrative law, promoting transparency and holding agencies accountable for their regulations.²³ Under this framework, agencies must publish proposed rules in the Federal Register, allow public comment, and provide at least 30 days before final rules take effect.

The APA's importance to federal research funding lies in its dual function: it both structures how agencies impose funding conditions and provides a mechanism for judicial review of the agency's actions. When agencies like HHS or the Department of Education establish new compliance requirements for grant recipients, these actions must satisfy APA procedural requirements unless they fall within narrow statutory exceptions. However, a critical tension emerges in the grant context: matters relating to "public property, loans, grants, benefits, or contracts" are explicitly exempted from APA notice-and-comment requirements under Section 553(a)(2).²⁴ This exemption means that agencies have more discretion to impose new conditions on federal research funding without the transparency and public input that characterize normal rulemaking.

IVa.3. South Dakota v. Dole: The Spending Clause and Leverage by the Federal Government

²² Ibid.

²³ 5 U.S.C. §§ 551-559, 701-706

²⁴ Ibid.

Through its Spending Clause authority, Congress has the authority to attach conditions to the receipt of federal funds by states, agencies, and private institutions. This power to condition spending on compliance with specific requirements has long served as a cornerstone of what can be referred to as ‘cooperative federalism’. This authority was most clearly articulated in *South Dakota v. Dole*, the Supreme Court answered the question whether Congress could lawfully distribute federal highway funds on the condition that states enact a minimum drinking age of 21. Congress had passed 23 U.S.C. § 158 in 1984, directing the Secretary of Transportation to withhold up to 5% of federal highway funds from any state in which the purchase or public possession of alcoholic beverages by persons under age 21 was legal. The state of South Dakota, which allowed anyone aged 19+ to purchase 3.2% beer, challenged this. They claimed that Congress did not have the constitutional authority to withhold funds in exchange for regulation change²⁵.

The Court upheld Congress’s conditioning of highway funds on the adoption of the minimum drinking age at 21. Chief Justice Rehnquist’s majority opinion established that funding conditions are permissible if they (1) pursue the general welfare, (2) are unambiguous, (3) are related to the federal interest in the program, and (4) do not violate other constitutional provisions. Importantly here, the Court also cautioned that financial inducement must not become coercion: “Congress is not empowered to achieve directly, but, instead, means that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional”.

While *Dole* addresses state compliance, the same doctrinal structure is applied to the federal relationship with universities. When a university accepts federal research dollars, it enters into a conditional regime like the state-funding model in *Dole*. The Court explains, “Our decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”²⁶

Federal agencies can also attach requirements for research funding. These often come in the form of nondiscrimination certifications, reporting obligations, indirect cost rate negotiations, or compliance with civil rights mandates. These funding controls need to comply with *Dole* criteria to be constitutionally permissible, including lacking possibility of coercion. However, in this research context, issues emerge: unlike a state with diversified funding, a research institution might depend heavily on federal grants. This also raises questions about whether “choice” is meaningful in academic research and whether threatening to pull substantial funding becomes coercive in effect even if not explicitly said or even implied. What began as a fiscal tool has evolved into much more of a regulatory ecosystem: continued access to federal funding depends on adherence to a complex architecture of administrative expectations, which could lead to increasing incidences of coercion.

²⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987)

²⁶ *Ibid.*

IVa.4. National Federation of Independent Business v. Sebelius (2012)

In *National Federation of Independent Business v. Sebelius*, the Supreme Court established constitutional limits for Congress's spending power, clarifying the existing *Dole* doctrine. The case challenged the Affordable Care Act's Medicaid expansion, which required states to extend coverage to additional low-income individuals or risk losing all existing Medicaid funding.²⁷ In this case, Chief Justice Roberts held that while Congress possesses broad authority to condition federal funds under the Spending Clause (*Dole*), financial inducements cannot be so coercive that they "pass the point at which pressure turns into compulsion."²⁸ With this precedent, threatening states with loss of all Medicaid funding (representing over 10% of most state budgets) constituted unconstitutional coercion rather than permissible incentive.

This holding can be applied to research universities, as it focuses on entities heavily dependent on federal funds. It clarifies that they face qualitatively different pressures than entities in truly voluntary transactions: the Constitution prohibits the government from exploiting this dependency to impose conditions it could not directly mandate. The decision also emphasized that conditions must relate to the federal program's purpose and that recipients must have clear notice when accepting funds, establishing that financial leverage has constitutional limits.

IVb. "Soft Regulatory Control" via Eligibility Influence

IVb.1. Grove City College v. Bell: Title IX eligibility to receive funds

In *Grove City College v. Bell*, the Supreme Court addressed whether a private liberal-arts college that accepted no direct federal institutional aid but enrolled students who received federally-funded Basic Educational Opportunity Grants (BEOGs) could be requested to comply with § 901(a) of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in "any educational program or activity receiving federal financial assistance."²⁹ The College refused to execute an Assurance of Compliance with the Department of Education's regulations, prompting the department to initiate proceedings to terminate the federal assistance to students of the college unless the Assurance was executed.³⁰ The Court held that the college was a "recipient" of federal assistance and thus subject to Title IX obligations because the BEOGs received by the students constituted indirect federal financial assistance to the institution. With this, the court upheld the termination of the student grants and valid conditions for funding, stating that "the Department's sex discrimination regulations made clear that

²⁷ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

²⁸ Supra note 25.

²⁹ U.S. DOE, "Title IX and Sex Discrimination," U.S. Department of Education, 2025, <http://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination>.

³⁰ *Grove City Coll. v. Bell*, 465 U.S. 555 (1984)

"[s]cholarships, loans, [and] grants . . . extended directly to . . . students for payment to" an institution constitute federal financial assistance to that entity....”³¹

Grove City College established a clear precedent: the federal government may condition eligibility to receive federal funds on institutional compliance with specific requirements. Although this case arose under an anti-discrimination statute rather than research grants, the underlying logic of the case translates quite directly to the funding-for-research context: once an institution accepts federal dollars (even indirectly, as in this case), it becomes enmeshed in a regulatory regime and may be required to execute assurances, adopt policies, or submit to additional oversight to retain these funds. Research universities that participate in federal grant programs are drawn into additional conditions that qualify their grant reception, including reporting, nondiscrimination certifications, indirect cost limitations, and (related to the flashpoint of this note) policy-alignment directives. To put it plainly, the decision reveals how federal funding functions as a regulatory trigger: it is not only the direct recipient who is regulated, but the institution as a whole when federal funding is involved surrounding it and within it.

IVb.2. Sherley v. Sebelius: A note on research eligibility for funding

In 2009, the NIH adopted new guidelines for federal funding of human embryonic stem cell (hESC) research. The plaintiffs, researchers James L. Sherley and Theresa Deisher, whose work centered around adult stem-cell research rather than embryonic cell research, challenged the policy and filed a complaint against the Secretary of Health and Human Services and the Director of the NIH.³² They alleged that by allowing federal funding of hESC-line research, the NIH had violated the Dickey-Wicker Amendment, which prohibits federal funding for research in which human embryos are destroyed. Additionally, they alleged that the NIH’s adoption of those different guidelines had violated the Administrative Procedure Act by being “arbitrary” and “capricious”.³³

689 F.3d 776 (D.C. Cir. 2012):

“Specifically, they asserted and assert now that the Dickey-Wicker ban ‘unambiguously’ extends to any research project that uses ESCs. Sherley, 644F.3d at 395. Their argument, now and before, is that if a funded research project involves the use of an ESC, then an embryo necessarily has been destroyed, and the ban of Dickey-Wicker has been violated.”³⁴

“Applying Chevron analysis, see *Chevron U.S.A., Inc., v. NRDC*, 467 U.S.837, 842-43 (1984), we held that NIH had reasonably interpreted Dickey-Wicker’s ban on funding ‘research in which . . . embryos are destroyed’ to allow federal funding of ESC research.

³¹ Ibid.

³² *Sherley, et al. v. Sebelius, et al.*, No. 11-5241 (D.C. Cir. 2012)

³³ Ibid.

³⁴ Ibid.

Sherley, 644 F.3d at 393-96. We explained that ‘research’ as used in Dickey-Wicker was a ‘flexible’ (i.e., ambiguous) term.”³⁵

The Court of Appeals affirmed the summary judgement for the government by holding that the Dickey-Wicker Amendment is ambiguous with respect to whether research in which embryos are destroyed should be read to cover only the actual act of destroying the cells or also include any subsequent research on the cell lines. The Court also concluded that the NIH’s decision-making process did not constitute arbitrary or capricious agency action.³⁶

Sherley demonstrates a very crucial mechanism by which the federal funding machine regulates not only through conditions on grants but also through eligibility and interpretive definitions of what research may be funded at all. By interpreting a statute like the Dickey-Wicker Amendment in a way that enables more broad funding eligibility or excludes certain topics, the NIH effectively shapes the research agenda of academic institutions. This case seems to underscore how institutional autonomy can be mediated by participation in federal funding: when researchers and universities depend on federal grants, they have to align not only with explicit grant conditions but also policy frameworks that govern eligibility.

IVc. Self-Sensorship and Institutional Adaptation

The more latent power of federal funding does not manifest itself solely through explicit regulatory conditions or more formal enforcement actions, but it also operates through more subtle pressures to shape institutional behavior, research agendas, and academic freedom of speech.

IVc.1. Sweezy v. New Hampshire

In *Sweezy v. New Hampshire*, the Supreme Court confronted the possibility of imposing broad legislative investigative power into academics. Paul Sweezy, a self-described Marxist and socialist and university professor at the University of New Hampshire, was subpoenaed twice by the New Hampshire Attorney General to answer questions about both the content of a lecture at the University of New Hampshire and his association with the Progressive Party.³⁷

Sweezy refused to answer those questions on grounds that they are “not pertinent to the inquiry” and violated his First Amendment rights.³⁸ The Attorney General petitioned the Superior Court to compel answers from him, and the trial court ruled the questions pertinent, holding Sweezy in contempt when he continued to refuse to comply. The New Hampshire Supreme Court affirmed the contempt conviction and Sweezy appealed to the Supreme Court. The Court held that the New Hampshire’s inquiry, without adequate legislative oversight or

³⁵ Ibid.

³⁶ Ibid.

³⁷ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)

³⁸ Ibid.

sufficiently focused purpose, did in fact violate the Due Process Clause of the 14th Amendment when it coerced disclosures that encroached on Sweezy's academic freedom and freedom of political associations,

354 U. S. 234, 354 U. S. 250:

"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."³⁹

While this case did not arise in the context of federal research funding, its reasoning speaks directly to institutional adaptation in the face of oversight and conditionality. When universities (or their faculty) anticipate that funding (or eligibility for it) may trigger scrutiny over speech, association, or research content they may start to shift their behavior to self-sensor controversial topics and avoid any inquiries that may lead to reviews of sorts. The Sweezy framework helps to conceptualize how even very indirect regulatory pressure can put a significant chill on academic freedom by instilling a culture of pre-emptive compliance.

In the modern funding environment, institutions may start to anticipate conditions attached to grants and start to adjust what they research accordingly. It could be argued that this pre-emptive compliance shifts institutional governance, hiring, and research agendas before any formal enforcement ever could: this is the "straight jacket" that the Court warned against: not imposed overtly, but adopted internally in fear of jeopardizing funding and prestige as a higher education institution. Thus, Sweezy anchors the idea that self-sensorship and institutional adaptation are part of the "regulatory toolkit" — often treated by universities as part of the cost of funding participation — and highlights how academic freedoms may start to erode not only through direct regulation or sanctions on certain research, but also through the threat of withdrawal of support.

Recent empirical data show that many faculty members believe their academic freedom may be under threat and report altering their behavior accordingly. A survey conducted by Inside Higher Ed and Hanover Research found that more than 40% of responding faculty across a wide range of public and private two and four-year institutions said their sense of academic freedom in teaching declined over the previous year and 20% said the same for research. Unsurprisingly,

³⁹ Ibid.

91% of responding faculty responded that they agree that academic freedom is under threat in higher education.⁴⁰

Following federal funding shifts and policy threats, major research universities have begun altering their internal funding strategies or re-allocating resources to stabilize their research portfolios. For example, in May 2025, Harvard University reallocated \$250 million to continue research throughout the federal funding freeze imposed by the Trump Administration and Johns Hopkins University began offering faculty and labs affected by the stop-work orders \$150,000 annually to cover ongoing research costs to continue projects.⁴¹ While this case involves reactive budget decisions rather than overt self-censorship of topic choices, the underlying mechanism is the same: institutional decisions around research funding and agenda-setting are shaped by the landscape of federal funding eligibility, compliance expectations, and covert regulatory dynamics.

IVc.2. Whitehill v. Elkins

In *Whitehill v. Elkins*, an applicant to a faculty position at the University of Maryland challenged the constitutionality of a state-imposed loyalty oath as a condition for employment at the university.⁴² This oath required certification that the applicant was not “engaged in one way or another in the attempt to overthrow the Government...by force or violence”.⁴³ This issue was brought to the Court to determine if that oath requirement violated the Due Process Clause in the 14th Amendment (and, more implicitly, academic freedom) by being unconstitutionally vague in the sensitive context of higher education employment.

Justice Douglas, writing for the Court, stated that the oath derived its authority from Maryland’s Ober Act, which defined “subversive person” in what he cited as overly vague and sweeping terms. The Court found that the statute definitions and underlying oath itself were unconstitutionally vague, particularly for academic employment purposes.

389 U.S. 54

“We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom. As we said in *Sweezy v. New Hampshire*, 354 U. S. 234, 354 U. S. 250: ‘The prescribed oath requires, under threat of perjury, a statement that the applicant is not engaged “in one way or another” in an attempt to overthrow the Government by force or violence’.”⁴⁴

⁴⁰ Inside Higher Ed, “2025 Survey of College and University Presidents | inside Higher Ed,” Inside Higher Ed | Higher Education News, Events and Jobs, 2025, <https://www.insidehighered.com/reports/2025/02/25/2025-survey-college-and-university-presidents>.

⁴¹ Collin Binkley, “Harvard to Self-Fund Some Research to Offset Cuts to Federal Grants,” AP News, May 14, 2025, <https://apnews.com/article/harvard-trump-research-funding-universities-560292a39b4ec4fe473ed1f91d89f556>.

⁴² *Whitehill v. Elkins*, 389 U.S. 45 (1967)

⁴³ *Ibid.*

⁴⁴ *Ibid.*

Although *Whitehill* did not involve federal research funding directly, its rationale is highly related to the concept of censorship and covert regulation of academic freedoms. The case demonstrates how external conditionality, here a loyalty oath, imposes real and immediate indirect constraints on academic faculty. In essence, the threat of forced certification and surveillance affects who may teach, what they teach, and how they choose to speak or research. Translating this to a federal-funding context: when institutions accept federal grants with binding certifications or policy compliance regimes, they may internalize limits similar in effect to a “loyalty oath” type of condition to not risk losing funding. Thus, *Whitehill* helps show how the regulatory architecture of funding can foster self-censorship.

IVc.3. USAID v. Alliance for Open Society International, Inc.

In *USAID v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), the Supreme Court established a foundational principle: limiting the government's ability to impose ideological conditions on federal funding that has profound implications for academic research institutions. The case is based in a challenge to a provision of the US Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, which required organizations receiving federal funds to combat HIV/AIDS to adopt “a policy explicitly opposing prostitution.”⁴⁵ Writing for the majority, Chief Justice Roberts held that this requirement violated the First Amendment, citing that it would have compelling grant recipients to adopt a particular viewpoint as a condition of federal funding.

The Court distinguished between conditions that define the guardrails of a federally funded program (which the government can and should legitimately impose) and conditions that seek to leverage funding to regulate recipients' speech outside of the program itself. The Court found that this policy requirement fell into the unconstitutional category because it compelled organizations to espouse a specific belief even in their privately funded activities and general advocacy work unrelated to the federal grant.

As Chief Justice Roberts explained, “this case is not about the Government’s ability to enlist the assistance of those with whom it already agrees. It is about compelling a grant recipient to adopt a particular belief as a condition of funding. By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects ‘protected conduct outside the scope of the federally funded program.’ *Rust*, 500 U. S., at 197.”⁴⁶ Thus, in this case, conditioning federal funding would effectively be compelling speech beyond the funded program's scope. Applying *Alliance* to the current federal funding landscape, the decision recognizes that while Congress can choose which research priorities to fund and define the scope of funded projects, it cannot use financial leverage to compel institutions or researchers to adopt official positions on policy, political issues, or scientific debates beyond the immediate research being supported.

⁴⁵ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013)

⁴⁶ *Ibid.*

V. Current and Emerging Policy Moves in Federal Funding

As the newest administration has taken office, federal research funding has entered a period of transition. Once viewed very primarily as a tool to advance innovation, discovery, and institutional capacity in American higher education, federal grants and subsidies for institutions have been recalibrated as tools for policy and power. New executive directives now emphasize stricter oversight of grants, explicit alignment of awards with national political priorities, and more conditions for eligibility — including indirect-cost caps discussed in section II and often ideological criteria linked to wider institutional behaviors and research themes.

At the same time, large-scale research universities and their faculty who have long been reliant on federal backing from entities like the NSF and NIH have been confronted with the prospect that continued access to funding may depend on compliance not only with scientific criteria but with shifting policy expectations. A message to the Harvard community on the website of the Office of the Vice Provost for Research confirms this: “Many federal agencies are updating their policies and solicitations in response to recent Executive Orders and related federal agency directives. We know that our community is closely following these developments and may have questions about impacts to their own research. The regulatory environment and agency-specific orders and requirements are changing rapidly. Harvard leadership continues to monitor these developments closely, and we will update this page frequently as we learn more.”⁴⁷

In this light, the following discussion moves beyond an analysis of the programmatic support for university research to examine the extent to which federal funding now, as of November 13th, 2025, functions as a regulatory instrument and influences not only what research gets done, but how universities govern themselves, what they teach, who they hire, and how they define “acceptable” scientific inquiry.

Va. Winter 2025 NSF Grant Cuts and Keyword Scrutiny

In early 2025, the NSF undertook sweeping terminations of active grants that research indicates were overwhelmingly tied to projects including keywords such as “diverse”, “underrepresented”, “gender”, and “sexual orientation.” A July 2025 report by the Urban Institute found that nearly 90% of all cancelled awards included at least one DEI-related keyword, compared with about half of non-cancelled grants.⁴⁸ In April 2025, NSF explicitly cancelled grants related to disinformation, misinformation, and DEI initiatives, which was an institutional shift described as part of “deep and sweeping cuts” by the current Trump

⁴⁷ Harvard University, “Updates on 2025 Federal Research Policy Changes – Office of the Vice Provost for Research,” Harvard.edu, 2025, https://research.harvard.edu/research-policies-compliance/2025-federal-policy-changes/?utm_source=chatgpt.com.

⁴⁸ Jonathan Schwabish and Judah Axelrod, “NSF Has Canceled More than 1,500 Grants. Nearly 90 Percent Were Related to DEI,” Urban Institute, July 9, 2025, <https://www.urban.org/urban-wire/nsf-has-canceled-more-1500-grants-nearly-90-percent-were-related-dei>.

Administration.⁴⁹ By early May the NSF had cancelled more than 1,400 existing grants, representing over a billion dollars in support for research and training.⁵⁰ Moreover, 16 states filed suit against the NSF for its cap on indirect-cost recovery and termination of diversity-related research projects.⁵¹

This round of sweeping cuts to federally funded research demonstrates how funding agencies are reshaping not just processes or conditions, but what eligible research is. Research proposals focused on women, racial equity, or LGBTQ+ issues face heightened risk of cancellation: this reveals how funding dependency induces self-censorship. As a result of these funding cuts, institutions and researchers will likely begin to avoid topics flagged as “risky” or dependent on shifting administrative priorities even if technically they are eligible.

Coupled with grants being revoked after award (rather than only at renewal), the threat becomes immediate to those whose livelihoods depend on funding from grants to continue research. For example, one project supporting a peer-review journal dedicated to women in STEM was abruptly terminated: “We received notification last week from the National Science Foundation that the remaining three years of our grant have been canceled. The grant funded a credible, peer-reviewed academic journal, the ADVANCE Journal: Individual and Institutional Transformation for Social Justice, which focused on supporting women in academic STEM fields and advancing the knowledge base that informs higher education theory, institutional transformation and workplace satisfaction.”⁵²

An analysis by the AAU of the funding landscape shows that NSF awards are down nearly 50% compared to recent years, while the NIH reported declines of nearly 29%.⁵³ The effects of this will ripple beyond university labs: one study estimated that cuts to NIH and NSF would cost the U.S. economy between \$10 B and \$16 B annually in lost output and potentially result in the loss of 70,000 jobs.⁵⁴ Unfortunately, this disruption is not just economic — it will have a long-lasting impact on research institutions and early-career scientists, whose programs are being shuttered or redirected. This year, field-changing STEM education and broad-participation programs (many led by women and underrepresented groups) have been

⁴⁹ Sarah Scire, “National Science Foundation Cancels Research Grants Related to Misinformation and Disinformation,” Nieman Lab, 2025, <https://www.niemanlab.org/2025/04/national-science-foundation-cancels-research-grants-related-to-misinformation-and-disinformation/>.

⁵⁰ Paul Bierman, “Cuts to the National Science Foundation Endanger Wealth of Research,” upi.com (United Press International, May 15, 2025), <https://www.upi.com/Voices/2025/05/15/national-science-foundation-cuts-dangers/2111747317001/>.

⁵¹ Ben Unglesbee, “16 States Sue National Science Foundation over Wide-Reaching Research Cuts,” Higher Ed Dive, May 30, 2025, <https://www.highereddive.com/news/16-states-sue-national-science-foundation-research-cuts-indirect-costs-dei-grants/749339>.

⁵² Susan Shaw, “The National Science Foundation Canceled Our Grant Because It Focused on Women,” Ms. Magazine, May 13, 2025, <https://msmagazine.com/2025/05/13/national-science-foundation-funding-women-science-stem-health/>.

⁵³ Supra note 18.

⁵⁴ Steve Bonitatibus, “Mapping Federal Funding Cuts to U.S. Colleges and Universities,” Center for American Progress, July 23, 2025, <https://www.americanprogress.org/article/mapping-federal-funding-cuts-to-us-colleges-and-universities>.

disproportionately affected by the funding cuts. The NSF itself reported that projects “to broaden participation” were heavily impacted, and many of those being cut are led by Black scientists, women, and those with disabilities. “Biologist Jo Handelsman of the University of Wisconsin–Madison says she is not surprised that researchers from underrepresented groups were more likely to feel the ax than their white, male colleagues. ‘These scientists are more likely to do work on interventions intended to broaden participation in science,’ she says.”⁵⁵

Furthermore, with all of the uncertainty, universities are being pushed to re-evaluate priorities which often includes freezing hiring cycles and redirecting resources. Thus, because financial survival is tied to federal approval, the boundaries of inquiry, institutional planning and academic freedom are constrained in a subtle yet extremely damaging way.

Vb. October 2025 Compact for Academic Excellence in Higher Education

On October 1, 2025, the White House and the Department of Education sent formal letters to nine top US universities inviting them to enter the Compact for Academic Excellence in Higher Education. The invitation offered these institutions “preferential access to ‘multiple positive benefits,’ including ‘substantial and meaningful federal grants’ as well as invitations to White House events and discussions with Administration officials.”⁵⁶ These institutions included Massachusetts Institute of Technology, Brown University, Dartmouth College, University of Pennsylvania, University of Virginia, University of Arizona, University of Texas at Austin, University of Southern California, and Vanderbilt University.

The Compact itself is structured around eight broad policy categories including equality in admissions, marketplace of ideas & civil discourse, institutional neutrality, financial responsibility, and foreign entanglements. Among other commitments, it asks institutions to comply with various directives: prohibit consideration of race, ethnicity, sexual orientation, sex, and gender identity in the admissions and hiring process; cap international student enrollment at 15%⁵⁷; revise campus governance/academics including “transforming or abolishing institutional units that purposefully punish, belittle, and even spark violence against conservative ideas”⁵⁸. Most crucially to this thesis, the Compact states that institutions “are free to develop models and values other than those below, if the institution elects to forego federal benefits.” With this in mind, the Compact does not provide a legal basis for giving universities preferential funding access for conforming, yet does ominously note that the federal government has historically

⁵⁵ Jeffrey Mervis, “NSF’s Grant Cuts Fall Heaviest on Scientists from Underrepresented Groups,” *AAAS Articles DO Group*, May 16, 2025, <https://doi.org/10.1126/science.zvh1h57>.

⁵⁶ Mark Barnes et al., “White House Invites Nine Universities to Enter ‘Compact’ in Exchange for Access to Federal Funds and Other Benefits,” *Ropesgray.com*, October 8, 2025, <https://www.ropesgray.com/en/insights/alerts/2025/10/white-house-invites-nine-universities-to-enter-compact-in-exchange-for-access-to-federal-funds>.

⁵⁷ Sai Sankar, “White House Compact Sets 15% Cap on International Undergrad Enrollments,” *Visaverge.com*, 2025, <https://www.visaverge.com/news/white-house-compact-sets-15-cap-on-international-undergrad-enrollments/>.

⁵⁸ David Lewis, “MIT AAUP Chapter on the ‘Compact for Academic Excellence in Higher Education’ - MIT Faculty Newsletter,” *MIT Faculty Newsletter*, October 11, 2025, <https://fnl.mit.edu/october-2025/statement-on-the-compact-for-academic-excellence-in-higher-education>.

supported institutions through: “(i) access to student loans, grant programs, and federal contracts; (ii) funding for research directly or indirectly; (iii) approval of student and other visas in connection with university matriculation and instruction; and (iv) preferential treatment under the tax code.”⁵⁹

The Knight First Amendment Institute at Columbia University presents legal analysis that argues the Compact is unconstitutional because it conditions receipt of federal benefits on institutional forfeit of core First Amendment rights.⁶⁰ The Compact would allow the federal government invasive control, and institutions are not built to teach in alignment with an administration’s current ideological agenda.

The response from the academic community was swift and strongly critical. The MIT AAUP Chapter warned that the phrase “limited, targeted feedback to ensure mutual alignment” demonstrated the Compact’s clear purpose: a demand for conformity to a political agenda. They continue: “We urge MIT leadership and the MIT Corporation to reject the Compact wholesale. Federal funding for higher education research should be based not on political litmus tests, but on academic, scientific, and intellectual criteria that serve the nation and the world.”⁶¹ As of mid-November 2025, seven of the nine universities initially invited to join the Compact have formally rejected it. The remaining two remain undecided or have continued to engage in dialogue rather than sign.⁶²

The mechanism of the Compact is a clear case of conditionality. Federal benefits were offered and threatened to be withheld, based on the compliance of an institution with reforms that go beyond research or program administration. Because large US research universities rely heavily on federal funding, the “choice” posed (sign and receive enhanced benefits OR decline and risk disadvantage) is undercut by institutional dependency. This also signals that preferential funding is being offered as a bargaining tool rather than simply expanded grant access. This raises significant concerns referencing back to the conditional-spending doctrine about whether the offer is genuinely voluntary or in fact coercive. Moving forward, the effects of the Compact and any future similar directives will depend on how many institutions comply, how strictly compliance is monitored, and if the federal government enforces the penalties it signalled it might.

Vc. The University of Virginia’s “Dual Posture”

⁵⁹ John R. Vile, “Compact for Academic Excellence,” The Free Speech Center, October 15, 2025, <https://firstamendment.mtsu.edu/article/compact-for-academic-excellence/>.

⁶⁰ Amanda Shanor and Serena Mayeri, “A Brief Legal Analysis of the Department of Education’s Proposed Compact for Higher Education,” Knight First Amendment Institute, 2015, <https://knightcolumbia.org/blog/a-brief-legal-analysis-of-the-department-of-educations-proposed-compact-for-higher-education>.

⁶¹ Supra note 58.

⁶² Alan Blinder, “All but 2 Universities Decline a Trump Offer of Preferential Funding,” *The New York Times*, October 20, 2025, <https://www.nytimes.com/2025/10/20/us/politics/universities-funding-compact.html>.

On October 17, 2025, UVA rejected the Compact offered by the federal government, Interim President Paul Mahoney stated the following: “seek[s] no special treatment in exchange for our pursuit of ... foundational goals. The integrity of science and other academic work requires merit-based assessment of research and scholarship. A contractual arrangement predicated on anything other than merit will undermine the integrity of vital, sometimes lifesaving, research and further erode confidence in American higher education.”⁶³

Simultaneously, UVA was reaching an agreement with the DOJ to pause a civil-rights investigation in exchange for UVA’s commitment to the administration’s new DEI policies. Under this, UVA must provide quarterly compliance reports through 2028, explicitly certify adherence to federal civil-rights laws, and restructure and eliminate certain DEI-related arrangements and programs throughout the university.⁶⁴ This “dual posturing” by rejecting the Compact but trading DEI compliance through a negotiated pause in investigations goes to illustrate the complex regulatory leverage embedded in the federal funding system. While UVA did affirm its independence in governance it nonetheless had to navigate through a framework that attaches funding eligibility to institutional compliance.

VI. Policy Review: Rebalancing Federal Oversight and Academic Freedom

It is becoming clearer and clearer that federal funding is one of the most powerful (and least democratically visible) mechanisms for regulating research and higher education in the US. Agencies like the NSF, DOD, HHS, and Department of Education do not just allocate funding for institutions, they condition it on compliance in a growing and politically shifting atmosphere. While grant conditions are often justified on their own terms (preventing discrimination, ensuring ethical treatment of human subjects, protecting national security) they also expand federal influence. The American Political Science Association has condemned the use of funding threats to condition institutional behavior, calling such tactics “a dangerous strategy... undermining the basic principles of academic freedom.”⁶⁵

Via. Implications for Institutional Autonomy

When universities accept funding, they agree to a set of external expectations in grant terms, agency policy guidance, and administrative communication. For example, the NSF announced in 2025 that it would not prioritise research proposals that aim to combat

⁶³ Brian Coy, “UVA Declines Invitation to Join Federal Education Compact,” UVA Today, October 17, 2025, <https://news.virginia.edu/content/uva-declines-invitation-join-federal-education-compact>.

⁶⁴ Bianca Quilantan, “Justice Department Finalizes Deal with University of Virginia to Pause Civil Rights Probes,” POLITICO (Politico, October 22, 2025), <https://www.politico.com/news/2025/10/22/doj-announces-deal-with-uva-to-pause-civil-rights-investigations-00619061>.

⁶⁵ American Political Science Association, “Statement on the Academic Freedom and Independence of U.S. Institutions of Higher Education,” *Apsanet.org* (American Political Science Association, April 8, 2025), <https://apsanet.org/wp-content/uploads/2025/04/FINAL-Statement-on-Academic-Freedom-at-Universities.pdf>.

“misinformation”, “disinformation”, or “malinformation” in ways that might “advance a preferred narrative” about matters of public debate.⁶⁶ Simultaneously, the agency was cancelling over 1500 grants, with ~90% of the cancellations including a set of “DEI” related keywords.⁶⁷

These recent developments highlight the shifting role of funding agencies within the funding ecosystem, as they now shape what is considered eligible, acceptable, and intellectually tolerable research. With this, institutional autonomy is being compromised. As institutions grow more dependent on federal funds for labs, indirect cost recovery, graduate fellowships, and overhead, compliance becomes a survival strategy.

VIb. Research Agenda Constraints

The threat of losing funding incentivizes defensive behavior, which can already be seen as researchers start to avoid controversial topics. Because funding agencies now condition eligibility on compliance with policy directives, research topics historically considered legitimate become risky. The Wall Street Journal conducted a journalistic investigation into scientists stripping “diverse” or “underrepresented” language from proposals and found that over 600 NIH projects had been modified over the past fiscal year to avoid defunding.⁶⁸ This illustrates how academics shift behaviour not because they want to, but to remain fundable.

VIc. Gaps in Legal Protection: Fragmented Doctrine

The presence of a preferential offer tied to institutional reform raises serious questions about whether the offer is actually voluntary. It should also be noted that the coercive “threshold” is much lower for research universities, especially those without excessive endowments, than for states with diversified funding sources. Rather obviously, when a single funding agency controls a large portion of the institution’s research budget, the risk of compulsion increases and triggers should be reconsidered.

The doctrinal framework that might protect academic freedom in this context is patchy. On one hand, academic freedom cases like *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents* focus on individual faculty and public employee rights to free speech, not institutions as a whole tied to federal funding. The conditional spending doctrine operates in domains oriented towards states and general recipients, not research universities whose core operations are dependent on federal research grants.

VIc.1. President & Fellows of Harvard College v. HHS et al

⁶⁶ U.S. NSF, “Updates on NSF Priorities,” NSF - National Science Foundation, 2025, <https://www.nsf.gov/updates-on-priorities>.

⁶⁷ Supra note 48.

⁶⁸ Sara Randazzo, Caitlin Ostroff, and Shane Shifflet, “Scientists Strip ‘Diversity’ Language from Research to Keep Federal Grants,” *wsj.com* (The Wall Street Journal, August 23, 2025), <https://www.wsj.com/health/scientists-are-removing-dei-language-to-keep-federal-grants-d092833b>.

Another glaring example of the fragility of legal protections for institutional autonomy can be seen when, in September 2025, U.S. District Judge Allison Burroughs ruled that the Trump administration's freeze and termination of \$2.2 billion in research funding to Harvard violated the First Amendment, Title VI, and the APA. The court found the administration had engaged in unconstitutional retaliation, targeting Harvard after it rejected "demands ... to better manifest the government's favored viewpoint."⁶⁹ The judge also faulted HHS for failing to follow the formal procedural protections required under Title VI in addition to making funding decisions in an arbitrary and very ideologically motivated manner.

This ruling underscores the real-world risk that federal funding can be wielded not just as a carrot but as a weapon, and it illustrates how existing legal doctrines (First Amendment, civil-rights, APA) may provide only partial protection, particularly when grant conditions or freeze orders are wrapped with policy justifications.

VId. Implications for R&D and the shuttering of workforce development

Government funded R&D has huge economic benefits for the nation. According to a study conducted by a professor at the University of Georgia, Trump's proposed NSF grant cuts would "ultimately cost the U.S. economy \$10 billion annually in unrealized gains". The consequences extend beyond dollars: they undermine the very intellectual ecosystem that produces innovation in the U.S. Long-term, workforce development in the U.S., which is supposedly a vital priority to the NSF, would undoubtedly be at risk in this new, leaned model. Public research investments train the STEM workforce, support early-career scholars, and sustain labs where fundamental questions (often unprofitable in the short-term) can be explored. Francis Cordova, the former director of NSF under both the Trump and Obama administrations, echos this sentiment: "Industry representatives often tell me that arguably the most important investment NSF makes is in the workforce training of STEM talent...arguably the most important part of our economic security, our national security and the relatively high standard of living we enjoy in this country is due to government funding of basic research in the scientific workforce."

When funding is cut significantly, not only is the pipeline for scientific talent at risk, but academic freedom itself is weakened. Researchers may feel pressured to avoid foundational projects in favor of applied, immediately marketable work. Similarly, universities short on funding might prioritize short-term gains over long-term scholarship. In that sense, cuts to funding don't stop at eliminating potential innovations, they also cut back on freedom of inquiry as a whole.

⁶⁹ ACLU of Massachusetts, "Court Blocks Government's Unconstitutional Attacks on Harvard | American Civil Liberties Union," American Civil Liberties Union, 2025, <https://www.aclu.org/press-releases/court-blocks-governments-unconstitutional-attacks-on-harvard>.

VII. Proposed Guardrails

To prevent the total coercive potential of conditional research funding from impacting academic freedom and institutional autonomy, a set of targeted guardrails is needed. While the government can and should preserve its legitimate interest in accountability, civil rights compliance, and policy goals, recent questionably coercive policy moves have necessitated a review of the safeguards in place to protect universities' ability to pursue independent research.

VIIa. Strengthening Judicial Review and Transparency under the Administrative Procedure Act

Debarment, funding freezes, and mass grant terminations occurred with limited notice, unclear criteria, and minimal opportunity for institutions or investigators to protest and fight back against adverse decisions. Moreover, the APA's exemption for "grants, benefits, or contracts" under Section 553(a)(2) has allowed agencies to impose funding conditions with minimal transparency or public input. This exemption should be narrowed when funding conditions affect constitutional rights or core institutional functions of universities.

Courts should apply heightened scrutiny when reviewing agency actions that leverage funding dependency in a university setting, as these extreme financial dependencies have the consequence of possibly compelling speech-related and viewpoint-based institutional reforms. The unconstitutional conditions doctrine, as seen in cases like *Alliance for Open Society International*, prohibits the government from using private entities to restrict individuals' constitutional rights. When applied to universities, this doctrine should translate to preventing agencies from conditioning research grants on institutional adoption of policies that restrict faculty or student speech, alter curriculum content based on viewpoint, or mandate specific ideological orientations in hiring or admissions.

However, it is important to note the nuance here: Alliance protects the institutional autonomy and intellectual freedom essential to academic research, but it also acknowledges the government's legitimate authority to define its objectives and ensure accountability for public funds. A possible reformed framework would require agencies to demonstrate that those funding conditions: (1) are directly related to the funded research activity itself; (2) do not compel institutions to adopt policies affecting speech or scientific inquiry beyond the scope of the particular grant; and (3) provide notice and opportunity for institutional response before termination or suspension proceedings.

VIIb. Pre-registering research protocols with grant review reform

One promising idea for structural reform comes from recent proposals to integrate peer-reviewed preregistration into the federal funding grant review pipeline. Introducing the process of editorial registration into the grant review process would allow research proposals to

be peer reviewed and registered before a study begins, minimizing the incentive for researchers to start to tailor their topics to shifting policy within projects.⁷⁰ As Bornmann and Schweiger from the Science Policy and Strategy Department at the Administrative Headquarters of the Max Planck Society argue, combining grant decisions to in-principle accepted study protocols would (1) reduce agency discretion, (2) constrain arbitrary funding withdrawals, (3) minimize political influence over methodological review, and (4) ensure that vetted research designs (not ideological alignment) determine funding outcomes for institutions.⁷¹

VIIc. Statutory Codification of scientific integrity protection

Legislative proposals, like the Scientific Integrity Act, proposed by Congressman Paul D. Tonko (NY-20) in February of 2025, would require federal agencies to adopt enforceable scientific integrity policies, prohibit manipulation or suppression of scientific findings, and establish clear protections against retaliation for scientists. While such legislation has received bipartisan support in committee, it has not yet been enacted into law. Language from the House resolution specifies its direct response to recent funding cuts: “Under the bill, among other parameters, such policies must (1) ensure that scientific conclusions are not based on political considerations, (2) prohibit the suppression or alteration of findings, and (3) permit researchers to disseminate their findings and engage with the scientific community as appropriate. Scientific integrity policies must also include a mechanism through which stakeholders may report violations of the policy.”

Additionally, the proposal includes safeguards on transparency through public logs documenting communication, which will increase accountability and deter inappropriate influence: “Agencies are required to submit their scientific integrity policies to the Office of Science and Technology Policy for approval. Approved policies must be made public, submitted to Congress, and periodically updated. Agencies may use their existing policies provided they satisfy the requirements of the bill. The Government Accountability Office must review implementation of the policies.” The proposal also includes a request that each research-funding agency appoint an independent “Scientific Integrity Officer” with authority to investigate allegations of political interference, recommend corrective action, and report publicly on violations.

VIIId. Conditional Spending Limits adapted for Universities

The coercion analysis from *South Dakota v. Dole* should be extended and adapted to protect universities from coercive funding conditions. As Federal funding can constitute such a major portion of research universities' annual budgets, far exceeding a 10% threshold the

⁷⁰ Lutz Bornmann and Gerald Schweiger, “Reforming Research Funding: Combining Editorial Preregistration with Grant Peer Review,” arXiv.org, 2025, <https://arxiv.org/abs/2511.01439>.

⁷¹ Ibid.

Supreme Court characterized as unconstitutionally coercive in *NFIB v. Sebelius*.⁷² A possible statutory framework should look to establish that funding conditions become naturally coercive when (1) they threaten funding withdrawal exceeding 15-20% of an institution's research budget, (2) the conditions extend beyond a particular funded program to regulate institutional speech, (3) new conditions are imposed on already-awarded grants, (4) conditions imposed require institutions to adopt particular ideological positions, suppress different research topics, or ensure specific viewpoint representation beyond legitimate anti-discrimination requirements and hiring practices.

VIII. Conclusion: Reconciling Federal Authority and Academic Independence in the US

It is vital to note that the tensions exposed throughout this analysis are not between federal oversight and university autonomy, but actually between two competing visions of how federal funding should function in relation to higher education. On one hand, federal research funding serves essential public purposes: ensuring compliance with civil rights laws, promoting accountability for taxpayer dollars, advancing national research priorities, and supporting the infrastructure that makes American innovation possible. On the other hand, universities function as unique institutions within democratic society. They are places where inquiry must be free from ideological control, where controversial questions can, and should, be explored, and where the next generation of knowledge-producers are trained.

The federal government's legitimate interests in research funding are not in question. It is absolutely necessary that the government ensures that institutions receiving federal funds comply with anti-discrimination laws, protect research subjects and ethics, maintain financial accountability, and conduct research with integrity. These are all proper exercises of federal authority. Title VI enforcement, indirect cost oversight, and programmatic requirements directly related to funded research activities serve important public purposes. These all fall comfortably within the bounds of conditional spending doctrine outlined in *South Dakota v. Dole* and *NFIB v. Sebelius*.

The danger of Federal oversight emerges when funding conditionality expands far beyond these core concerns to become a mechanism for comprehensive institutional control. Recent federal actions, especially under the Trump administration, including expanded Title VI investigations and agency guidance, have moved beyond traditional anti-discrimination enforcement to regulate teaching content, curricular priorities, and institutional diversity initiatives. When compliance with funding conditions requires universities to restructure governance, eliminate academic departments, mandate specific viewpoint representation, or avoid entire categories of research topics, the line between accountability and coercion has been crossed.

VIIIa. The Stakes of Inaction

⁷² Supra note 27.

The consequences of failing to establish clearer guardrails for regulating the influence of federal funding extend far beyond individual universities. As referenced above, economic analysis estimates that the proposed federal funding cuts will result in massive economic losses for the nation and eliminate thousands of early career jobs. But the costs are not merely economic: they strike at the foundation of American scientific leadership and democratic governance.

When researchers modify proposals to avoid politically disfavored terms the self-censorship that *Sweezy v. New Hampshire* warned against becomes reality. When universities, including Harvard, reallocate hundreds of millions of dollars to support themselves when threatened with federal funding cuts, institutional missions are redirected from discovery and initiatives benefiting the future generation of American professionals to simple survival. And when entire fields of study become funding liabilities, the marketplace of ideas that universities are meant to protect shifts and shrinks into an ideological monoculture, instead being shaped by political winds that shift. The 2025 Compact for Academic Excellence represents the logical endpoint of this transformation: a formal bargain in which universities trade autonomy, constitutional freedoms, and independence for "preferential access" to funding they once received based on their scientific merit by itself.

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Unionizing College Athletics

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Abstract

For years, student-athletes were barred from profiting off the use of their NILs (Name, Image, and Likenesses) and from receiving compensation for their labor from their respective colleges. Under the guise of “amateurism”, the NCAA argued the concept was a cornerstone of their product. Today, college athletics is entirely different than it was ten years ago, or even five years ago. Colleges are now able to provide student-athletes compensation beyond educational-related benefits. This trend can be directly linked to the rulings of O’Bannon and Alston, which were instrumental in opening the floodgates for college athletes to receive compensation for the use of their NILs. This article analyzes the judicial reasoning through which courts concluded that the NCAA’s amateurism rules constitute unlawful restraints of trade under Section 1 of the Sherman Act. The end results of O’Bannon and Alston removed the NCAA’s restrictions on limiting the benefits that student-athletes could receive from schools, including the ability for student-athletes to profit off of their NILs. Although NIL has created meaningful benefits for schools and athletes, it has also brought significant challenges. While both parties are financially benefitting from this new arrangement, the classification of student-athletes has become extremely unclear. Despite student-athletes receiving up to millions of dollars from colleges, they are not formally classified as employees, and thus are unable to unionize for better working conditions from their colleges and the NCAA. As a result, student-athletes continue to suffer from exploitative practices. This paper recommends that student-athletes be given the opportunity to unionize for the ability to negotiate working conditions and rights through collective bargaining with their respective colleges and the NCAA.

I. Introduction

“Division I athletics generated \$15.8 billion in revenues in 2019, according to the National Collegiate Athletic Association... Men’s basketball and football generate the vast majority of revenues with media rights, bowl revenues, ticket sales, royalties and licensing, donor contributions and other sources accounting for more than half of these revenues. Institution and government support as well as student fees accounted for the remaining 44 percent of the cash inflows to Division I athletic departments in 2019, according to the NCAA.”¹

College athletics has reached an unprecedented scale in the modern era. Despite the enormous revenues generated by Division I athletics, the student-athletes who fuel this commercial success remain vulnerable within their institutions. The law has not kept pace with

¹ Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS NEWS (Mar. 18, 2023), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports>.

the rapid expansion of the college sports industry or with the legal challenges it has produced. This lag is especially evident in the recent developments surrounding NIL rights, which allow student-athletes to profit from their names, images, and likenesses and to receive compensation beyond traditional educational-related benefits.

On June 21st, 2021, The Supreme Court of the United States affirmed the decision of the Court of Appeals in *NCAA v. Alston*. The Court held that the NCAA's limits on education-related benefits for student-athletes constituted an unlawful restraint of trade under Section 1 of the Sherman Antitrust Act. For the first time in American history, there were no limits as to what benefits colleges could provide their student-athletes. This decision was deemed a win for colleges and their student-athletes who sought to profit from the use of their NILs, and opened the floodgates for boosters and collectives to funnel money directly toward student-athletes. *Alston* was not without precedent. In 2015, former Division I Basketball player Ed O'Bannon sued the NCAA after discovering that his likeness was used in a basketball video game. At the time, the NCAA's amateurism rules prohibited student-athletes from profiting off of their NILs. O'Bannon argued that the NCAA's amateurism rules constituted an illegal restraint of trade, a violation of Section 1 of the Sherman Antitrust Act. Because colleges and private companies such as EA were profiting from student-athletes but the student-athletes themselves were unable to receive compensation for the use of their NILs, the court ruled that there was a restraint of trade and commerce imposed on student-athletes by the NCAA.

The Sherman Act was created with the intent to promote the free flow of interstate trade and commerce. In both cases above, the NCAA encroaches on the rights of the colleges and the rights of the student-athletes involved. From the student-athlete perspective, they were unable to receive financial benefits from the use of their NILs, and lost bargaining power with their respective colleges and the NCAA who were profiting significantly off of them. From the perspective of colleges, schools were unable to offer benefits to prospective student-athletes that exceeded educational-related benefits. This restricted competition among colleges vying to attract the most talented student-athletes they could. Under the Sherman Act lies the rule of reason principle, which stipulates that any act relating to a contract in a joint venture will be judged based on the context of relevant markets.

As a result of the rulings of O'Bannon and *Alston*, colleges and student-athletes are now making millions of dollars from NIL. While this legislation benefits colleges financially and transfers more financial power to student-athletes than ever before, it introduces several complications for the NCAA, its member colleges, student-athletes, and the laws governing all three. The National College Athletic Association, or NCAA, is the regulatory body of all college athletics for its member schools. Colleges, specifically athletic departments, can be seen as employers of college athletics due to being responsible for maintaining the environment in which their student-athletes compete and learn in. Student-athletes are employees of colleges, as they contribute their athletic prowess, and more recently their NILs, for their respective colleges and the NCAA to profit off of. The rulings of O'Bannon and *Alston* present an argument that student-athletes are no longer amateur athletes at school to play sports while obtaining an

education, but rather they are employees that have a large financial impact on the colleges they play for. Despite student-athletes and colleges profiting financially from NIL deals, student-athletes are paying a far greater price than their respective colleges. As a result of the large time, mental, and physical commitments being a student-athlete requires, these young men and women are left with little time to devote to their studies. Female student-athletes have an even worse experience, as collectives and NIL deals disproportionately favor male athletes and sports.

The four major sports leagues in the United States, the NBA, NFL, NHL, and MLB all have labor unions, which are referred to as “players associations.” These entities are responsible for representing the interests of professional athletes who play for teams that are members of those leagues. Through collective bargaining, professional athletes are able to negotiate working conditions with their respective teams and leagues. In addition to negotiating working conditions, players associations advocate on behalf of their member athletes. For example, the National Football League Players Association (NFLPA) works with the NFL to discipline players and coaches via fines and suspensions. The NFL states that “on-field action is governed not only by the rules of play, but also by a code of conduct, established by the league and the NFL Players Association, that specifies the behavior that will not be tolerated and the minimum fines for each transgression.”² Through agreements such as these, the NFLPA and the NFL agree on the code of conduct that governs the players and the fines they receive for violating code of conduct. As a result, despite having to play under the NFL’s rules, the players get to have a say in them.

Labor unions have had a long track record of success for professional athletes, as evidenced by the Major League Baseball Players Association (MLBPA) which was conceived in 1965.³ Economist Marvin Miller assisted Major League Baseball players in creating the first-ever collective bargaining agreement (CBA) in professional sports in 1968. The MLBPA mentions that “the agreement raised the minimum salary in baseball from \$6,000 -- the level at which it had been stuck for two decades -- to \$10,000 and set the tone for future advances... Miller helped players negotiate the right to arbitration to resolve grievances -- an achievement Miller considered the most significant of the union's early years because the process paved the way for future gains.”⁴ Since student-athletes are treated as employees who provide financial benefits to their colleges from their labor by competing in Division I athletics, student-athletes should be given the right to a union so that they can participate in collective bargaining with their colleges. The introduction of a labor union for student-athletes would provide adequate representation for them, provide a collective bargaining agreement between them and their colleges along the NCAA, and provide further regulations for student-athlete NILs of both male and female athletes. By following the framework of labor unions and CBAs currently in place for professional athletes, student-athletes will be given the employment rights that they deserve under federal law.

² *NFL Rules Compliance*, OPERATIONS.NFL.COM (2025), <https://operations.nfl.com/inside-football-ops/rules-enforcement/nfl-rules-compliance/>.

³ History, Mlbplayers.com (2025), <https://www.mlbplayers.com/history>.

⁴ *Ibid*.

A labor union for student-athletes would solve four major problems currently plaguing college sports. First, a labor union would give student-athletes the ability to collectively bargain with their respective colleges and the NCAA for better working conditions such as the priority of classes and academics over practice times along with limitations on the amount of hours students are allowed to practice and perform each week. Second, a labor union would address the growing power of collectives and boosters by implementing a revenue-sharing provision as the players associations of the MLB, NBA, NFL, and NHL have. This would ensure the equal distribution of NIL funds from colleges toward their student-athletes. Third, as a result of revenue-sharing, the disparity in NIL earnings and opportunities between male and female student athletes would be effectively eliminated, thus ensuring that colleges and athletic departments remain in compliance with Title IX. Finally, through collective bargaining, student-athletes will be able to hold their respective colleges to greater accountability in terms of ensuring that the revenue being generated from student-athlete labor goes toward supporting them and the school as a whole as opposed to others.

II. Case Precedent: O'Bannon v. NCAA

Ed O'Bannon was a college basketball player at UCLA and a former All-American.⁵ In 2008, he discovered that there was an avatar of himself in a college basketball video game produced by Electronic Arts (EA).⁶ This avatar played for UCLA in the video game, bore visual resemblance to O'Bannon, and wore the number 31 that O'Bannon wore while playing college basketball.⁷ O'Bannon had never given consent to EA to use his likeness, and he had not been compensated for it.⁸ He decided to sue the NCAA, arguing that their amateurism rules were an illegal restraint of trade under Section 1 of the Sherman Antitrust Act.⁹ O'Bannon also sued the Collegiate Licensing Company (CLC), which licenses the trademarks of the NCAA and some of its member schools.¹⁰ After a 14-day bench trial, the district court concluded that the NCAA's rules prohibiting student-athletes from receiving compensation for the use of their NILs violate Section 1 of the Sherman Antitrust Act.¹¹

The Sherman Act is a federal statute that forbids any business-related act that restricts competition and interstate commerce in the marketplace.¹² Section I of the Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹³

⁵ Edward C. O'Bannon Jr. v. National College Athletic Association (United States Court of Appeals for the Ninth Circuit 2015), 12.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* at 15.

¹² *Sherman Antitrust Act*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/Sherman_Antitrust_Act.

¹³ *Ibid.*

In this case, the NCAA is said to be restricting competition in the college education market among colleges who are attempting to attract the most talented athletes to their Division I athletics programs.¹⁴ The NCAA is also restricting interstate commerce by limiting benefits that colleges can provide for student athletes and by not allowing student-athletes to profit from the use of their names, images, and likenesses while in college. The district court determined that the illegal restraint of trade imposed by the NCAA on its schools and student-athletes occurred in the college education market and the group licensing market. In the college education market, the court concluded that the market regarding Football Bowl Subdivision (FBS) football and Division I basketball scholarships was subject to antitrust laws because there are no professional or college football or basketball leagues that can substitute what FBS football and Division I basketball schools provide for their student-athletes.¹⁵ In the group licensing market, the court determined that student athletes and college athletics, if not for the NCAA's restrictions, would be able to profit off NILs. This would be able to be done through live game telecasts, sports video games, game rebroadcasts, advertisements, and archival footage.¹⁶

Using the rule of reason, the court analyzed the legality of the NCAA rules being challenged in the context of the college education market and group licensing market. The rule of reason is a legal principle that falls under the Sherman Act. It states that the conduct of any person making or carrying out a contract to carry out a joint venture shall not be illegal per se and will be judged based on its "reasonableness."¹⁷ This reasonableness is judged in the context of the action's effect on the competition in defined relevant markets, and the worldwide capacity is considered when determining defined relevant markets.¹⁸ In this case, the action being carried out by the NCAA is the limiting of educational-related benefits to student-athletes. The relevant market in this case is the college athletics market. The NCAA is the only organization where student-athletes can play Division I football and basketball. The district court also ruled that the NCAA's rules had an anticompetitive effect in the college education market.¹⁹ It was determined that if the NCAA's restrictions were not in place, colleges would be able to compete with each other by offering recruits compensation exceeding the cost of attendance.²⁰ These restrictions were seen as a price-fixing agreement because student-athletes would end up compensating colleges with their labor and NILs. However, all competing colleges had been required to value the NILs at \$0 due to the NCAA's rules.²¹

The NCAA first argued to the district court that their restrictions on student-athlete compensation maintained competitive balance by helping to level the playing field between schools. Second, the NCAA argued that the court was unable to reach the merits of the plaintiffs

¹⁴ O'Bannon Jr, *supra*, at 15.

¹⁵ *Ibid.* at 15-16.

¹⁶ *Ibid.* at 16-17.

¹⁷ *15 U.S. Code § 4302 - Rule of Reason Standard*, CORNELL LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/uscode/text/15/4302>.

¹⁸ *Ibid.*

¹⁹ O'Bannon Jr, *supra*, at 17.

²⁰ *Ibid.*

²¹ *Ibid.* at 18.

due to the Supreme Court's previous ruling in *NCAA v. Board of Regents of University of Oklahoma*, and that student-athlete compensation rules do not fall under the umbrella of the Sherman Act because they were said to have not regulated commercial activity. The NCAA's third argument was the plaintiffs were unable to sue under the Sherman Act as they had not suffered injury related to antitrust. None of these arguments persuaded the court.

The court rejected the first argument of the NCAA because the Board of Regents ruling did not honor the NCAA's amateurism rules along the lines of the Sherman Act. Instead, it held that the concept of "amateurism" and its rules were a part of the character and quality of the NCAA's product of FBS football and Division I basketball, and not consistent in regards to the Sherman Act.²² As a result, the NCAA's rules were subject to antitrust laws, including the rule of reason. Under the rule of reason analysis by the court, it concluded that the role of the NCAA was to preserve the tradition of amateurism for its branding purposes. It was decided that enforcing rules that restricted economic output for universities and student athletes did not fall under the purview of the NCAA, whose rules were "part of the the character and quality of the [NCAA's] 'product.'"²³ As a result, the court's opinion supports the argument that the NCAA has a valid reason to preserve the concept of amateurism, as it serves a procompetitive purpose. However, the court still ruled that the NCAA is still subject to antitrust regulation, as nothing from the Board of Regents case was found to support an exemption.

Next, the NCAA contended that the plaintiffs could not invoke the Sherman Act at all because it applies only to "restraint[s] of trade or commerce." In their view, the compensation rules concern eligibility and do not regulate commercial activity. The court rejected this argument, as it believed that the definition of "commerce" is broad, and that it could include almost any activity where the actor could expect economic gain.²⁴ The court believed that the definition of commerce included student-athletes and athletic recruits exchanging their labor and NIL rights for a Division I athletic scholarship to a college.²⁵ Both the student-athletes and universities were seen to have engaged in an economic exchange due to the scholarship and grant funding being involved, which led the court to conclude that the NCAA's compensation rules are subject to the Sherman Act as the court remained unconvinced that the rules were noncommercial.²⁶

Finally, the NCAA argued that the plaintiffs failed to show injury related to antitrust. In order to satisfy this requirement, a plaintiff needed to prove that they suffered as a result from "antitrust laws [were] intended to prevent and that flows from that which makes defendants' acts unlawful."²⁷ The NCAA argued that the plaintiffs did not suffer because in their view, their restrictions did not deprive them from NIL compensation that they otherwise would have received.²⁸ The court concluded that had the NCAA's restrictions not existed, students would

²² *Ibid.* at 29-30.

²³ *Ibid.*

²⁴ *Ibid.* at 33.

²⁵ *Ibid.*

²⁶ *Ibid.* at 35.

²⁷ *Ibid.* at 37.

²⁸ *Ibid.*

have been compensated by video game makers for their NIL rights.²⁹ The district court explained that EA negotiates with the NFL and NBA players unions for the rights to the NILs of their members.³⁰ The plaintiffs referenced a 2005 presentation from EA, that stated the inability to use the NILs of college athletes was the main factor holding back NCAA video game growth.³¹ The plaintiffs were able to prove injury and the need for antitrust, as absent the restrictions of the NCAA, video game makers would have likely paid student-athletes to use their NILs.³²

In the end, the district court was successful in using the rule of reason standard to determine that if the NCAA did not have restraints in place, student-athletes would have the ability to profit off of their NILs through multiple different channels. The court was also successful in using the rule of reason standard to argue that colleges are also victims of the NCAA's restraints, and that if these restraints were not in place, colleges would be able to bid on the services of student-athletes, exceeding the cost of attendance. In *O'Bannon*, the court held that "amateurism" was part of the character of the product of the NCAA. They acknowledged that it served a procompetitive purpose, but also acknowledged that it did not exempt the NCAA from antitrust regulations. Furthermore, the court emphasized the broad definition of "commerce," as they determined that athletic recruits exchanging their labor and ability to profit from their NILs for Division I athletic scholarships constituted an economic exchange, thus subjecting it to the Sherman Act. Finally, the court explained that the plaintiffs did in fact suffer injury related to antitrust, as they emphasized that EA's inability to use the NILs of college athletes was responsible for preventing the growth of NCAA video games, and that EA would likely compensate student-athletes for the ability to use their NILs in the video games they make.

III. Case At Hand: NCAA v. Alston et al.

Shawne Alston, a former student-athlete, along with other former and current student-athletes of Division I FBS football, and men's and women's Division I basketball, challenged the current set of NCAA rules that limited the types and amounts of education-related benefits they could receive. They complained that the NCAA's rules violated the Sherman Antitrust Act by unreasonably restraining trade in the market for student-athletes' services. The NCAA defended its rules by claiming they were necessary to preserve the amateur nature of college sports. The district court had a 10-day bench trial, and in the end, held that the NCAA's limits on education-related compensation were deemed to be anticompetitive and unjustified. The NCAA appealed this ruling to the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the decision from the district court, and the NCAA then appealed the decision to the Supreme Court, challenging the rulings on education-related benefits. In this case, it was

²⁹ *Ibid.* at 38.

³⁰ *Ibid.*

³¹ *Ibid.* at 39.

³² *Ibid.* at 43.

not the student-athletes who challenged the court's ruling, it was the NCAA.³³ Supreme Court Justice Neil Gorsuch states that “before us, the student-athletes do not challenge the district court's judgement. But the NCAA does. In essence, it seeks immunity from the normal operation of antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints.”³⁴

The Supreme Court explained that under the rule of reason analysis undertaken by the district court, it found that the NCAA and its member schools had full autonomy to restrain student-athlete compensation in any way they pleased.³⁵ In the case of *Alston*, the court defined the relevant market as “the market for ‘athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or sport-specific market.’”³⁶ The court determined that there were no viable markets that could serve as a substitute for student-athletes, as it stated that the NCAA's Division I was the only relevant market for elite college basketball and football.³⁷ As a result, the court explains that “the NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services... Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor.”³⁸

In an earlier case, *NCAA v. Board of Regents of University of Oklahoma*, the NCAA argued that they strive to preserve the tradition of amateurism in college sports, which included the restraint of student-athletes from receiving compensation.³⁹ The NCAA stated that since these restraints were being put in place to maintain the quality of its product, they are consistent with the goals of the Sherman Act, and do not violate it.⁴⁰ Further adding to this argument, the NCAA stated that by rejecting its definitions and views of the requirements of amateurism, the district court “impermissibly redefined” their product.⁴¹ The Supreme Court rejected this argument from the NCAA, claiming that the argument “misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests... But none of that means a party can relabel a restraint as a product feature and declare it ‘immune from Section 1 scrutiny.’”⁴² The Supreme Court went on to argue that the district court discovered that there was no consistent definition of “amateurism” that the NCAA had adopted because of how the rules governing student-athlete compensation have changed over time.⁴³ Additionally, the district court found that the NCAA did not reference anything related to consumer demand, and that the

³³ *National Collegiate Athletic Association v. Alston et Al.* (Supreme Court of the United States 2021), 2.

³⁴ *Ibid.*

³⁵ *Ibid.* at 9.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* at 17-18.

³⁹ *Ibid.* at 20.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 29.

⁴² *Ibid.*

⁴³ *Ibid.* at 28-29

restrictions they imposed on colleges and student athletes were unnecessary in preserving consumer demand.⁴⁴

In his concurring opinion, Justice Kavanaugh reinforced the importance of Justice Gorsuch's majority opinion and further clarified the Court's rationale behind the decision. Kavanaugh explains that the NCAA acknowledges the power it has over its member colleges and student-athletes as a result of its compensation rules and the lack of means for student-athletes to negotiate with the NCAA about them.⁴⁵ He further explains that the NCAA believes that its compensation rules are procompetitive because they help define college sports as a product, and that according to the NCAA, the defining feature of their product is that student-athletes are not paid.⁴⁶ Kavanaugh remarks that the NCAA is price-fixing its labor, which destroys the free market in which student-athletes could receive compensation for their services.⁴⁷ In the end, Kavanaugh concludes his concurring opinion by stating that “traditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.”⁴⁸

In the end, the ruling in *NCAA v. Alston* was pivotal in exposing the NCAA’s “amateurism” model for what it was—a mechanism for restricting student-athlete compensation under the guise of preserving the tradition of college sports. The court successfully portrayed the NCAA as holding all the power over colleges and student athletes because of their status as being the only relevant market for college athletics. This led to the NCAA and colleges exploiting student-athletes for profit without any obligation of compensating them beyond the cost of attendance for their institution. Under the same rule of reason analysis that was used in *O’Bannon*, it was determined that the restraint not only violated antitrust laws, but that it was unnecessary and unreasonable due to the NCAA’s position of being the only market for elite college football and basketball. The Supreme Court defends its ruling by stating that the NCAA’s definition of “amateurism” had no legitimate merit in exempting them from antitrust laws, as the court determined that the NCAA mislabeled a restraint as being a feature of the product. The court concludes that the behavior of the NCAA threatens the free market for student-athletes, and that under antitrust laws there is no evidence as to why college athletics would be any different from other service industries.

IV. Current State Of College Athletics

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 5.

Currently, student-athletes remain vulnerable to exploitative and harmful treatment from the NCAA and their colleges because there are so few mechanisms in place to hold these institutions accountable. Student-athletes lack protections from universities, their athletic departments, and the NCAA in regard to working conditions, as they are forced to devote significantly more time to athletic commitments than on academics or their own personal well-being. For example, when talking about the Northwestern University football team, Emily Gabos explained that the players spent 40-50 hours a week on their sport during the season. This sizable time commitment required some students to change their majors and career paths, as they could not handle the course workload associated with them.⁴⁹ Additionally, the NCAA and colleges went to great lengths to exercise control over the lives of their student-athletes. Gabos explains that Dartmouth College, for example, “determined when and where players would practice, travel, eat, and sleep... Coaches also dictated players’ course loads by asking them to avoid classes meeting at certain times. While Dartmouth’s class absence policy stressed that players were ‘students first and athletes second,’ players testified that they had to generally prioritize practice over class.”⁵⁰

These working conditions imposed by colleges and athletic departments have a detrimental impact on student-athletes and their overall wellbeing. Despite the NCAA applying some level of oversight, such as regulating the amount of time student-athletes are allowed to play or practice, student athletes continue to suffer.⁵¹ One example is in the amount of time and distance a team spends traveling for games. Last year, the UCLA Bruins football team traveled a total of 22,226 miles, enough to circle the globe.⁵² Furthermore, Billy Witz argues that “winter sports like basketball, and spring sports like baseball and softball, which both play more than 50 regular-season games, are likely to cause even more missed classes.”⁵³ A study conducted by the NCAA found that 30% of female athletes and 25% of male athletes were experiencing struggles balancing their mental health along with their academics and athletics.⁵⁴ As a result, student-athletes are more likely than their non-student-athlete peers to experience academic underperformance, leading to lower overall graduation rates.⁵⁵

Colleges becoming increasingly invested in the money related to athletics is evident through their partnerships with collectives. The NCAA classifies collectives as a type of booster club, but collectives operate differently compared to traditional booster clubs.⁵⁶ This is because the money that is raised through booster clubs goes directly to the athletic departments of

⁴⁹ Emily Gabos, *College Athlete Unionization: A Winning Play or a Losing Game?* (2024), https://scholarship.law.upenn.edu/prize_papers/27/, 6.

⁵⁰ *Ibid.* at 7-8.

⁵¹ *Ibid.* at 16.

⁵² Billy Witz, *Being a College Athlete Now Means Constant Travel and Missed Classes*, THE NEW YORK TIMES, Oct. 30, 2024, <https://www.nytimes.com/2024/10/30/us/college-football-conference-realignment.html>.

⁵³ *Ibid.*

⁵⁴ Gabos, *supra*, at 16.

⁵⁵ *Ibid.*, at 17.

⁵⁶ Sophie Zelony, *NIL Speeds Ahead While Title IX Trails Behind: Finding Room for Title IX in the Evolving NIL Landscape*, 27 (2025), <https://scholarship.law.vanderbilt.edu/jetlaw/vol27/iss4/7/>, 913.

colleges.⁵⁷ From there, the athletic departments distribute the money among its sports teams.⁵⁸ Collectives, however, work directly with student-athletes, bypassing oversight from colleges. These collectives operate as private entities by funneling money raised between notable alumni and boosters directly to the student athletes.⁵⁹ Zelony defines collectives as the “‘fundraising arms of schools... that are legally separate from the schools on paper but not in function.’ Unlike traditional boosters, collectives do not funnel money through athletic departments to distribute to student athletes, but instead distribute the money directly to student athletes themselves. Technically, as third-party entities, they are neither subject to Title IX nor to NCAA disclosure rules; therefore, they do not have to disclose student athlete deals or how they distribute money to student athletes.”⁶⁰

The presence of collectives has proven to be harmful to the greater landscape of college athletics. North Carolina athletic director Bubba Cunningham explained that NIL deals earned by former North Carolina Basketball star Armando Bacot and his teammates are diverting booster money away from the athletic program as a whole.⁶¹ Before the ruling of *NCAA v. Alston*, the only way boosters were allowed to contribute to student-athletes was by giving money directly to the athletic departments of colleges.⁶² The competition for booster funding posed by collectives makes it harder for colleges to fund other teams in their athletic departments that are unable to generate enough revenue to cover their own costs.⁶³ Because collectives are now able to raise money to pay student-athletes directly, the gap in funding between teams is emphasized, as Bruce Schoenfeld notes that Bacot’s income from NIL is almost twice as much as the budget of the swim team at North Carolina.⁶⁴ Despite Armando Bacot’s NIL information and earnings being publicized, student-athletes who receive money from collectives are not obligated to disclose their NIL earnings since they operate as third-party entities. As a result, it is impossible for colleges and the NCAA to determine and compare the earnings of student athletes. This lack of financial disclosure makes it impossible for colleges to know whether or not they are Title IX compliant, as they have no way of determining if their male and female student-athletes receive equal financial benefits and opportunities.

Because collectives are legally defined as separate entities from college boosters, the NCAA is unable to regulate them, and the deals process between collectives and student-athletes are not subjected to Title IX regulations.⁶⁵ The NCAA oversees the operation of both male and female sports as opposed to the NFL, NBA, MLB, and NHL, which only oversee male sports. With many colleges receiving federal financial assistance, female athletes receiving less NIL could have grounds to file a lawsuit against their respective colleges over the unequal

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 912-913.

⁶⁰ *Ibid.* at 926.

⁶¹ Bruce Schoenfeld, *Student. Athlete. Mogul?*, THE NEW YORK TIMES MAGAZINE, <https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html>.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Zelony, *supra*, at 914.

distribution of benefits. The NCAA defines Title IX as stating that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁶⁶ Zelony explained that the 1975 Regulation established the regulatory framework for Title IX that is still in place today. She stated that the 1975 Regulation "solidified Title IX's application to athletics, clarifying that educational institutions must treat both sexes equally with regard to three distinct aspects of athletics: participation opportunities, athletic scholarships, and equitable treatment of male and female athletes."⁶⁷ Since the ruling of *Alston* remains relatively new and student-athletes are receiving compensation for their NILs for the first time, the Title IX policy has remained unchanged. As a result, it does not explicitly state whether or not NIL compensation would be included in the list of provisions mentioned above.

In terms of evaluating whether equal opportunities between male and female athletes exist, the 1975 Regulation lists the following: the provision of equipment and supplies; scheduling of games and practice time; travel and per diem allowance; access to coaching and tutoring; provision of locker rooms, practice, and game facilities; provision of medical and training facilities and services; provision of housing and dining facilities; and publicity.⁶⁸ Zelony mentions the case of *Schroeder v. University of Oregon*, an ongoing class-action lawsuit which focuses on the lack of publicity that the plaintiffs alleged they received from the college compared to male athletes. They alleged that the disparity violates Title IX's mandate for the equal treatment of male and female student-athletes. Zelony explained that "although publicity has not been the focus of major Title IX lawsuits in the past, the rise of NIL brings universities' potentially discriminatory publicity practices to the forefront; as publicity rights directly impact female student-athletes' NIL earning potential. If universities promote male athletes more than female athletes, they provide male athletes with more opportunities to be recognized and awarded NIL deals, leaving female athletes—not promoted and therefore less likely to be recognized—to 'work harder' than their male counterparts to market themselves for NIL deals."⁶⁹ Because publicity is an explicitly stated provision in the 1975 Regulation, the plaintiffs contend that publicity plays a major role in securing NIL deals, the lack of publicity that female athletics receive compared to male athletics directly impacts their NIL earnings. Under this logic, NIL earnings can be viewed as a benefit due to the fact they are linked to the provision of publicity.

Finally, with more colleges and their athletic departments making more money year after year, athletic departments are gaining more financial power within the context of their colleges. This is evident in the amount of money that colleges make from their athletic programs. For example, Joshua Lacoste highlighted that the athletic departments of the University of Texas at Austin and Auburn combined to make over \$360 million with over two-thirds of that coming

⁶⁶ *Title IX Frequently Asked Questions*, NCAA.ORG (2025), <https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx>.

⁶⁷ Zelony, *supra*, at 905.

⁶⁸ *Id.* at 906-907.

⁶⁹ *Ibid.* at 915.

only from their football programs.⁷⁰ Despite some of the money being invested into the well-being of student-athletes, the athletic departments, and the colleges as a whole, a lot of the money is being wasted in the forms of buyouts and other expenses. Lacoste wrote that “The arguable reason that ‘an increasing percentage of annual revenue goes to coaches, support and administrative staff members’ but a ‘decreasing percentage goes toward expenses that have costs that are relatively fixed’ is that those expenses have limits. Such limits are either ‘explicitly stated, such as the number of scholarships that are allowed per sport or the types of expenses that can be covered by grants-in-aid, or because of practical limits, such as how many meals athletes can eat in a given year, even though they’re allowed unlimited meals and snacks.’” The data show that “[a]s revenue is increasing, an increasing percent of it is going to coaches’ and not players.”⁷¹ NIL has played a major factor in increasing the funding college athletics receive, however, the majority of this money still goes toward coaches and their salaries or buyouts instead of student-athletes and their benefits.⁷²

One recent example of this practice is the case of college football head coach Brian Kelly, who was fired from Louisiana State University in the middle of the 2025 FBS football season. As a result of being fired, Kelly was entitled to a \$54 million buyout after signing a 10-year contract worth nearly \$100 million just four years ago.⁷³ Since Kelly was not terminated with cause, he was set to receive the full \$54 million he was owed as only actions deemed “serious misconduct” such as crimes, immoral behavior, or NCAA violations were among the grounds to fire him with cause.⁷⁴ Brian Kelly’s firing highlights a growing moral issue for how the increase in NIL money is funding college athletics. Lacoste notes that “coaches are the highest-paid public employee in 44 states. In such states, the level of poverty, educational attainment, and... public health may be suffering... To state more practically, [i]n Louisiana, 19% of the population... do[es] not earn enough income to provide the essential for food, housing, and transportation... Further, the state of Louisiana has 391,000 citizens under the age of 65 without health insurance.”⁷⁵ Rather than directing the \$54 million towards student-athletes, the student body as a whole, or the significant needs of the state of Louisiana, these funds will instead be used to compensate an already highly-paid head coach, despite the fact that he will not even serve in the role for the next six seasons.

These four arguments come together to highlight how more money in college athletics without proper regulation can be detrimental toward colleges, student-athletes, and third-parties. First, student athletes are mandated to devote as much time to their athletics as they would to a full-time job, equating to a 40-hour work week or even more in some cases. Despite the NCAA’s

⁷⁰ Joshua S Lacoste, *On the Increased Prevalence of Buyouts in College Athletics*, 34 MARQUETTE SPORTS LAW REVIEW (2024), <https://scholarship.law.marquette.edu/sportslaw/vol34/iss2/6>, 461.

⁷¹ *Ibid.* at 462.

⁷² *Ibid.*

⁷³ Brett Martel, *Fired Coach Brian Kelly Lawsuit Alleges LSU Is Declining to Honor the Terms of His Contract*, ASSOCIATED PRESS NEWS (Nov. 11, 2025), <https://apnews.com/article/lsu-brian-kelly-lawsuit-074233f4df33deba55dfd57b1acd2d02>.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* Supra note 32.

attempts at regulating the power of colleges over student-athletes as well as the amount of hours they are expected to practice or compete, these regulations become ignored due to the student-athletes' lack of representation against their schools and the need for them to keep their athletic scholarships from getting revoked. Second, the rise of collectives has undermined the financial power college athletic departments previously had. Because athletic departments now have to compete with collectives to receive funding from boosters, this greatly impacts the funding smaller athletic teams at colleges receive, as evidenced by the gap in between Bacot's income from NIL and the budget of the swim team at the University of North Carolina. Third, due to collectives being third-parties and legally separate from colleges and boosters, the NCAA is unable to regulate them, leading to potential violations of Title IX. Finally, as student athletes currently lack the ability to collectively bargain with their respective colleges, they are unable to have a say in how the revenue they generate is spent, leading many colleges to make financially irresponsible decisions with the money that does not benefit the student-athletes or the college itself whatsoever.

V. Unionization

In her work, Ellen Staurowski describes the lack of a voice for student-athletes in the context of the All Players United protest (APU). She mentions that "NCAA rules have been designed to preclude athletes from being recognized as workers and expressly prohibits athletes from having agents or other representatives to negotiate on their behalf. If the athletes who participated in the APU protest are not workers and do not have the rights of employees, then where is the source of their rights?"⁷⁶ Because student-athletes are not legally classified as employees, they are subject to exploitation at the hands of the NCAA and their colleges. This has a significant impact on how student-athletes and their NILs are classified and what protections they are afforded. If NCAA schools are allowed to directly compensate or "pay" for student-athletes, student-athletes should be seen as employees, not as students or amateurs. As a result, these employees should be given the right to a union, and the ability to unionize.

The right for employees to collectively bargain with their employers is granted through the National Labor Relations Act. The National Labor Relations Act (NLRA) was enacted in 1935 with the objective of preventing labor-related disputes in order to facilitate the free flow of commerce.⁷⁷ The right to collectively bargain is not granted to all employees, as individuals who are employed by supervisors are not included in this provision.⁷⁸ Section 2 of the NLRA clarifies that "the term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to

⁷⁶ Ellen Staurowsky, *College Athletes' Rights in the Age of the Super Conference: The Case of the All Players United Campaign*, 7 JOURNAL OF INTERCOLLEGIATE SPORT 11 (2014), 17.

⁷⁷ Jon Shimabukuru, *The National Labor Relations Act: Background and Selected Topics*, CONGRESS.GOV (Sept. 7, 2012), <https://www.congress.gov/crs-product/R42703>.

⁷⁸ *Ibid.*

recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”⁷⁹ In the case of colleges and student-athletes, coaches and athletic directors can be seen as “supervisors” toward student-athletes, as they operate in the interest of the team, athletic department, and ultimately the school. Coaches and athletic departments engage in financial transactions with student-athletes for their labor. Coaches have the power granted to them by their respective colleges to recruit, bench, and dismiss their athletes who are a part of their programs.

The National Football League, National Basketball Association, Major League Baseball, and National Hockey League all have respective unions known as “Player Associations.” These associations are responsible for representing the rights and interests of their athletes.⁸⁰ Respective players associations advocate for their athletes in disagreements with their league including but not limited to medical and legal matters.⁸¹ These players associations also protect players by establishing league-wide standards for work hours and working conditions as well as ensuring they are upheld.⁸² Additionally, players associations can also do the work of group licensing representatives.⁸³ This means that they can manage the NIL rights of their players, with this representation extending to outside third-parties. Players associations in professional sports utilize collective bargaining agreements (CBAs) to implement league standards.⁸⁴ Through these agreements, CBAs ensure a balance of power between owners and players. CBAs cover several issues which include player safety, discipline, grievance procedures, health benefits, salary structures, and the distribution of revenue between athletes and teams.⁸⁵

A labor union for student-athletes would serve all athletes who participate in NCAA Division I sports at member colleges. This union, or players association, would negotiate directly with the NCAA and its member colleges on behalf of the athletes attending those institutions. While the NCAA implements rules and policies governing amateur athletics, colleges and athletic departments are directly responsible for maintaining standards related to working conditions and limits on practice time. The players association of the NCAA would work directly with the NCAA as well as its member colleges because the colleges are the employers providing the student-athletes money and benefits, while the NCAA is responsible for turning these products into a commodity. Like the players associations of professional sports, the NCAA players association would be responsible for representing the rights and interests of their member athletes. The players association would advocate for their athletes when they have disagreements with their college over compensation and benefits, working hours and conditions, and legal and eligibility concerns. Gabos mentions that student-athletes could lose their scholarships if they

⁷⁹ *Ibid.*

⁸⁰ Marcus Myers, *Do You Know Ball? A Beginner's Guide to Player's Associations and Collective Bargaining Agreements*, PSU.EDU (Feb. 6, 2025), <https://sites.psu.edu/myersentrepreneursportslaw/2025/02/06/do-you-know-ball-a-beginners-guide-to-players-associations-and-collective-bargaining-agreements/>.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

suffer an injury, fail to maintain an adequate grade-point-average, or exhibit poor athletic performance.⁸⁶ Should an issue arise, the players association of the NCAA would protect student-athletes from potential negligence and loss of scholarship from their college. Furthermore, the players association of the NCAA would be able to oversee the NIL rights of their athletes similar to how the professional players associations do. Through collective bargaining agreements, a standard can be adopted for the NCAA in terms of NIL usage and licensing. Through collective bargaining, a revenue-sharing provision could be put into place, ensuring that all Division I student-athletes at member colleges can benefit from NIL. This would be especially important for female student-athletes, whose NIL values are typically lower than those of their male counterparts.

A labor union for student-athletes would address all four issues mentioned in the previous section. First, the issue of the working conditions and practice hours would be addressed through collective bargaining. By working with their respective colleges and the NCAA, student-athletes would be able to advocate for a greater emphasis on their academics and future professional careers. Second, the financial power of boosters and collectives would be limited as a result of a potential revenue-sharing provision, which would help ensure that student-athletes at their respective colleges would receive equitable compensation regardless of which individual athletes collectives and boosters want their money directed toward. Third, revenue-sharing would reduce the possibility of a Title IX violation as a result of male student-athletes receiving more NIL money and opportunities from their colleges than female student-athletes. Finally, student-athletes would be able to collectively bargain with their schools and the NCAA regarding the use of NIL revenue, as despite the increase in revenue and NIL money, it does not necessarily go toward benefits for student-athletes or the college's athletic department.

This proposal for unionization is not without a counterargument, as some players could oppose the idea of unionizing due to the possibility of it including a revenue-sharing provision. In her work, Gabos states that “under Section 9(a) of the NLRA, a union representative is the exclusive representative of all union employees... The NLRA’s collective bargaining provisions vest power in the elected representative to act in all employees’ interests, even when an employee disagrees or could obtain more favorable terms through an individual agreement.”⁸⁷ As a result, players who are more talented and more marketable could lose out on potential NIL earnings. This theory is exemplified in the case of the University of Iowa’s women’s basketball team. Caitlin Clark, whom many believed to be the face of women's basketball during her time in college and into the WNBA, earned an estimated \$3.1 million from NIL deals in college.⁸⁸ Comparatively, the autograph of Clark’s college teammate Taylor McCabe sold for only \$47.⁸⁹ However, this counterargument is susceptible to Schoenfeld’s claim that “of the approximately 520,000 students currently competing in intercollegiate athletics, maybe 519,000 are making nothing at all. A vast majority of deals reward the top players on the nationally competitive

⁸⁶ Gabos, *supra*, at 16-17.

⁸⁷ *Ibid.* at 28.

⁸⁸ *Ibid.* at 29.

⁸⁹ *Ibid.*

teams in two sports: football and men's basketball."⁹⁰ Because the overwhelming majority of student-athletes will never see a million-dollar NIL deal in their lifetimes, only a small minority of top NIL athletes would be impacted by revenue-sharing. Furthermore, the revenue-sharing provision would not necessarily eliminate the possibility of student-athletes pursuing NIL-related opportunities outside of their colleges.

VII. Conclusion

While it can be acknowledged that the increase in revenue of college athletics has had a direct benefit toward college athletics and student-athletes, it can also be acknowledged that more money has caused more problems for student-athletes, colleges, and third-parties. Since the rulings of O'Bannon and Alston are still relatively new, the law has not caught up to regulating colleges and athletic departments in regard to the treatment and classification of their student-athletes. One way this is exemplified is by the lack of protections student-athletes have from their colleges. Due to college athletes not being unionized, they are not represented as one and are unable to participate in collective bargaining with their schools and the NCAA. Another way that exemplifies the slow legal reaction to the rulings of O'Bannon and Alston is the lack of a definitive classification for student-athletes. Since student-athletes never received compensation from their colleges outside of scholarship and grant money, they were always viewed as students attending school to compete in athletics. However, as student-athletes are now receiving compensation directly tied to their athletic performance from colleges, the argument can be made that student-athletes are employees more than they are students.

The rulings of O'Bannon and Alston have been successful in defining student-athletes as employees. In O'Bannon, the district court overturned all three arguments made by the NCAA in justifying the enforcement of their restraints. By applying the rule of reason to the restraints enforced by the NCAA, it was determined that the restraints did not assist in creating competitive balance due to the fact that colleges could spend as much as they wanted in other aspects of their athletics programs. It was also determined that the plaintiffs were able to be subjected to the Sherman Act and the rule of reason because of the broad definition of commerce, and the transaction that occurred between colleges and student-athletes involving athletic scholarships and grant funding. Finally, the court determined that the plaintiffs succeeded in demonstrating injury related to antitrust, as the NCAA's restraints were proven to be standing in the way of video game developers such as EA paying student-athletes for the use of their NILs.

In Alston, the Supreme Court affirmed the ruling of the lower courts. The court determined that the NCAA was the sole market for men's and women's Division I basketball and FBS football, and that they enjoyed a monopoly as a result of student-athletes having nowhere else to sell their labor. By referencing an earlier case in *NCAA v. Board of Regents of University of Oklahoma* which defined "amateurism" for the NCAA, the Supreme Court was successful in arguing that the NCAA's definition of "amateurism" is unclear. In his concurring opinion in

⁹⁰ Schoenfeld, *supra*.

Alston, Justice Kavanaugh pointed out that the NCAA labeling the restraint of receiving compensation as a feature of the product undermines antitrust laws.⁹¹ He succeeds in this by stating that “the NCAA’s business model would be flatly illegal in almost any other industry. All of the restaurants in a region cannot come together to cut cooks’ wages on the theory that ‘customers prefer’ to eat food from low-paid cooks... Hospitals cannot agree to cap nurses’ income in order to create a ‘purer’ form of helping the sick... Movie studios cannot collude to slash benefits to camera crews to kindle a ‘spirit of amateurism’ in Hollywood.”⁹²

The rulings of O’Bannon and Alston have given student-athletes and colleges unprecedented levels of power. However, with this power still relatively new, it remains unchecked. The current state of college athletics is a free-for-all, as the business of college athletics and NIL is growing faster than the law attached to it is. This has created challenges in the ways colleges and athletic departments are governed, how student-athletes and NIL earnings are governed, and how student-athletes are legally defined and represented. Athletic departments expect student-athletes to devote as much time to their athletics as a standard 40-hour work week. This leaves them little time to study, take care of themselves, and prepare for their future careers once their playing days come to an end. Colleges care about making money and the NILs of athletes through tickets, merchandise, and TV deals more than the well-being and futures of their student-athletes. There is no limit to the amount of money that boosters and collectives can raise, thus furthering the problem and creating potential new ones. Collectives create further injury to the greater landscape of college athletics, as they divert funding away from college athletic departments and direct it toward the student-athletes themselves. As male athletes and athletics have been proven to be more popular and generate greater revenue for colleges and collectives, female athletes and athletics receive inequitable treatment and benefits compared to male. This encroaches on Title IX, a federal law that explicitly mandates that no student shall be denied the benefits of any educational program receiving federal funding. Furthermore, despite the rulings of O’Bannon and Alston, a majority of the money being generated is not going toward student-athletes or benefits for them but rather coaches and administrative staff.

Unionization is desperately needed in college athletics to ensure student-athletes receive protections and rights they are entitled to under the law as students and as employees of their respective colleges. Professional sports unions have proven to be successful at representing the collective interests of their athletes, and therefore serve as an effective starting point for the creation of an NCAA Players Association. The ability to collectively bargain would not only give student-athletes an opportunity to advocate for themselves, but it would also provide colleges an opportunity to remedy current issues within their athletic departments and with new NIL developments, potentially avoiding future legal issues and disputes.

n in college sports, all four major issues mentioned in the section outlining the current state of college athletics will be addressed. First, if student-athletes were given the opportunity to collectively bargain with their colleges and the NCAA, they would be able to negotiate more

⁹¹ Kavanaugh, *supra*, at 3.

⁹² *Ibid.*

favorable practice and performance hours. They would also be able to place a greater priority on their academics by having class schedules and academic commitments dictate practices as opposed to the other way around. Unionization would improve the mental health, academic outcomes, and professional outcomes of student-athletes. Second, unionization would address the problem that collectives are currently posing for athletic departments and female student-athletes through collective bargaining. Third, similar to the MLB, NBA, NFL, and NHL, unionization and collective bargaining would likely include a revenue-sharing provision. This would further ensure that colleges are in compliance with Title IX regulations and reduce the liability of a potential Title IX lawsuit. Finally, unionization would address the increasing financial power colleges have over their student-athletes and third parties. A collective bargaining agreement would keep the powers of colleges in check.

In summary, NIL has completely turned the world of college sports upside-down. Because the restraints imposed on colleges and student-athletes by the NCAA went unchecked for many years, they became labeled as features of the product of college athletics. The district court's ruling in O'Bannon affirmed that the NCAA's amateurism rules were a restraint of trade and interstate commerce under the Sherman Act. The later ruling of the Supreme Court in Alston affirmed that the NCAA was not above antitrust laws, and called out the lack of a concrete definition of "amateurism" with Justice Kavanaugh concurring with the opinion of the court that the NCAA's business model exploited the labor of student-athletes. The current state of college athletics is unsustainable due to the number of hours student-athletes are expected to devote to their sport, collectives siphoning money from athletic departments in favor of student-athletes themselves, the disregard of Title IX in regard to NIL opportunities, and financially irresponsible colleges and athletic departments that continue to redirect their increase in money from NIL away from student-athletes, the college, and the surrounding community while paying millions for coaches, buyouts, and other expenses. Unionization would provide student-athletes the right to collectively bargain that should be afforded to them under the National Labor Relations Act. Professional sports unions, or players associations, already exist as a blueprint for a union for college athletes. By unionizing and collectively bargaining with their respective colleges and the NCAA, student athletes would be afforded more favorable practice hours, the disparity in NIL opportunities and compensation between male and female student-athletes would be shot down, colleges and athletic departments would be Title IX compliant, and all student-athletes would receive the financial benefits they are rightfully entitled to.

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Guard not Govern: Constitutional Limits on Government Regulation in Medical Education

By: Shriya Kashyap

Abstract

The government has a moral and absolute responsibility to protect public health by ensuring that doctors are competent, ethical, and properly trained. However, when the state goes beyond just setting a benchmark of standards for safety, and they begin to dictate and rule how a medical school should teach, it starts to undermine constitutional, moral, and educational principles. This paper will argue that the government should have baseline outcomes to ensure physician competency and patient safety while allowing medical schools to determine their own instructional methods and approaches to controversial topics.

From the time of the Flexner Report of 1910 to the rise of federal funding and modern medicine, this paper will show how state and institutional roles grew together. Historically, courts have upheld the balance of the government's right to set qualifications and licensing requirements while ensuring the protection of the universities' rights to determine curriculum. The American system relies on this partnership, where the government acts as the guardian for standards and the schools create an environment conducive to learning and development.

With current debates over abortion education, gender-affirming care, and end-of-life ethics, it is more important than ever to ensure the protection of this structure. The politicization of medicine not only threatens academic freedom but also the idea of patient care and the notion that science should guide medicine. By examining the historical foundations of government oversight, this paper will establish why it is important that medicine be a field that is guided by evidence and ethics, not political ideology and motive.

I. Historical Foundations of Medical Education

Ia. Early Medical Training

For the majority of the nineteenth century, medical education in the US did not have a system establishing structure or consistency. Many students would often train through apprenticeships or proprietary schools where there wasn't much scientific instruction, many of which were considered "for profit" institutions.¹ There was no baseline agreement on curriculum, standards, or what qualifications one would need to practice medicine. Predictably, this system resulted in large disparities in the quality of care patients received, leaving ample distrust in the profession as a whole.

In response, state legislatures introduced licensing laws mandating that physicians demonstrate a basic level of knowledge or pass an exam, a move that faced significant challenge at the time. Many believed that these laws infringed on individual liberty and professional

¹ *Medical Education*, UNIV. OF TOLEDO LIBRARIES,
<https://www.utoledo.edu/library/canaday/services/exhibits/quackery/quack10.html>

autonomy, but the Supreme Court upheld these laws in the late 1800s. Their opinion was that the state has the authority to regulate the practice of medicine so that the public would be protected from non-malicious harm.² This early regulatory approach helped shape the balance of power we see today: the state could require physicians to meet a basic standard of competence, but it could not dictate how they met those standards.

The separation between qualification and education would be the constitutional baseline for regulation in medicine.

Ib. The Flexner Report of 1910

The main turning point for medical education in America was the Flexner Report of 1910. This report was commissioned by the Carnegie Foundation and evaluated 155 medical schools throughout North America in the span of two years. This report exposed deficiencies in rigor, facilities, and patient care throughout many of these schools. Flexner proposed reforms for all medical schools, including that they be affiliated with universities, grounded in biomedical science, and integrate hospital-based teaching so students could learn from real patients.

Flexner's recommendations were taken seriously, and their implementation transformed American medicine. Within a decade, more than half of medical schools closed, and the rest adopted Flexner's recommended model. Importantly, Flexner's approach did not mention government micromanagement of curriculum. Instead, he suggested that the government set a baseline standard to ensure a consistent level of scientific training while still allowing schools to determine how they wanted to reach those standards.

The report's main message suggested that medicine be grounded in science, which helped define what role, if any, the government had in healthcare education. States could set minimum requirements for competence and accreditation but could not impose their own political ideology or dictate what content was taught in a classroom. In this sense, Flexner created a model of regulation that balanced standardized expectation with institutional independence, a balance that continues to shape policy in the current day.³

Ic. Federal Involvement

The federal government has expanded its influence over medical education throughout the twentieth century through financial support rather than direct control. After WWII and the official establishment of the NIH (National Institutes of Health) in 1930,⁴ federal grant funding began expanding, which made Washington a major fund for research, training, and infrastructure.

² Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations* (1999), https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1307&context=faculty_scholarship

³ ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1910), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/Carnegie_Flexner_Report.pdf

⁴ NIH...Turning Discovery Into Health® | National Institutes of Health (NIH), (Jan. 21, 2025), <https://www.nih.gov/about-nih/nih-turning-discovery-into-health>.

Through this federal investment, many laboratories were built, along with medical research, including more of an emphasis on public health priorities.⁵

Even as funding increased, the government avoided telling schools how and what to teach. Federal policy operated by offering resources in order to achieve a shared public health goal but allowed academia to apply these resources in the way they deemed appropriate.⁶ This idea respected the principle that scientific ideas and research should remain separate from political oversight.

Although Congress retained the ability to set conditions for grants and encourage nationwide initiatives, like expanding primary care or reducing health disparities, it could not constitutionally require universities to adopt its politically influenced perspectives.⁷ Thus, the federal government's role was to facilitate public health, not dictate its content.

Id. Accreditation

With the recommendation of the Flexner model, the Liaison Committee on Medical Education (LCME) was established in 1942 and was recognized by the US Department of Education, making it the main accreditor of M.D. programs and degrees. The standards the committee sets expectations for both the public and professionals in that field. The LCME requires that every medical school have good-quality curriculum design, proper faculty oversight, etc.⁸ These standards don't just set rules but rather focus on outcomes, such as the graduates' abilities to apply what they learned, care for patients safely, and act ethically, essentially placing an emphasis on outcomes rather than course content.

Accreditation also ensures a sense of transparency and accountability. Schools must show that they are meeting six basic requirements: medical knowledge, patient care, professionalism, communication, systems-based practice, and continuous learning. These categories are intentionally broad so that programs can address ethics and diversity in their own way, catering to their students and communities.

Accreditation is not meant to be idealistic; it is meant to function so that future physicians can navigate through moral, ethical, and legal dilemmas without taking a political stance on them. This neutrality allows medicine to be a space for academia and questions, not politics.

Ie. Judicial Recognition

⁵ NAT'L RESEARCH COUNCIL, *MEETING THE NATION'S NEEDS FOR BIOMEDICAL AND BEHAVIORAL SCIENTISTS: APPENDIX A, HISTORICAL OVERVIEW* (1994), <https://www.ncbi.nlm.nih.gov/books/NBK236727/>

⁶ Tara Temkin et al., *The Landscape of Federal K-12 School Health Efforts, 2010–2020* (2021), https://www.researchgate.net/publication/354339485_The_Landscape_of_Federal_K-12_School_Health_Efforts_2010-2020

⁷ Victoria L. Killion, *Funding Conditions: Constitutional Limits on Congress's Spending Power* (CRS Report No. R46827, July 1, 2021), <https://www.congress.gov/crs-product/R46827>

⁸ Robert H. Eaglen, *Academic Quality and Public Accountability in Medical Education: The 75-Year History of the LCME* (Oct. 2017), https://www.lcme.org/wp-content/uploads/filebase/articles/October-2017-The-75-Year-History-of-the-LCME_COLOR.pdf

Over the past half century, the judiciary system has acknowledged the different nature that goes into academic decision-making. Courts have usually deferred to universities' judgments when it comes to grading, curriculum design, and professional standards, and they only typically intervene when decisions appear to be discriminatory or inconsistent.⁹

This legal “tradition” uses the same logic that shaped the Flexner Report era and the accreditation era. Education, not legislators, has the power to determine what professional knowledge looks like in practice. The concept of judicial restraint in academic matters reflects the idea that while the government upholds standards of performance, it does not regulate how individuals think or reason.¹⁰ This principle, when applied to medical schools, means that while a state can determine what a competent physician must know and what skills they must demonstrate, they cannot decide how that knowledge is taught or what moral ideas a student reaches in conclusion. Academic freedom thus becomes not just a norm, but a constitutional safeguard against the interference of politics in science and medicine.

If. Public Interest

In the current day, medical education in the US operates through a shared responsibilities system that has evolved throughout the century. The government ensures that there is a certain level of public safety through proper licensing and funding, accreditation organizations translate these basic guidelines into measurable competencies, and schools apply and carry this out through research and teaching.¹¹ Each role is essential to a system that functions effectively when the boundaries between them are respected.

Through this flexible structure, medical schools are able to respond to new challenges that arise, such as pandemics or ethical controversies, without having to wait for governmental approval. At the same time, public accountability is kept in check through licensing exams and federal oversight of funding and finances. This mutual restraint system works when the government does not force ideology and schools uphold the standard of rigor set by the government. If this level of restraint starts to collapse, both sides suffer. With too much government interference, medicine turns into a political practice rather than the evidence-based practice it should be. On the other hand, if educational institutions ignore public safety concerns, then they lose the trust that justifies their autonomy. Essentially, the two must coexist and work together, not in competition.

⁹ Barbara A. Lee, *Judicial Deference to Academic Decisions: Evolution of a Controversial Doctrine*, 47 J. Coll. & Univ. L. 93 (2022),

https://www.nacua.org/docs/default-source/jcul-articles/volume47/rutgers-jcul-vol47_issue1_judicial-deference.pdf

¹⁰ ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1910),

http://archive.carnegiefoundation.org/publications/pdfs/elibrary/Carnegie_Flexner_Report.pdf

¹¹ Sherard Jones, *Understanding the Distinct Roles in Education: Government Regulator, Standards Development, and Accrediting Bodies* (July 10, 2024),

<https://www.iacet.org/events/iacet-blog/blog-articles/understanding-the-distinct-roles-in-education-government-regulator-standards-development-and-accrediting-bodies/>

II. Discussion and Application

IIa. Constitutional Line Between Oversight and Interference

The central question is the extent to which government regulation of medical education can protect public welfare without infringing on academic freedom. The state undeniably has a reasonable and legitimate interest in ensuring that physicians are adequately trained. Yet when the government dictates curricular content or specific instructional methods, especially pertaining to contested moral or scientific issues, such involvement becomes interference.

The courts have recognized that education, especially specialized education, thrives best at the intersection of the accountability of the public and the autonomy of the institution. The precedent that has been used to support this for over a century essentially holds that the government may guard public health but cannot govern scientific thought. This balance between baseline competency and intellectual freedom has been proven through many key cases, including *Dent v. West Virginia* (1889), *Sweezy v. New Hampshire* (1957,) and *Edwards v. Aguillard* (1987).

These cases form what this paper will establish as the baseline and autonomy framework. Under *Dent v. West Virginia* (1889), the state has a clear authority to set a minimum standard for professional training to protect public health. But, *Sweezy v. New Hampshire* (1957) proves that academic institutions, not legislators, decide what may be taught, how it is taught, and who may teach it. *Edwards v. Aguillard* (1987) confirms that the government cannot reshape science to serve political or ideological goals. Together, these cases show that the state may regulate outcomes and qualifications of physicians, but it may not control scientific content. When applied to today's controversial topics, such as restricting education on abortion, gender-affirming care, or other politically sensitive topics, they show the risks of letting politics intrude into curriculum and judgement.

The discussion below expands on these cases, not only in their legal reasoning but also in how each decision reflects a larger idea about knowledge, governance, and the limits of a state's power. Together, they show that professional education has a unique constitutional foundation behind it—one that is accountable to the public and comes from ideology.

IIb. *Dent v. West Virginia*

In *Dent v. West Virginia* (1889), the Supreme Court upheld the state's decision to require physicians to have a diploma from a “reputable medical college” or pass a competency exam before they begin practicing. Frank Dent, a man who had been practicing medicine for years, was convicted after failing to meet this criterion. He argued that the West Virginia statute violated his 14th Amendment rights by depriving him of liberty without due process.

Justice Stephen J. Field wrote the decision for the court, essentially rejecting Dent’s claim and solidifying the stance of the state’s authority to regulate medicine. The court stated that “The power of the State to provide for the general welfare of its people authorizes it to prescribe all

such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as deception and fraud.” The opinion emphasized that medicine was different from other ordinary jobs/trades, stating that it “had a direct implication for human life and safety,” therefore allowing the state to require proof of competency to practice in order to keep the public protected from “unfit practitioners.”

The decision in *Dent v. West Virginia* was based on evidence rather than ideology, allowing regulation only so far as to promote public welfare instead of controlled thought. This case confirms that the state may establish baseline qualifications for education and examination to protect the public from incompetence and fraud but does not suggest that the state may control what is taught in medical schools or how scientific ideas develop. Its justification is rooted in public safety, not political ideology. Applied today, *Dent* supports accreditation and licensing systems that assess competence, but it does not justify curriculum censorship. A state has the power to ensure that medical school graduates are able to treat their patients safely, but it may not decide what medical facts are acceptable to teach.

Dent also represents how regulation and restriction are not the same. The court’s language stating, “The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud,” can be interpreted as saying that we should endorse oversight that builds knowledge, not limits it. Some modern policymakers cite *Dent v. West Virginia* to justify why they intervene in the medical curriculum, but that misrepresents the case’s intent. *Dent* assumed that states would be protectors of public health, not judges of what is the truth and what is not. Using it to justify bans on topics in medical education goes against the very principle the court attempted to uphold.

Furthermore, *Dent’s* focus on the importance of basic competence supports national exams such as the United States Medical Licensing Examination (USMLE) and the National Board of Medical Examiners (NBME) frameworks. These tests measure knowledge, not ideology. In this sense, *Dent v. West Virginia* can be seen as the constitutional root of outcome-based accreditation, which essentially emphasizes protection through being able to prove skills rather than political alignment.¹²

IIc. Sweezy v New Hampshire

In *Sweezy v. New Hampshire* (1957), the state of New Hampshire gave its attorney general power to investigate “subversive persons.” Guest lecturer Paul Sweezy, who was a marxist economist, was subpoenaed to answer questions about his lectures and writing. He refused, invoking academic freedom and due process. The state then held him in contempt, although the Supreme Court later reversed it. The Supreme Court found that the state’s question violated Sweezy’s due process rights as well as academic freedom. The plurality opinion stated that there was a level of “governmental intrusion into the intellectual life of a university...”

¹² *Dent v. West Virginia*, 129 U.S. 114 (1889), <https://supreme.justia.com/cases/federal/us/129/114/>

Justice Frankfurter's concurring opinion stated, "It is the business of a university to provide that atmosphere, which is most conducive to speculation, experiment, and creation. 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." This case proved to be a turning point, with the Court specifically recognizing that academic freedom is protected under the Fourteenth Amendment's Due Process Clause. Essentially, while the state has authority to regulate education for public safety and accreditation, that power does not include control of content or intellectual inquiry.

When applied to medical education, *Sweezy v. New Hampshire* stands for the principle that scientific instruction must be separate from political ideology. Just as the state of New Hampshire couldn't compel a lecturer to disclose or justify the content of his lesson, modern legislatures can not compel what medical schools teach about topics such as abortion, reproductive care, or gender-affirming medicine. When governments try to control what may be taught, they force education to become a form of conformity rather than a form of inquiry.

The Court in *Sweezy v. New Hampshire* even framed academic freedom as not just important to the individual but rather to society as a whole. The opinion states that "To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." This logic is even more important in the field of medicine, where progress is dependent on continued questioning, revision, and testing—all values that don't necessarily align with politics.

Essentially, *Sweezy v. New Hampshire* gives us the constitutional foundation for each institution to have its own autonomy. It builds on *Dent v. West Virginia*, which says that courts may regulate competence but adds that courts may not regulate thought. The Court's reasoning in this case draws a clear line that while the state can require physicians to be trained safely, it cannot force any moral or ideological conclusions that a medical student must agree with.

Expanding on this logic, *Sweezy* implies that a state's involvement with education must end where intellectual questioning begins. However, in medicine, that line is often blurred because ethical and political questions have an overlap—but *Sweezy* does say that discomfort is not enough grounds for censorship. A medical curriculum including abortion, gender-affirming medicine, etc., does not support a specific position but rather just prepares doctors to confront their reality.¹³

Iic. Edwards v Aguillard

Thirty years after *Sweezy v. New Hampshire*, the Supreme Court reaffirmed their opinion and added similar principles in *Edwards v. Aguillard* (1987). Louisiana had a statute that was known as the "Balanced Treatment for Creation-Science and Evolution-Science Act," which required public schools to teach creation science when they teach evolution. Those supporting this act said that it promoted academic freedom since it exposed students to other theories. The

¹³ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), <https://supreme.justia.com/cases/federal/us/354/234/>

Supreme Court rejected this, saying that it violated the Establishment Clause of the First Amendment.

Justice Brennan wrote the opinion for the majority, finding that the state's goal was to advance religious beliefs, not to truly educate their students. The Court said, “The Act impermissibly endorses religion by advancing the religious belief that a supernatural being created humankind.” The court essentially reasoned that *Edwards v. Aguillard* had other implications beyond religion. This case reinforced the rule that the government cannot change scientific curriculum to serve ideological or political goals. This decision drew a clear line between education based on scientific thought, which must be grounded in reasoning and have academic standards, and political/religious ideas, which aren't welcome in the classroom.

Edwards v. Aguillard, when applied to medical schools, specifically supports the claim that when the government attempts to restrict or mandate certain content, such as prohibiting education on reproductive rights, abortion techniques, or gender-affirming care, it crosses the line and becomes unconstitutional. Although these laws can be framed and manipulated to seem as though they ensure physician competency, they actually work to compel ideological conformity, which is precisely what *Edwards v. Aguillard* established as unconstitutional.

Just as the court found it unconstitutional for the state of Louisiana to force creationism into the curriculum, it would be unconstitutional for a legislature to not allow curriculum about topics such as reproductive medicine or transgender health. Both of these actions would essentially change the educational process by forcing political ideology on scientific findings.

Furthermore, *Edwards v. Aguillard* essentially points out an important principle—scientific truth cannot be legislated. The government's role is to make sure that education serves the public, not to determine what they believe to be legitimate science. In this case, the overall decision is similar to a point *Sweezy v. New Hampshire* makes—when political authorities attempt to define what they believe the truth is, they violate what would be considered academic freedom.¹⁴

IId. Connecting the Cases

Together, *Dent*, *Sweezy*, and *Edwards* show the constitutional power between the state's responsibility to protect public health through regulation of medical schools and its constitutional limits preventing it from controlling ideas.

Case	Holding	Constitutional Principle	How it Applies to Medical Education
Dent v. West Virginia	States can require licensing and exams to ensure	States' powers allow for the regulation of public	Government is allowed to set minimum

¹⁴ *Edwards v. Aguillard*, 482 U.S. 578 (1987), <https://supreme.justia.com/cases/federal/us/482/578/>

	competence	safety	qualifications, but cannot dictate curriculum
Sweezy v. New Hampshire	Government cannot intrude in academic or intellectual life	Academic freedom is constitutional under the Due Process Clause	Scientific inquiry and thought have to be separated from political ideology
Edwards v. Aguillard	States cannot mandate or censor scientific teaching to promote a religious or political belief	The Establishment clause prohibits ideological control of curriculum	Legislatures cannot prohibit medical topics for moral reasons

III. Ethical Implications

IIIa. The Boundary Between Regulation and Intrusion

The constitutional principles established in *Dent*, *Sweezy*, and *Edwards* shape the boundaries between the state's role in education and academic freedom, especially in medicine—a field that has strong ties to science, ethics, and public policy. As debates over abortion education, gender-affirming care, and end-of-life ethics grow to be more and more polarized, it is important to ask the question: where does regulation end, and unconstitutional interference begin?

Medical education is grounded in the scientific method to encourage questions, peer reviews, and diverse opinions. Involving politics in this process puts the field of medicine at risk, transforming it from exploration and innovation to indoctrination. The cases above show a boundary, one that says that while the state may regulate who may practice medicine based on exams, how much competence is required, what is defined as enough competence, etc., it may not dictate what scientific facts are acceptable to be taught. When the government oversteps this line, they threaten academic freedom, patient safety, and basic democratic principles.

IIIb. Modern Attempts to Restrict Medical Curriculum

Over the past few years, many states have introduced laws that outline what medical students can be taught, especially in areas of reproductive and gender-affirming care. For example, in 2023, Florida passed a law that prohibited public funds from being used to teach about or provide gender-affirming treatments, forcing medical schools to remove instruction in that field. Providers who provide gender-affirming care face criminal penalties.¹⁵ In Texas, the

¹⁵ Human Rights Campaign (HRC), *Breaking: Florida Senate Passes Extreme Gender-Affirming Care Ban* (Apr. 4 2023), <https://www.hrc.org/press-releases/breaking-florida-senate-passes-extreme-gender-affirming-care-ban>

state's near-total abortion ban has had a similar effect on medical education. Texas Senate Bill 8, also known as the Texas Heartbeat Act, bans abortions at around six weeks of pregnancy.¹⁶ Since abortions are almost nearly prohibited, many OB-GYN programs in medical schools have been negatively impacted regarding training on this topic. Not only does this harm patients who wish to seek this care, but it also ill prepares physicians who might need to pass a certain accreditation exam.

These laws being proposed are justified as aligning with “state values” and holding a “moral responsibility.” However, under the reasoning of *Sweezy v. New Hampshire* and *Edwards v. Aguillard*, they are constitutionally wrong. The *Sweezy* case warned that when the government tries to control “the content of intellectual life,” it jeopardizes education and democracy. *Edwards v. Aguillard* also makes it clear that the state cannot change curriculum, especially scientific instruction, to reflect religious preferences. The overarching idea coming from these cases is that political bodies cannot rewrite science through legislation.

Other than these constitutional flaws, policies like these also undermine a proper level of medical training. In order for a physician to practice safely and ethically, they must understand different levels and types of care, even though they may not ever personally perform that type of care. By excluding abortion or gender-affirming treatments, the realities of medicine will struggle. Forcing schools to exclude areas of practice that are scientifically recognized creates gaps in education that endanger patients and public safety, something *Dent v. West Virginia* originally tried to prevent.

IIIc. Professional Organizations on Politics-Free Training

Medical institutions, along with educational institutions, have consistently stated that government-mandated curriculum restrictions are not compatible with education based on evidence. The Association of American Medical Colleges and the American Medical Association have both stated that clinical instruction must not have any politics built into it.

In 2025, the AMA stated that they “...vigorously oppose interference by the government or other third parties that causes a physician to compromise their medical judgment as to what information or treatment is in the best interest of the patient.”¹⁷ Similarly, the AAMC has also cautioned against policies that restrict instruction on topics such as reproductive health, since it should be a requirement, and without it, the scientific integrity of medical education may be compromised¹⁸. These statements by esteemed organizations echo the reasoning stated in *Sweezy* and *Edwards*—curriculum should be guided by professional judgement, academia, and evidence, not political ideology.

¹⁶ S.B.A. No. 8, 87th Leg., R.S. (Tex. 2021), <https://www.capitol.texas.gov/tlodocs/87R/billtext/pdf/sb00008f.pdf>

¹⁷ American Medical Association, *Fighting Government Interference in Evidence-Based Medicine* (Jan. 28, 2025), <https://www.ama-assn.org/health-care-advocacy/state-advocacy/fighting-government-interference-evidence-based-medicine>

¹⁸ Association of American Medical Colleges (AAMC), *Reproductive Health Care and Education* (Group on Resident Affairs/GRA), <https://www.aamc.org/learn-network/affinity-groups/gra/reproductive-health-care-and-education>

The relationship between legal precedent and professional ethics is important. When courts protect universities' independence they are giving them the space they need to search for the truth through academic research initiatives. Medicine relies on the freedom to test ideas without a fear of political interference.

IIId. Public Funding Argument for Curriculum Control

Those who support restrictions on curriculum argue that because some medical schools receive public funding, the state should be allowed to shape their teaching priorities.¹⁹ While this argument might be appealing on a foundational level, it fails practically speaking and when considered under the regulation of the Constitution. Legally, *Edwards v. Aguillard* makes it clear that public funding does not give the state power to impose religious or moral ideology on education. The court said “that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect...”²⁰ Extending this reasoning to medical schools, the state may not tie medical school funding to agreement with its political stance on reproductive rights or gender identity.

From a practical standpoint, too much political oversight changes the meaning of what accountability really means. Accountability in medicine is measured by competence and ethical care, not by how they conform to legislative ideas. When lawmakers take power over curriculum content, they change that accountability by substituting their own political goals for educational ones. Instead of incentivizing schools to produce ethically trained, safe physicians, they pressure programs to avoid teaching topics based on their political opinions rather than patient needs. The result of this is a less prepared workforce, with large gaps in training, and a system where medical education responds to the demands of politics instead of evidence.

In the past, we've also seen that once politics has influence on education, the line between academic oversight and propaganda dissolves. In the 1900s, many authoritarian regimes attempted to “standardize” medical curriculum by ordering scientific experiments in the name of national values, claiming it was scientific progress. For example, in the early decades of the twentieth century, Germany's Nazi regime and the Soviet Union's Stalinist government started to impose their political views on science and medicine. In Nazi Germany, medical schools were forced to adopt “racial hygiene,” which would essentially teach that sicknesses, IQ, and moral worth would be biologically predetermined by race.²¹ This ideology spread across the state, which led to the expulsion of a lot of Jewish doctors and scientists. Similar to this, in the Soviet Union, Joseph Stalin adopted Trofim Lysenko's ideas that rejected genetics because they matched

¹⁹ American Association of University Professors, *Responding to Legislative Interference in University Governance* (Academe, Vol. 95),

<https://www.aaup.org/academe/issues/95/responding-legislative-interference-university-governance>

²⁰ *Edwards v. Aguillard*, 482 U.S. 578 (1987), <https://supreme.justia.com/cases/federal/us/482/578/>

²¹ United States Holocaust Memorial Museum, *The Biological State: Nazi Racial Hygiene, 1933–1939* (Nov. 27, 2023), <https://encyclopedia.ushmm.org/content/en/article/the-biological-state-nazi-racial-hygiene-1933-1939>

Marxist ideas that the environment was in charge of shaping heredity.²² Scientists who disagreed with this were either imprisoned or killed, leading to soviet biology being replaced with politics, therefore making the Soviet Union fall behind for decades. Both of these regimes show how government control over medicine can turn science from trying to find answers to a tool to control politics and destroy public trust. While the US is far from extremes such as this, attempts to teach through fear or ideology have the same fundamental risk: authority instead of evidence-based reasoning. These examples highlight the importance of why a democracy must protect a clear boundary between scientific discoveries and political authority, a principle that was later affirmed in *Sweezy v. New Hampshire* and *Edwards v. Aguillard*, where the court ruled that there was required to be freedom to teach and learn without ideological pressure taking over.

IIIe. Consequences for Political Influence on Medical Education

Political ideology mixing with medical education has consequences that have an impact outside of the classroom. It weakens doctors' ethical duty to base their care on science, and it makes it harder for them to respect their patients' choices. A doctor trained under political censorship cannot truly uphold the Hippocratic oath that doctors pledge to follow before treating patients while serving an ideology.²³

Democratically, this type of influence can have a negative impact on constitutional governance, making the separation between knowledge and power a blurry line. When the government determines what actually counts as science, it can endanger informed democracy. The framers of the constitution understood that self-government depends on people who can think critically and make decisions based on their own knowledge and education, rather than authority. This same principle applies to doctors, whose education is meant to prepare them to serve the public with their own judgment. If political forces limit what doctors can learn or discuss, then patients lose access to informed care that is fair and grounded in evidence.

This impact can go past medicine. Once academic freedom begins to disappear in one field, the pattern can spread into others. If the state can control what counts as acceptable medical knowledge, then eventually it can also start to control what is taught in topics such as psychology, environmental science, or public health. This can lead to a dangerous form of intellectual control, where truth is established by the law and not through research and debate.

As the court explained in *Edwards v. Aguillard*, the constitution does not allow the state to use its "great authority and coercive power" in education to promote ideology. Though this case was about creationism, this statement relates across legislative attempts to this day to restrict scientific teaching in medicine. Every version of censorship, no matter how small, chips away at both science and democracy.

²² Svetlana A. Borinskaya et al., *Lysenkoism Against Genetics: The Meeting of the Lenin All-Union Academy of Agricultural Sciences of August 1948, Its Background, Causes, and Aftermath*, 212 *Genetics* 1 (2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6499510/>

²³ U.S. House of Representatives, *Federal Support for Innovation: Hearing before the House Committee on Innovation, Research, and Technology*, 117th Cong. (2022), <http://congress.gov/117/meeting/house/114995/documents/HHRG-117-IF02-20220719-SD007.pdf>

III.f. Shared Responsibility Between State and Schools

The solution is not to remove government involvement from medical education but to restore the balance between public oversight and academic independence. Both the Constitution and ethics draw a line between what the state should regulate and what educators should be able to decide. *Dent v. West Virginia* made it clear that the state has the responsibility to protect the public from unqualified or corrupt physicians by setting fair standards for licensing and competence. However, beyond this, decisions about what future doctors learn and how they are being taught belong to medical schools. Institutions themselves, along with other accrediting bodies, have the best preparation and equipment to design courses, choose materials, and train students in science as well as ethics.

This kind of shared responsibility has been guiding American medical education for over a century. This mutual restraint is the same vision that was laid out in the Flexner Report and the same decisions that were later reinforced by the court. A partnership in which the government ensures accountability and safety, but universities are the bodies that drive innovation and education, proving that they both depend on each other. When states respect academic freedom, it shows that they are attempting to protect public good. When universities honor their duty to uphold standards and educate students, they strengthen both the field of medicine and the concept of democracy. However, when either side crosses its limits, this relationship breaks down, leading the state to seem politicized and education to lose its integrity.

IV. Comparative Case Study: UK

IVa. Overview of the UK's Model

The United Kingdom offers a strong example of how a nation can combine government oversight with freedom in medical education. While the government is very involved in regulating healthcare and licensing doctors, they do not dictate what universities can teach or encourage specific scientific views. Regulation in the UK centers around whether or not graduates meet certain professional outcomes and if they can practice safely and ethically. The oversight they have focuses on how well medical schools actually prepare competent doctors, not what opinions each individual has. The General Medical Council (GMC) is the UK's independent body that regulates doctors. They set expectations and standards through outcomes, continuous quality assurance,²⁴ and the licensing exam known as the Medical Licensing Assessment (MLA).²⁵ This structure ensures that the public is held accountable while still allowing academics to have independence. It represents the same level of government versus educational decision balance that is mentioned in *Dent v. West Virginia*, *Sweezy v. New Hampshire*, and *Edwards v. Aguillard*.

²⁴ General Medical Council, Our Mandate, <https://www.gmc-uk.org/about/what-we-do-and-why/our-mandate>

²⁵ General Medical Council, Medical Licensing Assessment (MLA), <https://www.gmc-uk.org/education/medical-licensing-assessment>

IVb. Outcome-Based Standards in the UK

The foundation of the UK medical system is outlined in the GMC's Outcomes for Graduates, which clearly defines what new doctors must know before they start to practice. These outcomes cover multiple fields, including patient safety, communication, ethics, teamwork, clinical skills, etc. It also includes a certain number of practical procedures that students must know how to perform before they graduate.²⁶ This system is unique in the way that it focuses on results rather than exact methods of teaching. This leads to each medical school being able to design their own curriculum, teach strategies they find fit, and determine how they want their course to be structured, so long as students can demonstrate that they are proficiently competent by the end of their training. This structure ensures that all graduates are properly educated and will follow ethical guidelines for all fields/subjects without forcing a method of teaching.

This model also is quick in adapting scientific discoveries and changes in the medical field. The GMC regulates outcomes of students rather than the syllabi of institutions, so schools are able to quickly change their courses to include emerging issues such as the Covid-19 pandemic or the increasing presence of AI in healthcare. This level of flexibility allows institutions to have academic independence while still ensuring that students have relevant, modern training. In the US, having this outcome-based model could help prevent politics from influencing medical education. Simultaneously, it can ensure a maintained standard of patient safety throughout the nation.

IVc. Quality Assurance and Institutional Review

Every medical school in the UK needs to be approved by the GMC, and must also be reviewed regularly to make sure that their program meets the national standard. The GMC also has a Quality Assurance Framework, which sets clear expectations for how a curriculum should be designed, how students should be supported overall, and how assessments are to be made to ensure fairness. Institutions are required to submit reports, provide data on student outcomes, and welcome GMC reviewers onto their campus so that they may review the institution for areas for improvement. When these problems are found, the GMC typically works alongside an institution to correct these mistakes rather than punishing them politically.²⁷

A form of regulation such as this ensures that there is trust between the government and institutions rather than control. The public is then aware that all graduates of medical institutions are trained and have passed tests that match up to science-based standards. However, universities still have the freedom to decide what type of materials, theories, or questions they want to include in their teachings. Oversight, in this case, is more like a partnership, just like the “mutual restraint” model that is described in the US. It prevents too much governmental overreach but ensures that there is no neglect on the side of academics. As long as schools are able to prove

²⁶ General Medical Council, *Outcomes for Graduates 2020* (Nov. 2020), http://www.gmc-uk.org/-/media/documents/outcomes-for-graduates-2020_pdf-84622587.pdf

²⁷ General Medical Council, *How We Quality Assure Education and Training*, <https://www.gmc-uk.org/education/how-we-quality-assure-education-and-training>

that their graduates can meet the necessary standards, they are able to determine themselves what the best way to reach these goals is.

IVd. Medical Licensing Agreement

In the most recent years, the GMC has introduced the Medical Licensing Assessment (MLA).²⁸ This exam is one exam administered nationally, and all doctors must pass it before practicing in the UK. This exam has both a knowledge test along with a clinical skills portion. This exam essentially evaluates whether or not a graduate can properly treat a patient across many scenarios. The MLA is applicable to students that receive their training in the UK as well as those who have been trained in a different country, which ensures that every doctor practicing in the UK has the same standards.

This assessment given throughout the nation strengthens accountability without dictating what schools actually teach. It does not test for if a graduate is conforming to national standards, but rather tests for ability, knowledge, reasoning, etc. In this way, the MLA operates with the same base as US medical licensing exams, but with more of a focus on national outcomes. The MLA essentially protects fairness and medical education without allowing a political intrusion into the curriculum.

IVe. Good Medical Practice in the UK

Medical education in the UK also follows the GMC's Good Medical Practice, which outlines how doctors should act towards patients, coworkers, and the general public.²⁹ This includes areas such as acting with integrity, treating colleagues with respect, making patients their first concern, etc. Medical schools are required to integrate this into their curriculum so that future doctors can understand how to uphold moral and social responsibilities rather than just learning about how to treat illness.

By connecting education with ethics, the Good Medical Practice combines science and society to bridge the gap. It is a way to ensure that doctors are guided by compassion and equity rather than with political ideology. Placing such a heavy emphasis on professionalism also ensures that patients have autonomy and all decisions are formed from evidence-based values, something that is essential to make sure there is public trust. While there are some laws that attempt to restrict how controversial topics are taught, this approach is a way to teach students how to handle disagreement through ethical reasoning and patient-centered care.

IVf. Handling Controversial Topics

The UK has an outcome-based model, which is specifically effective in areas of medicine that might have a politically contested view, such as abortion, assisted suicide, or gender-affirming care. Instead of banning education on these topics, the GMC requires that

²⁸ General Medical Council, *Medical Licensing Assessment (MLA)*, <https://www.gmc-uk.org/education/medical-licensing-assessment>

²⁹ General Medical Council, *Good Medical Practice* (Jan. 30, 2024), <https://www.gmc-uk.org/professional-standards/the-professional-standards/good-medical-practice>

doctors be able to practice safely within both professional and moral boundaries. For example, in abortion care, a doctor who refuses to perform the procedure must still be competent enough to refer the patient to another qualified doctor. Similar to this, in gender-related care, doctors must understand the physical and psychological needs of transgender patients regardless of their personal opinion on the topic.

This system makes sure that education is the basis of laws and patient safety, not ideology. Medical school students must learn how to navigate certain conflicts by using evidence and empathy. The goal is not to make all doctors conform to one standard but to make sure that they can all provide safe, legal, and empathetic care. In the US, the difference between competence and belief is often blurred between politics and medical education. The UK, however, proves that it is possible to still respect individual opinions while still guaranteeing high-quality care for patients.

IVg. Academic Freedom Throughout Higher Education

Outside of medicine, the UK has reinforced academic freedom across multiple universities. The Higher Education (Freedom of Speech) Act 2023 allows there to be more open debate, leading to schools and students both upholding free expression and diversity.³⁰ The Office for Students, the organization that oversees universities in the UK now has the power to investigate cases where people at a university are punished for expressing their opinions.³¹ Universities UK, an advocacy organization for universities throughout the UK defines academic freedom as being able to question views and explore different ideas without being afraid of consequences.³²

Laws and policies such as this help create an open academic environment that is crucial for medical education. These types of laws and policies protect professors who teach controversial topics as well as allow students to learn from multiple viewpoints. By ensuring that not one singular ideology is in charge of a classroom, the government in the UK enforces the idea that knowledge in academia must be separate from politics.

IVh. Lessons the US Can Learn from the UK

The UK's approach of balancing institutional freedom with public accountability is something the US can learn. For example, the government can ensure that the public is safe by enforcing a clear standard based on outcomes in the medical field, something that is similar to the GMC's Outcomes for Graduates. In addition to this, the US could consider expanding national licensing exams to have both practical skills and ethical reasoning rather than having standards that are different per state. Furthermore, they can strengthen protections for academic

³⁰ Higher Education (Freedom of Speech) Act 2023, 2023 c. 16 (U.K.), <https://www.legislation.gov.uk/ukpga/2023/16>

³¹ Office for Students, *Introduction to the Office for Students*, <https://www.officeforstudents.org.uk/for-providers/registering-with-the-ofs/introduction-to-the-office-for-students/>

³² Universities UK, "Universities UK", <https://www.universitiesuk.ac.uk/>

freedom and inquiry in medical education, which would essentially make it harder for politics to get involved and ban topics of study.

Just as the UK is able to use its framework to assist with safety in their country without controlling individuals' thoughts, the US can attempt to lean on its constitutional foundation to protect quality and independence. The main principles proven in *Dent*, *Sweezy*, and *Edwards* are similar to the UK's outcome-based system—the state may regulate medical education only for the good of the public but cannot have an impact on ideology. The UK shows how these ideas can work in everyday administration.

The UK proves that it is possible for a country to hold their medical system responsible while still preserving the freedom of thought. Oversight is based on transparency, not loyalty to a specific ideology. Doctors are tested on what they can do to help patients, not what political beliefs they hold. For the US, this case shows that when the government focuses on outcomes and ethics rather than controlling with censorship, the medical field is based on evidence and helps serve the public better.

V. Conclusion

Va. Guard not Govern

This paper has demonstrated a point that has been represented throughout more than a century of American medical education and law: the state may guard standards that are best for the public, but it must not govern ideas. From licensing statutes from 1889 that *Dent v. West Virginia* approved, all the way to the court's stance in *Sweezy v. New Hampshire* that essentially said that universities have the control to decide who may teach, what must be taught, and how it can be taught, to *Edwards v. Aguillard*, where the court said that scientific instruction should not become an ideology. The government should only have an interest in public safety and the competence of physicians; they should not have an interest in the content or beliefs of the political ideas behind a syllabus. Physicians must be trained with evidence, respect patient decisions, and approach contested ideas with professional integrity. These ideas cannot be implemented through content mandates but are rather only able to be applied through questions, debate, exposure to new ideas, and an assessment of skills.

The UK's approach that is outcome-centered reinforces that idea in practice. A separate independent regulatory board sets what standards graduates must meet and what they must do, while the universities have the power to decide how to teach it. These results are measurable and have proven time and time again that they work. The public is best served when states define what baseline outcomes must be and enforce transparency, while medical institutions have the autonomy to use methods, materials, and topics of inquiry that will allow medicine to be honest and patient-centered.

Vb. Why This Matters

For patients, having outcome-based oversight guarantees that every doctor meets a standard of competence and ethics. When the government limits what can be taught rather than letting evidence shape curriculum, patients are the ones who are harmed by it. By leaving out training on topics such as reproductive health or gender-related care, it does not eliminate the need for care on these topics but rather just leaves doctors less prepared to handle them safely. This boundary is limiting what makes progress possible: the ability to test ideas, change when something fails, and adopt better policies without being afraid. Medicine is able to advance because there is a space to correct it out in the open, and without an influence of politics, evidence will stay evidence. When the government and lawmakers treat science as something they can rewrite, they undermine trust in both medicine and law. When they have a space for academic inquiry but are still enforcing competence, they strengthen both.

Having this boundary does not mean that everything is up to the universities. Instead, it makes the state's role clearer. When the government focuses on outcomes, they can help protect patients without dictating conclusions. When universities have control over content and teaching methods, they can introduce controversial topics honestly and train students to reason through the different points of view rather than avoiding them.

Vc. Addressing Objections

While some might object to the stance that if taxpayers are the ones who fund medical schools, then the government should be able to control what is taught.

Public funding requires accountability, not a control of ideas. Accountability works better when it is tied to performance on licensing exams, clinical skills, ethics, etc., not a mandatory syllabus. Linking funding to proof that students are actually competent lets lawmakers push for better results without controlling the science itself. But when laws start dictating what schools must teach, the curriculum becomes harsh, and whatever political debates happen today can get locked into the training of future doctors, even if those ideas later prove wrong.

Vd. Practical policy honoring both Oversight and Autonomy

It's important to write laws and regulations and have accreditation rules around competencies that must be measured, including but not limited to clinicals, patient safety, communication, etc. it's important to avoid a list of required topics along with banned topics. This helps to keep oversight focused on patient protection.

Strengthening independent quality assurance will also help with accountability. It's important to invest in external reviews so that there is a public assessment of how well a medical school is doing, and this will lead to targeted changes for weak programs. Data such as licensure passing rates and the Objective Structured Clinical Examination should be the ones driving accountability rather than political pressure.

Coordinating with national organizations hosting exams is also important to make sure that core skills and behaviors are assessed consistently across all states. Aligning standards throughout ensures that “day one readiness” is the same thing throughout the nation.

Programs should also be required to teach students to communicate consent, manage risk, and practice the law ethically in politically sensitive areas. Exams, simulations, and workplace-based assessments can be used to evaluate these skills, which can be very important, as the political science throughout the country is not the exact same at any given location.

Finally, transparency is key. Publishing information showing program-level assessment reliability, licensing exams, clinical placement quality, etc. Transparency pressures institutions to improve their methods and what they teach students without forcing them to have certain items on their syllabi.

Vf. Preserving Competence, Integrity, and Democratic Values

Ultimately it is crucial to have a clear division of labor. The state can ensure that every doctor is competent, safe, and accountable. Schools develop knowledge through judgment and open inquiry. When this boundary is respected, patients receive safe and ethical care, science advances through trial and error, and the public sees democracy as being strengthened when the government is serving the truth rather than reshaping it. When the boundary collapses, patients are harmed, educators will censor their materials, and the public loses trust in both medicine and government.

The solution is a combination of outcome-based oversight and academic freedom that has shaped US medical education all the way from the Flexner reforms to the modern day. This framework does not guarantee a consensus in controversial areas but rather a system that argues from evidence, helps patients' needs, and changes when the facts point to it needing a change. That is what it means to protect both public health and freedom in a democratic society.

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Reconciling Copyright with the Right to Education: How the International IP Regime Restricts Access to Teaching and Learning Materials in the Global South

By: Gabrielle Valencia

Abstract

The international copyright regime, built upon the Berne Convention and the Agreement on Trade-Related Aspects of International Property Rights (TRIPS), structurally constrains states' ability to realize the right to education by limiting access to teaching and learning materials (TLM), particularly in the Global South. Situating copyright within the right to education within international human rights law and the UN Sustainable Development Goal 4 (SDG4), this paper argues that the meaningful fulfillment of SDG4 requires equitable, affordable access to quality TLM. Yet the trade-driven normative evolution of copyright, especially the institutionalization of the three-step test and growing presence of TRIPS-plus obligations has narrowed the practical scope of limitations and exceptions that states can use to expand educational access. A comparative analysis of Brazil and South Africa's disparate copyright frameworks illustrates how countries in the Global South may navigate these constraints. Brazil employs a protection-oriented strategy, whereas South Africa has attempted to expand fair-use style educational exceptions. Yet both countries remain limited by international norms and interpretative uncertainty. This paper concludes by advocating a human-rights based reinterpretation of copyright's social function, balanced against its economic function, in which the protection of authors' moral and material interests is implemented in a manner that does not undermine states' core obligations to ensure inclusive and quality education for all.

I. Introduction

On the eve of the 77th anniversary of the United Nation (UN) General Assembly's adoption of the Universal Declaration of Human Rights (UDHR), it is necessary to reflect on its profound decree: "everyone has the right to education."¹ This declaration of education as a human right, significant in its own right, constructs a standard for all people and nations to uphold. Nevertheless, its inclusion in the UN's Sustainable Development Goals (SDGs) as Goal 4 underscores that education is also a catalyst for sustainable development. The SDGs, ambitious in their objective to improve global living conditions by 2030, are not a set of independent targets, but an integrated framework. They acknowledge the interdependence of development: "action in one area will affect outcomes in others, and that development must balance social, economic, and environmental sustainability."² Ultimately, this reveals that education is a foundational force shaping development across all areas.

¹ *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, art. 26 (Dec. 10, 1948).

² United Nations Development Program, *The SDGs in Action*, UNDP, <https://www.undp.org/sustainable-development-goals> (last visited Nov. 13, 2025).

The COVID-19 pandemic exerted pressure on the global intellectual property (IP) regime, both in its effects on education and on economic development more broadly, thereby illustrating this reflexivity. In the months immediately following the pandemic's onset, around 95 percent of children stopped attending school and over 90 percent of countries shifted to digital learning programs.³ In addition to a number of other structural barriers, such as possession of electronic devices or a stable internet connection, many students and educators encountered copyright barriers, constraining their ability to access the teaching and learning materials (TLM) needed for a quality education. Although many countries had existing policy frameworks that enabled certain limitations and exceptions to improve educational access, those permissible uses were frequently confined to physical facilities.⁴ In many developing nations already struggling with educational access and pervasive inequality, COVID magnified these effects.

While COVID-19 placed pressure on the global IP system, its effects extended far beyond the realm of global education. During the pandemic, several World Trade Organization (WTO) members proposed waiving IP protections for vaccines, diagnostics, and therapeutics.⁵ Other members disapproved, contending it would undermine innovation. While some waivers were granted, the contention around the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the primary instrument governing global intellectual property (IP) rights, has steadily increased. A review of countries' stances on TRIPS and their evolving domestic copyright policies generally reveals a divergence between the Global North and Global South. For example, The United States has proposed bills that may inhibit international IP treaties, while Colombia has proposed a comprehensive review of the implementation of TRIPS.⁶

Since its inception, TRIPS has reflected the belief, primarily promoted by developing nations, that strong IP protection supports innovation, trade, and economic development. Today, IP and knowledge-intensive industries compose a greater proportion of global economic output than ever.⁷ The increasing role of IP-heavy industries in the economy suggests that strong IP rules drive the creation of high-value industries that attract investment and drive economic growth. Thus, as nations develop and generate more IP themselves, the international IP framework becomes a greater determinant of their development trajectory.

Yet, as COVID revealed, the international copyright regime has huge implications on education, especially in developing nations. Such impact is not only confined to digital materials; scholars and policy makers have debated and challenged the implications of the copyright regime on states' abilities to meet their educational goals since the origins of the regime as it exists

³ Keara Galvin, *The Impact of COVID-19 on SDG 4: Quality Education for All*, POPULATION EDUCATION (Mar. 23, 2022), <https://populationeducation.org/the-impact-of-covid-19-on-sdg-4-quality-education-for-all/>.

⁴ Sean Flynn, *Copyright and COVID*, in INTELLECTUAL PROPERTY RIGHTS IN TIMES OF CRISIS 140 (Jens Schovsbo ed., 2024), <https://www.elgaronline.com/view/book/9781035323579/book-part-9781035323579-12.xml>.

⁵ Chris Borges, *RAI Explainer: A Brief History of the International IP Regime*, THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) (Apr. 17, 2025), <https://www.csis.org/blogs/perspectives-innovation/rai-explainer-brief-history-international-ip-regime>.

⁶ Ibid.

⁷ U.S. CHAMBER OF COMMERCE, 2025 INTERNATIONAL IP INDEX 26 (2025), <https://www.uschamber.com/intellectual-property/2025-ip-index>.

today. Protection-oriented copyright policies impact education, particularly when limitations, exceptions, and other flexibilities do not sufficiently enable access to TLM.

As nations pursue economic growth and global influence, their policy choices, in turn, shape the quality and accessibility of education. Such consideration is important for Brazil and South Africa, two BRICS economies with strong IP-dependent sectors and clear ambitions to strengthen innovation within their borders. Yet, both Brazil and South Africa suffer from extreme inequality, which has thwarted their progress towards the achievement of education for all. To achieve high-income status, both nations must confront domestic inequality, strengthen their workforces, and expand the number of skilled workers, efforts that depend on improving educational outcomes. Both nations have taken distinct approaches to copyright policy. Brazil has adopted a protection-oriented framework, while South Africa has focused on expanding exceptions, particularly for educational access.

This paper examines copyright and related rights, rather than other IP regimes such as patents or trademarks. The brief discussion of the broader TRIPS debates serves to position copyright within an evolving international IP landscape. As states who have failed to meet their education targets reform their domestic IP frameworks, they must reconsider the normative function of copyright. Historically structured around trade considerations, copyright law was not designed with development as its primary objective. As education is necessary for sustainable development, copyright policy plays a twofold role: it can incentivize innovation, but it may also restrict access to the TLM that education and development depend on.

II. Positioning Copyright Within the Right to Education

The right to education, articulated in international human rights law, is operationalized through SDG4, whose targets reveal that fulfilling this right depends on ensuring access to TLM. Goal 4 endeavors to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.⁸ Examining the realization of the right to education through the lens of SDG4 recognizes that education is a foundational force bringing about the fulfillment of other human rights and shaping development across all areas. Moreover, it also establishes a 2030 deadline, emphasizing the urgency of accelerating progress towards educational goals. However, while education is recognized as a human right, copyright is too. Understanding how international human rights conceptualizes and balances these rights provides guidance for how the international copyright regime should function in practice.

IIa. Teaching and Learning Materials as the Foundation of SDG4

An examination of the slow progress toward SDG4 reveals how TLM plays a critical role in improving educational outcomes. Realizing the right to education therefore requires ensuring

⁸ U.N. GA Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, U.N. Doc. A/RES/70/1, at 17 (Oct. 21, 2015)

the substantive accessibility of TLM, with a focus on both their quality and equitable distribution. The UN has identified ten specific targets to define and track progress towards the realization of SDG4. These targets focus on ensuring access to different levels of education and educational resources, increasing the number of individuals with technical and teaching skills, addressing the cleavages and disparities present in educational systems, and creating safe places for students to learn.⁹ Together, these targets underscore that achieving SDG4 requires more than expanding enrollment, but strengthening the conditions that make learning possible.

An examination of the fulfillment of these targets indicates that progress towards SDG4 remains slow, and despite some improvements, learning outcomes in many countries are declining.¹⁰ Hundreds of millions of people remain illiterate, with women disproportionately affected, and teacher qualifications have shown minimal improvement.¹¹ Socioeconomic disparities in a number of indicators are concerning, displaying that rural and poorer families experience greater disadvantages.¹² Many countries are moving backwards in terms of learning outcomes at the end of lower secondary school, which may be indicative of external factors such as conflict but also internal pressures such as student motivation and retention.

Access to TLM is the foundation upon which every SDG4 target depends. TLM includes all materials and tools that act as aids, with learning as the goal in an educational context, such as textbooks, journal articles, databases, diagrams, pictures, videos, and more.¹³ In the context of SDG4, access to TLM enables improved educational outcomes from the perspectives of both students and teachers. For students, learning materials facilitate visible teaching, positively impacting motivation and engagement, and contributing to increased literacy skills.¹⁴ For teachers, access to materials supports the structuring of the material and streamlining of the work.¹⁵ This can improve the delivery of learning, especially where teachers do not meet minimum qualification standards, and can also contribute to increased training to raise those standards. Yet their benefits depend entirely on whether students and teachers may actually obtain and use them.

Some studies have shown that digital teaching materials are particularly effective in improving students' literary literacy skills, interest, and motivation; contributing to increased quality of curriculum and improved educational outcomes at the primary level.¹⁶ Moreover, the rapidly changing digital environment and increasing presence of technology in education requires that students "have access to relevant, high-quality content that prepares them for the

⁹ Gabrielle Valencia, Marta Perales Martinez, Haeun Lee & Eloisa Moreno Rinaldi, *Quality Education: Victim of Inequality or Tool for Change? A Comparative Analysis of SDG4 Progress in Brazil vs. South Africa* (unpublished manuscript at 5, Univ. Carlos III de Madrid, Dec. 10, 2024) (on file with author).

¹⁰ UN Department of Economic and Social Affairs, *Goal 4 Progress and Info*, (2025), https://sdgs.un.org/goals/goal4#progress_and_info.

¹¹ Ibid.

¹² Ibid.

¹³ Thomas Illum Hansen & Stig Toke Gissel, *Quality of Learning Materials*, 9 IARTEM E-JOURNAL at 124 (2017).

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Dudu Suhandi Saputra et al., *The Effectiveness of Digital Teaching Materials to Improve Literary Literacy Skills in Primary Schools*, 10 JOURNAL CAKRAWALA PENDAS 671 (2024).

demands of a rapidly evolving labor market.”¹⁷ Digital skills in themselves promote sustainable development, but they are also foundational to other skills that enable individuals to drive their own educational and professional outcomes and to access educational materials where quality instruction may not be available.

The quality of TLM is determinative to educational outcomes as well. Scholars offer a variety of approaches in determining how quality should be assessed. The goal perspective evaluates quality by assessing how well materials align with curriculum objectives.¹⁸ The user perspective focuses on students’ experience of the material, for example its usability and design.¹⁹ The efficacy principle holds that materials must actually improve learning outcomes and create lasting effects.²⁰ The standardization principle, which has gained traction with the digitalization of materials, considers whether the material meets consistent, measurable standards for design, production, and structure.²¹ Although each perspective weighs different considerations and carries its own limitations, they all share a common underlying assumption. Each perspective assumes that quality is relational; it depends on how well a material fits the needs and environment of its individual user and contributes to their intellectual development and educational outcomes. This reveals a critical insight into how the quality of TLM, and their ability to advance SDG4, may be defined.

Finally, ensuring equitable access to materials assists in addressing the underlying systemic barriers that prevents the realization of quality education for all, such as social, economic, and cultural factors. Scholars widely recognize that differences in cultural capital among social classes affects educational outcomes; students from privileged backgrounds tend to generally perform better than their less affluent counterparts.²² In addition to socioeconomic disparities, vulnerable populations, such as women and persons with disabilities, also face distinct access barriers. Students and teachers must have equitable access to materials in ways that attend to the differing needs of students, as such inclusive access to TLM is critical to the realization of SDG4. If policymakers fail to prioritize such considerations, they will fail to overcome the structural barriers that impede educational access.

IIb. Balancing Copyright and Education: A Human Rights Analysis

International human rights law positions education and copyright not as opposing interests, but as coexisting rights that must be balanced to ensure both social access and individual protection. On December 10th, 1948, the UN General Assembly adopted the UDHR and for the first time, outlined universally protected fundamental human rights.²³ Article 26 of

¹⁷ Supra note 10.

¹⁸ Supra note 13.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Supra note 9.

²³ Supra note 1.

the UDHR is widely understood to recognize the right to education.²⁴ Far less attention is given to the subsequent article, which addresses the individual rights of access to knowledge to one's own intellectual and creative works. Article 27(1) maintains that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”²⁵ Article 27(2) recognizes the right to one's own creative products: “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”²⁶

While the UDHR is not legally binding on its own, over seventy other human rights treaties at the global and regional levels have enshrined the articulated principles and rights.²⁷ The multilateral International Covenant on Economic, Social and Cultural Rights (UCCESCR) enshrined the rights to education and protection of one's own moral and material interests that were included in the UDHR. Article 13 of the UCCESCR articulates such right to education, including free and compulsory education in primary school, and the progressive introduction of free education in years following.²⁸ Similarly, Article 15(1)(c) expresses the right to one's own moral and material interests from authored products as expressed in the UDHR.²⁹ The rights articulated in the UCCESCR are binding on the 173 state parties that have ratified the covenant, creating a challenge for policymakers who must ensure they protect the rights of authors while ensuring students have access to educational materials.³⁰

The Committee on Economic, Social, and Cultural Rights recognized that readers could misinterpret Article 15(1)(c) as granting broad IP rights, and that state parties may not properly balance their other core obligations. To mitigate such risk, the Committee issued a clarifying note that protection of authors' rights must not undermine educational access, stating:

In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant. Ultimately, intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or

²⁴ Ibid. at art. 26.

²⁵ Ibid. at art. 27(1).

²⁶ Ibid. at art 27(2).

²⁷ *Declaration on Human Rights Defenders*, OHCHR, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders> (last visited Oct. 23, 2025).

²⁸ *International Covenant on Economic, Social and Cultural Rights*, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

²⁹ Ibid. art. 15.

³⁰ *United Nations Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4 (last visited Oct. 23, 2025).

for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education.³¹

The tension between these rights is central to modern debates about copyright, educational access, and development. The Committee's clarifying note must guide policymakers in their determination of how these competing interests can be balanced in practice. Every individual is entitled to the fruits of their creative productions, and state parties must do their part in ensuring the protection of authors' interests. Yet, such commitment must not undermine an even greater responsibility. State parties must acknowledge how these rights interact and guarantee not only access to quality education, but also the TLM necessary to realize it.

III. Development of the International Copyright Regime

International copyright law plays a critical role in shaping access to TLM because its limitations and exceptions determine how widely those materials can be used in educational settings. These rules are often described as balancing the interests of rightsholders with the public interest in access, reflecting an attempt to achieve the balancing that international human rights law requires. However, the development of the international copyright regime shows that it was not designed with educational needs or development goals as its priority. Rather, its core treaties were designed to support trade, harmonize cross-border protections, and safeguard the economic value of creative works. Moreover, the three-step test, which primarily governs the domain of limitations and exceptions, constrains policymakers' ability to expand access. This trade-centered orientation creates a tension for states that must rely on copyright flexibilities to meet their obligations under SDG4. Understanding how this framework emerged and how it operates is therefore necessary before examining how Brazil and South Africa use domestic copyright policy to expand access to teaching and learning materials.

IIIa. The Berne Convention and Origins of Protection-First Principles

The 1886 Berne Convention for the Protection of Literary and Artistic Works was the first multilateral agreement to promote a standard set of legal principles that advanced mutual recognition of copyright between nation states.³² It remains in effect today, with 182 signatories.³³ The Berne Convention promotes the interests of creators to control their works' terms of use, advancing three key principles to achieve this effect. The principle of national

³¹ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author* (Art. 15, Para. 1(c) of the Covenant), E/C.12/GC/17, at 9 (Jan. 12, 2006), <https://www.refworld.org/legal/general/cescr/2006/en/39826>.

³² Intellectual Property Rights Office, *Copyright History*, https://intellectualpropertyrightsoffice.org/copyright_history/ (last visited Oct. 23, 2025).

³³ Intellectual Property Rights Office, *Berne Convention Countries*, https://intellectualpropertyrightsoffice.org/berne_convention/ (last visited Oct. 23, 2025).

treatment holds that Contracting States must give the same protection to the works of other Contracting States as they give to the works of their own nationals.³⁴ Secondly, works are to receive automatic protection, without any requirement of formal compliance.³⁵ Thirdly, Contracting States must protect copyrighted works, regardless of whether those works are protected in their country of origin.³⁶ The Convention details a number of economic rights and recognizes them as exclusive rights of authorization.³⁷ These include the translation, reproduction in any manner or form, public performance or recitation, broadcasting, adaptation, and cinematographic adaptation of a protected work.³⁸ These rights are subject to limitations and exceptions, enabling uses of protected works without authorization or payment to facilitate access to knowledge and education.

The Berne Convention has been revised seven times since its adoption, recognizing new rights with each revision.³⁹ While the evolution of rights between 1886 and 1971 is rather straightforward, the same cannot be said about the nature of limitations and exceptions. When provided with new rights, limitations and exceptions were mostly permissive, “unspecified possibilities” that must be enacted by national legislators.⁴⁰ The Appendix of the 1971 Paris Act of the Berne Convention (“the Berne Appendix”), the most recent revision, illustrates this clearly. The Berne Appendix allows developing countries a compulsory license for translating and reproducing copyrighted works.⁴¹ The 1971 revision was an important attempt to advance education in developing countries in principle; however, it is procedurally complex.⁴² Article I(1) of the Appendix governs that a developing nation is one that is recognized as such by the UN General Assembly.⁴³ As having this recognition, Brazil and South Africa both could, in theory, utilize the Berne Appendix to advance educational access within their borders. However, the Berne Appendix requires a country to formally declare adoption to be considered a party, and most developing nations, including Brazil and South Africa, have not agreed to the Berne Appendix.⁴⁴ Moreover, copyrighted works may not be translated into any European languages, which inhibits Brazil’s ability to reproduce works in Portuguese.⁴⁵

³⁴ Burley, Stephen & World Intellectual Property Organization, Introduction to the International Intellectual Property Legal Framework 39 (2023), <https://tind.wipo.int/record/47180>.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Daniel J. Gervais, Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations, 5 U. OTTAWA L. & TECH. J. 1 (2008), <https://scholarship.law.vanderbilt.edu/faculty-publications/844/>.

⁴⁰ Ibid. at 9.

⁴¹ *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act), July 24, 1971, 1161 U.N.T.S. 3, 52–57 (Appendix)

⁴² Noha El Labban, Copyright: A Roadblock to Education in Developing Countries? 4 (Feb. 1, 2013) (Master’s Thesis dissertation, American University in Cairo), <https://fount.aucegypt.edu/cgi/viewcontent.cgi?article=1952&context=etds>.

⁴³ Supra note 41.

⁴⁴ Supra note 42.

⁴⁵ Ibid.

IIIb. TRIPS and the Reconfiguration of Copyrights Normative Purpose

In 1994, TRIPS, a multilateral agreement under the World Trade Organization (WTO) took effect. TRIPS binds all WTO member states to protections available under the Berne Convention as well as further rules and obligations for IP rights.⁴⁶ TRIPS was groundbreaking in three respects. Firstly, it was the first instrument to cover IP rights under one agreement.⁴⁷ Furthermore, where the Berne Convention had been criticized for its lack of means of enforcement, the entire TRIPS agreement fell under the WTO's dispute settlement mechanism, which allows the use of trade sanctions against countries who fail to meet the standards.⁴⁸ Most notably, TRIPS was the first agreement to distinguish IP rights as a global trade issue, where "one country's failure to protect another's IP creates a barrier to trade between those countries."⁴⁹ In this effect, the normative function of the international copyright regime emerged, and its trade-oriented nature became the guiding determinant of how limitations and exceptions function in practice.

IIIc. Limitations and Exceptions: The Three-Step Test

In principle, the international copyright regime allows for certain limitations and exceptions to economic rights where protected works may be used without authorization of or payment to the rights owner. This functions to achieve a balancing act, protecting the interests of both rights owners and users of protected works. The Berne Convention details two primary permissions of such limitations and exceptions. First, the Convention permits certain free uses, including the utilization of works by way of illustration for teaching purposes.⁵⁰

Additionally, the 1967 Stockholm revision of the Berne Convention included the adoption of the three-step test. It details general exceptions to an author's exclusive right to authorize reproduction of a work: (a) in "certain special cases" where (b) "such reproduction does not conflict with a normal exploitation of the work" and (c) "does not unreasonably prejudice the legitimate interests of the authors."⁵¹ The World Intellectual Property Organization (WIPO) holds that there are many examples of uses that typically qualify under the three-step test and can be found in many national copyright laws, including "copying for private use by individuals," "use for educational, research and scientific purposes," "use for teaching purposes," "use by libraries and archives," "use for certain humanitarian purposes" such as "for disabled or

⁴⁶ Supra note 24. at 40.

⁴⁷ Supra note 42. at 5.

⁴⁸ *TRIPS*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/ISSUES/TRIPS> (last visited Oct. 30, 2025).

⁴⁹ Ibid.

⁵⁰ Berne Convention for the Protection of Literary and Artistic Works art. 10(2), Sept. 9, 1886, as revised at Paris July 24, 1971, 828 U.N.T.S. 221.

⁵¹ Ibid. at art. 9.

blind readers,” and “use for works for cultural purposes” such as “social and religious functions.”⁵²

However, the three-step test, which was originally a political compromise between states to limit exceptions to the right of reproduction, has become the “single sieve through which, all, or almost all exceptions to exclusive copyright rights must pass to be compatible with the TRIPS Agreement.”⁵³ As will be illustrated below, incorporating the three-step test into the TRIPS Agreement effectively shifted its interpretation away from Berne’s more natural-law, property-rights-oriented conception of rights toward a trade-driven framework aligned with WTO principles.

IIId. Variations in National Copyright Frameworks Under TRIPS

International policymakers recognized that framing IP towards trade could inhibit states’ ability to execute their other core obligations. To account for this, they designed the system to achieve a “balancing act,” eliciting the protection of IP rights while allowing states to balance other rights and obligations instrumental to sustainable development. Article 7 of the TRIPS Agreement articulates such objective:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁵⁴

To achieve this objective, TRIPS allows Contracting Parties to tailor their domestic IP systems to their developmental needs. Article 8 of TRIPS allows states to formulate or amend laws and regulations to adopt measures necessary to promote the public interest in sectors vital to their socio-economic and technological development, so long as those measures are consistent with the Agreement’s provisions.⁵⁵ In theory, this flexibility should enable states to adopt policy frameworks sensitive to their specific contexts and developmental priorities.

The international copyright regime provides a framework by which states adopt their own policies from. Limitations and exceptions to copyright for educational purposes are not strictly defined at the international level, and thus their scope varies from one country to another as an effect of their particular social, economic, and historical conditions.⁵⁶ A country’s legal tradition further provides insight into how limitations and exceptions are implemented within their domestic frameworks. In civil law systems, “national copyright laws provide case-specific

⁵² Supra note 34. at 49.

⁵³ Supra note 39. at 4.

⁵⁴ TRIPS art. 7, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁵⁵ Ibid. art. 8.

⁵⁶ Supra note 42. at 13.

exceptions to copyright,” whereas common law jurisdictions implement limitations and exceptions under the fair dealing or fair use doctrine.⁵⁷ These doctrines allow “fact-specific considerations” for the use of a copyrighted work, which may include “consideration of the purpose and character of the use or dealing, the nature of the work itself, the amount and sustainability of the use or dealing, alternatives to the dealing and the impact of the use or dealing on the original work.”⁵⁸ However, these doctrines are distinct; for example, fair dealing laws define categories of use to which the exception applies.⁵⁹

IIIe. Later Developments: Attempts to Expand Access within a Constrained Framework

Although later developments, such as the WIPO Internet Treaties and the Marrakesh Treaty, introduced reforms to modernize and expand access, these measures were ultimately narrow and did not crucially alter the broader, trade-oriented structure of the international copyright regime.

In 1996, the WIPO Internet Treaties, including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), updated copyright protections in response to technological developments.⁶⁰ These treaties provide protection for digital works, ensuring that authors’ rights are protected when licensing their works online, but also provide technological appurtenances to the rights.⁶¹ They also allow contracting parties to maintain and define new exceptions and limitations adapted to the digital environment, permitting such adaptations comply with Berne’s three-step test.⁶² This parallels the broader structure of flexibilities afforded to states under the international copyright framework, including the constraints that limit their practical effectiveness. In doing so, the WIPO Internet Treaties acknowledged the increased risks associated with digital works, including easy copying, vast storage capacity, and the maintained quality of works throughout repetitive reproduction.⁶³ Yet they fail to substantially define the applicability of the limitations and exceptions permitted by the Berne Convention in an ever-evolving, digital world. As illustrated by the COVID-19, the implications of this are profound: states are left without sufficient guidance on how to adapt limitations and exceptions to actual, fluctuating educational needs.

Additionally, the 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“The Marrakesh Treaty”) is the first access-oriented treaty centered on exceptions and limitations. The treaty enhances the ability of people with blindness or visual impairments to access quality TLM. It requires contracting parties to introduce limitations and exceptions to allow reproduction,

⁵⁷ Ibid. at 7.

⁵⁸ Supra note 7. at 49.

⁵⁹ Ibid.

⁶⁰ Ibid. at 40.

⁶¹ World Intellectual Property Organization, *WIPO Internet Treaties*, https://www.wipo.int/en/web/copyright/activities/internet_treaties (last visited Nov. 24, 2025).

⁶² Pierre Sirinelli, *Exceptions and Limitations to Copyright and Neighboring Rights* (1999).

⁶³ Ibid. at 27.

distribution, and availability of certain published works in formats accessible to people with blindness or visual impairments, and to permit exchange of these works across borders.⁶⁴ However, while Brazil is party to the Marrakesh Treaty, South Africa is not, highlighting broader inconsistency in the adoption of access-oriented copyright reforms in copyright reforms across the Global South and varied reliance on international instruments to advance them.

IV. The Economic Rationale for Strong Copyright Protections

Copyright protections are intended to protect authors' legitimate interests and promote creativity by allowing authors limited exclusive rights over their work for a period of time. These rights enable creators to manage the economic use of their work, and in this way, they function as economic goods:

Copyright law provides creators of literary, artistic, and other expressive works with a monopoly over how their creations are used. In this way, copyright creates 'knowledge goods' that derive economic value from being used. Access to these works thus typically takes place through the market. Historically, one of the justifications for copyrights' monopoly has been the encouragement of learning. On these terms, the monopoly over the use of the work, granted by copyright, provides an economic incentive for creators to continue to innovate, thereby contributing to knowledge for the benefit of the community as a whole.⁶⁵

The basic economic theory of copyright is that a functioning system simultaneously achieves a socially optimal production and consumption of copyright material by balancing the positive effects on creators' incentives against the negative effects on consumers.⁶⁶ Economists generally hypothesize that too little protection leads to excess demand for copyright materials, as creators are uninclined to publish within a system that does not sufficiently reward their inputs.⁶⁷ On the other hand, too much protection can create excessively high access barriers, deterring consumers and leading to excess supply.

Given these theoretical premises, copyright promotes innovation and creativity by incentivizing creators to share their work without fear of unauthorized copying, plagiarism, or other types of misuse.⁶⁸ When copyright enforcement became integrated under the WTO's

⁶⁴ Supra note 34.

⁶⁵ Sanya Samtani, *The Right of Access to Educational Materials and Copyright: International and Domestic Law*, at 1 (July 2, 2021) (University of the Witwatersrand), https://www.researchgate.net/publication/379566663_The_right_of_access_to_educational_materials_and_copyright_International_and_domestic_law.

⁶⁶ Richard Watt, *An Empirical Analysis of the Economics of Copyright : How Valid Are the Results of Studies in Developed Countries for Developing Countries?*, in *THE ECONOMICS OF INTELLECTUAL PROPERTY* 65 (2009), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1012-chapter3.pdf.

⁶⁷ Ibid.

⁶⁸ *The Role of Intellectual Property Rights in International Trade*, INTERNATIONAL CENTRE FOR TRADE TRANSPARENCY & MONITORING (Dec. 13, 2022), <https://icttm.org/the-role-of-intellectual-property-rights-in-international-trade/>.

dispute settlement mechanism, it oriented the copyright system's normative function towards economic growth and trade relations. Such orientation is dependent on domestic policy choices that prioritize protection. Recognizing and enforcing IP rights fosters an environment conducive to trade and foreign direct investment (FDI), as authors and investors are assured their creative assets will be safeguarded, ultimately strengthening trade relations between nations.⁶⁹ In turn, this promotes economic growth, job creation, fair competition, and knowledge exchange.⁷⁰ Protectionist policies benefit users too, as innovation encourages new creations and enhances product diversity.⁷¹

The increasing dominance of IP and knowledge-intensive industries within the global economy indicates that, at least in part, the international copyright regime has been successful in achieving its stated objectives. The positive impact is notable in two effects. First, the building of the international IP system has been accompanied by an increase in a number of IP assets registered globally.⁷² Second, the creation of these assets has enabled IP-intensive industries and sectors to drive a growing profusion of international trade, national employment, and economic output.⁷³ Former WTO Deputy Director General Johanna Hill recently held that such economic benefits are increasingly widespread and more equitable than ever.⁷⁴ In her keynote speech celebrating thirty years of TRIPS, she acknowledges the evolution of the interaction between trade and IP: "today, we see...extensive international trade in IP rights as trade items in themselves, amounting to billions of such transactions annually."⁷⁵ IP and knowledge-intensive industries compose a greater proportion of global economic output to an unprecedented degree: "in the United States, the European Union (EU), South Korea, Brazil, and Mexico, IP-intensive industries make up at least 40% of national economic output and over 30% of employment."⁷⁶ Yet these benefits, while real, are bound to structural constraints that increasingly determine how developing nations balance copyright protections with the developmental priority of educational access.

V. The Developmental Costs of a Trade-Oriented Copyright Regime

Because the international copyright regime is trade-oriented, the flexibilities it awards have increasingly been narrowed through TRIPS-plus standards and restrictive interpretations of the three-step test. While states maintained the flexibility to determine specific exceptions and limitations to accommodate their specific contexts, this did not effectively lead to developing nations having greater access to TLM. Rather, prevalent copyright practices and policies have

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ *Philosophy: TRIPS Attempts to Strike a Balance*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm01_e.htm (last visited Nov. 26, 2025).

⁷² Supra note 7. at 26.

⁷³ Ibid.

⁷⁴ Johanna Hill, *30 Years of TRIPS – High Level Dialogue: Charting the Way Ahead, Keynote Speech 2* (2024), https://www.wto.org/library/events/event_resources/trip_2503202415/442_1443.pdf.

⁷⁵ Ibid. at 2.

⁷⁶ Supra note 7. at 26.

provoked greater inequality instead of creating an accessible global system outside of domestic markets. Consequently, current copyright practices create a unidirectional flow of TLM from the Global North to the Global South, often in ways that do not strengthen developing nations knowledge, industries, or educational capacity.⁷⁷ Thus, scholars have criticized the international IP regime as presenting a “top-down approach” to international regulation, prioritizing the needs and interests of IP-rich states.”⁷⁸ This results in developmental consequences for developing nations, as their ability to “generate the full range of policy choices...to maximize global social welfare with respect to human development needs such as education” is constrained.⁷⁹

Va. Weakness of Flexibilities in Practice

The trade-oriented reading of the three-step test, coupled with the growth of TRIPS-plus obligations, has made the international copyright regime’s flexibilities far weaker in practice and harder for developing nations to use effectively. The WTO has grounded the analysis of the three-step test in the economic theory of copyright. The first step holds that limitations and exceptions may occur in “certain special cases.” Generally speaking, most “purpose-specific” and “limited” exceptions should pass step one.⁸⁰ More critically, the WTO has generally conflated the second and third steps which has curbed its effectiveness in developing nations. The second step allows reproduction if it does not “conflict with a normal exploitation of the work,” which means that any limitations that affect commercially significant markets, or compete with the economic interests of the rightsholder, are prohibited.⁸¹ The interpretation of the third step follows from step two and its meaning is the most unclear. Step three maintains that limitations and exceptions cannot “unreasonably prejudice the legitimate interests of the author.” While it is unclear what exactly constitutes “unreasonable” or “legitimate,” the WTO’s interpretation of step three indicates that step three is violated when an exception or limitation causes an “unreasonable loss of income to the copyright owner.”⁸² Consequently, any limitation and exception to copyright is “measured against any demonstrable loss of income for the rightsholders.”⁸³ For developing nations, this leaves little room to adopt robust educational exceptions, even where such exceptions are essential to meeting SDG4 targets or materializing the right to education. Because nearly all uses of TLM can be framed as disturbing some significant market, the test limits the flexibility the international regime designates.

Across the broader IP system, TRIPS-plus provisions have narrowed the use of flexibilities, and this extends to copyright as well. Both the Africa Group and Brazil noted that developing countries regularly face political or economic pressures, including sanctions, when

⁷⁷ Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007). <https://digitalcommons.law.seattleu.edu/faculty/392>.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Supra note 39. at 27.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

attempting to use TRIPS flexibilities such as compulsory licensing from powerful actors and trade partners.⁸⁴ Although these examples arise in the patent context, the same structural pressures discourage the use of copyright flexibilities, and illustrate the broader top-down dynamics of the international IP system, which contributes to legal uncertainty and restricts access to TLM as a consequence.

Vb. Developmental Consequences and Barriers to TLM

As TLM is directly relevant to countries' abilities to achieve their SDG4 targets, the developmental consequences of such limited policy choices are profound. One of the greatest challenges to the full achievement of SDG4 is a global financing gap, with the underinvestment in education leading to an uneven distribution of resources in education.⁸⁵ TLM can serve as a cost-effective strategy in developing nations to mitigate these challenges.⁸⁶ Specifically, they compensate for lack of teacher training, large class sizes, and parents' illiteracy.⁸⁷ While developing nations have made efforts to ensure access to TLM, few are able to provide substantial, inclusive access to quality materials in a consistent manner.

During the 46th session of WIPO's Standing Committee on Copyright and Related Rights (SCCR), only limited progress was made on the standing agenda item concerning the adaptation of international exceptions and limitations for education and access to knowledge. Notably, persistent divisions between member states inhibited progress towards a 2012 WIPO mandate, put forth by the Africa Group, to establish a suitable international legal framework regarding limitations and exceptions for education, research, libraries, and museums.⁸⁸ One scholar addressed the Committee, cautioning that copyright restrictions are directly contributing to challenges in teacher preparedness and shortages by creating legal and financial barriers to accessing the TLM needed to teach diverse groups of students in a rapidly changing educational environment.⁸⁹

The Committee addressed this evolving environment, particularly in relation to the increasing use of digital learning materials and the emerging considerations associated with artificial intelligence (AI). For example, the scope of the draft WIPO Broadcast Treaty has grown to include digital webcasting platforms, such as Youtube, which educators rely on to share

⁸⁴ Third World Network, *WIPO: Africa Group & Brazil Raise Concerns on Political Pressure Against Use of TRIPS Flexibilities*, https://twm.my/title2/intellectual_property/info.service/2024/ip241103.htm (last visited Dec. 2, 2025).

⁸⁵ UNESCO, *Closing the Global SDG4 Financing Gap: Accelerating Sustainable Financing Solutions for Education*, 1 (2025).

⁸⁶ UNESCO, *Distribution of Teaching and Learning Materials*, IIEP POLICY TOOLBOX, <https://policytoolbox.iiep.unesco.org/policy-option/distribution-of-teaching-and-learning-materials/> (last visited Dec. 2, 2025).

⁸⁷ *Ibid.*

⁸⁸ *Education International Urges Progress on Copyright Reform for Education and Research*, EDUCATION INTERNATIONAL (Apr. 15, 2025),

<https://www.ei-ie.org/en/item/29692:education-international-urges-progress-on-copyright-reform-for-education-and-research>.

⁸⁹ *Ibid.*

educational content. Some delegates noted concern about the absence of mandatory limitations and exceptions occurring with this expansion of rights. Moreover, as domestic policymakers have begun to consider how AI might impact both the copyright and educational environments, some participants exhibited concern that new policy frameworks will fail to prioritize the public interest as has consistently been done.⁹⁰ Ultimately, the complexity of the international copyright regime, and the lack of legal clarity associated with it, has significant consequences for the realization of the right to education in developing nations.

VI. Case Studies: Comparative Insights from Brazil and South Africa in the Global South

It is important to note that the term “Global South” is distinct from the broader category of developing nations, in that it generally refers to countries with shared colonial histories and comparable levels of inequality. This paper intentionally adopts the term “Global South” to emphasize how long-established inequalities shape the interplay between domestic copyright frameworks and access to TLM, thereby deepening barriers to the attainment of inclusive and quality education. The Global South is not monolithic; each country has its own distinct copyright history, market structure, political economy, and educational context. Nevertheless, an analysis of the common pressures exerted by the international copyright regime reveals broader patterns in how these domestic policy choices are shaped by global norms.

By way of illustration, the cases of Brazil and South Africa demonstrate this effect. Both countries share a number of similarities, but their distinct copyright approaches help in analyzing how the international framework constrains educational goals in the Global South. Both Brazil and South Africa’s economies are not classified as high-income by the World Bank and share histories of colonialism.⁹¹ Moreover, they are linked through BRICS, who have collectively demonstrated increasing participation in Western-led global governance bodies, such as the WTO, while simultaneously seeking to develop their own regional institutions to govern distinct challenges.⁹²

Most notably, while both countries have demonstrated strong commitments to expanding educational access, entrenched inequality constitutes the primary obstacle for both nations in realizing the right to education. Inequality has influenced the development of their current education systems and continues to constrain both countries’ progress towards SDG4 targets.⁹³ Specifically, Brazil struggles to eradicate socio-economic inequalities that impede educational access for marginalized groups, along with challenges in teacher retention that frustrate

⁹⁰ Ibid.

⁹¹ David James De Villiers & Alethea Cassandra De Villiers, *A Comparative Review of Education Policy in Brazil and South Africa: Divergent Trends in Inequality*, 10 AJE 323 (2022).

⁹² Matthew Louis Bishop & Peg Murray-Evans, *Five Little B(R)ICS: Huffing and Puffing, but Not Blowing Your House In*, 25 NEW POLITICAL ECONOMY 691 (2020).

⁹³ Supra note 9.

educational quality.⁹⁴ South Africa faces difficulties with equitable resource distribution and lack of primary education preparedness.⁹⁵

Brazil and South Africa's ability to address inequality within their borders is not only significant for realization of SDG4, but to enable greater conditions that drive economic growth and sustainable development. To achieve high-income status, the World Bank affirms that Brazil "must shift to a...productivity-led growth model, driven by high-quality education" to "create more and better jobs."⁹⁶ Similarly, South Africa must focus on inclusive growth that improves institutional efficiency, attracts foreign investment, and creates domestic jobs.⁹⁷

TLM are essential to overcoming key barriers to education and creating the conditions necessary for sustainable development. Yet, both countries have adopted distinct approaches to copyright reform: Brazil has maintained a protection-oriented model, whereas South Africa has pursued broader limitations and exceptions to expand access. Even so, both cases illustrate that the current international copyright regime shapes both countries' ability to achieve SDG4 and their capacity to align copyright policy with development and educational access. This comparative analysis illustrates broader patterns across the Global South, displaying how the international copyright framework influences domestic legal choices, how these choices can impede access to TLM, and how such constraints ultimately hinder progress towards SDG4.

Vla. Brazil

Brazil's legal environment surrounding copyright has historically been marked by the expansion of creators' rights, frequently prioritizing their interests over those of users. Brazil has some of the fewest limitations and exceptions in all of Latin America.⁹⁸ Consequently, access to TLM in Brazil is notably unequal; while the wealthiest citizens are able to pay for access, the less well-off majority is left to navigate the challenges of the copyright framework. Ultimately, examining the historical evolution of Brazil's copyright system, current policy around limitations and exceptions, and their implication on access to TLM reveals how the copyright framework limits the country's capacity to realize the right to education.

The current challenges regarding limitations and exceptions in Brazil today are in part a consequence of the country's historical copyright tradition. Brazilian copyright emerged from criminal law, and this historical foundation informs its persistent use of criminal sanctions for

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ World Bank, *The World Bank in Brazil*, <https://www.worldbank.org/en/country/brazil/overview> (last visited Nov. 22, 2025).

⁹⁷ World Bank, *Driving Inclusive Growth in South Africa: Quick Wins with Competitive Markets and Efficient Institutions*, <https://documents1.worldbank.org/curated/en/099030525063547256/pdf/P180069174d7f60701bf2f1de50aa4f9835.pdf> (last visited Nov. 22, 2025).

⁹⁸ Mariana G Valente, Alice P Lana & André P Houang, *Copyright and Research in Latin America: Law, Courts, and Perceptions*, 74 GRUR INT 19 (2025).

noncommercial copyright infringement.⁹⁹ Article 261 of the Imperial Criminal Code of 1830 first established a reproduction right, particularly in its delivery of criminal sanctions when such right was infringed.¹⁰⁰ Consequently, the “reproduction right itself” was “originally defined through criminal law.”¹⁰¹ When copyright became a constitutional matter in 1891, the authors of Brazil’s constitution established a life-plus term of protection but did not explicitly define copyright’s objectives, unlike the U.S. constitution, for example.¹⁰² Specification around limitations and exceptions was similarly absent from Brazil’s Constitution and first appeared in Lei 496/1898, known as the Medeiros e Albuquerque Law, which established seven specific limitations under Article 22.¹⁰³ While Brazil’s copyright laws have undergone considerable revisions, the absence of a defined purpose has remained a consistent feature of Brazil’s copyright laws and continues to pose challenges for legal questions concerning access:

Ever since the Medeiros e Albuquerque Law, every Brazilian copyright statute begins by establishing the scope and term of copyright protection, along with a few definitions, and then presents a list of limitations without specifying the principles that justify their existence. This was true of the Brazilian Civil Code of 1916 as well as the more recent copyright statutes of 1973 and 1998. Both kept the basic framework of the Medeiros e Albuquerque Law with some changes, particularly to the private copy exception. None of these versions, however, attempted to articulate a logic behind the shifting set of exceptions and limitations. Nor did they provide general principles that could be used to infer other appropriate, unforeseen uses of copyrighted material... The consequence is that not only legislation, but also legal literature and public opinion fail to adapt to the current technological challenges to copyright tradition.¹⁰⁴

Today, Brazil’s Copyright and Neighboring Rights Law (Law No. 9.610/1998), as amended up to Provisional Measure No. 1068/2021, is the primary instrument governing copyright. Commonly referred to as the “Brazilian Copyright Law,” this legislation incorporates the minimum standards of the Berne Convention, particularly that copyright protection occurs automatically upon creation and that rights may be enforced without any requirement of registration.¹⁰⁵ However, the Brazilian legal system does include a registration procedure, mainly for enforcement purposes, to facilitate authorship and creation date claims.¹⁰⁶ Additionally, the

⁹⁹ Pedro Nicoletti Mizukami et al., *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, ACCESS TO KNOWLEDGE IN BRAZIL: NEW RESEARCH ON INTELLECTUAL PROPERTY, INNOVATION AND DEVELOPMENT 41 (2008).

¹⁰⁰ *Ibid.* at 43.

¹⁰¹ *Ibid.* at 44.

¹⁰² *Ibid.* at 45.

¹⁰³ *Ibid.* at 46.

¹⁰⁴ *Ibid.* at 47.

¹⁰⁵ Law No. 9.610 of February 19, 1998, Brazil, WIPO Lex, <https://www.wipo.int/wipolex/en/legislation/details/23318> (last visited Dec. 1, 2025).

¹⁰⁶ Daniel Law, *Understanding Brazilian Copyright Law: Requirements for Protection, Registration, Duration, and Other Intellectual Property Rights* (Mar. 21, 2023),

duration of protection in Brazil is the authors' life plus seventy years, whereas the Berne Convention, which constitutes the international standard, sets minimum protection at 50 years.¹⁰⁷ This illustrates how Brazil's copyright framework has gone well beyond the minimum standards set by Berne, reflecting a broader trend towards the expansion of authors' rights.

Regarding education, Article 45 of the Brazilian Copyright Law explicitly permits the communication of works for educational purposes only in the context of stage and musical performances carried out exclusively for teaching purposes within educational establishments and without any commercial intent.¹⁰⁸ Additionally, the law explicitly establishes limitations and exceptions to copyright, creating a system that divides restrictions into intrinsic and extrinsic categories. Intrinsic restrictions include vertical and horizontal limitations. The former establishes a set term for protection, whereas the latter are independent of any term limit and reflect the interests and needs of the public.¹⁰⁹ The Brazilian Copyright Law states what the intrinsic horizontal limitations to copyright comprises of, outlining specific and exact circumstances where authorization is not needed, including:

- (i) the reproduction of works and public speeches for information purposes in the press,
- (ii) the representation of images on demand, (iii) the non-profitable adaptation of works for the visually impaired, (iv) the single partial copy, for private, non-profitable use by an individual, (v) citations, (vi) a collection of educational activities for their own use, (vii) the use of works for demonstrating electronic products, (viii) the non-profitable theatrical representation or musical execution for educational purposes or in family relations, (ix) presentation of judicial or administrative evidence, (x) use of small excerpts in new works, which are not the essential focus of the new work and do not hamper the normal exploration of the reproduced work.¹¹⁰

Such horizontal limitations are problematic in a number of ways and pose significant challenges for access to TLM in Brazil. Foremost, it is unclear what specific usages fall within these exceptions, or more precisely, how to monitor if reproduction usages fall within these reasons. Moreover, the statute has been criticized for its ambiguous wording, which raises sizable interpretation challenges. For example, private copies are limited to "small excerpts," yet the statute does not clarify their scope or lawful purposes, which ultimately bars many fair uses of works, including teaching and research.¹¹¹ Similarly, only "partial copies" are allowed for private, non-commercial use, and it is unclear what proportion of a work constitutes a partial copy.

<https://www.daniel-ip.com/en/blog/understanding-brazilian-copyright-law-requirements-for-protection-registration-duration-and-other-intellectual-property-rights/>.

¹⁰⁷ Supra note 50. at art. 7(1).

¹⁰⁸ Supra note 98.

¹⁰⁹ Eduardo Magrani & Helena Ferreira Matos, *Building Creativity: An Argument for the Reformulation of Brazil's Copyright System*, 15 BRAZILIAN JOURNAL OF OPERATIONS & PRODUCTION MANAGEMENT 366 (2018).

¹¹⁰ Ibid.

¹¹¹ Ibid.

Consequently, teachers and students are left to decipher the scope of permissible uses without clear guidance.

Another notable consideration is that the Brazilian Copyright Law creates a primary divide between commercial and non-commercial uses,¹¹² generally without distinguishing between educational and other non-commercial usages. Combined with the historical failure to set out copyright's objectives in legislation, the law has consistently been interpreted in a restrictive fashion, expanding authors' rights without due consideration for public access and educational needs. Ultimately, the scope of exceptions and limitations in Brazil is tremendously narrow as a consequence of the absence of a fair-use style provision, which would allow for fact specific considerations.

Brazil's copyright framework has long been criticized for its limited capacity to adapt to a rapidly evolving educational environment, particularly in light of the growing prevalence of digital learning. The truth of this is currently unfolding, as Brazil is currently reforming its copyright law to include considerations around AI. Bill 2338/2023, approved by the Brazilian senate and currently pending in the Lower House, is the first legal initiative in Brazil to regulate AI and machine learning technologies.¹¹³ Regulating these areas is of considerable importance to Brazil, as they create the conditions for increased economic activity by enabling technologies that analyze large amounts of data and drive innovation.¹¹⁴ However, AI is equally as significant for the right to education in Brazil, given its potential to use data-mining to analyze large volumes of educational materials and to expand equitable access to TLM. While Article 42 of the draft law restricts text and data mining that harms rightsholders' economic interests, its explanatory note also frames data as a common good.¹¹⁵ Although the draft legislation proposes a copyright exception enabling the use of protected works to be extracted, reproduced, and stored within AI systems, the draft legislation does not explicitly address limitations for research or educational purposes.¹¹⁶ This reflects a broader pattern within the international copyright framework, in which the expansion of rights is typically not followed with a corresponding expansion of, or increased clarity surrounding, limitations and exceptions.

The Brazilian Courts can further provide insight into how limitations and exceptions play out in the country. While Brazil has a civil law tradition, judicial opinions have notwithstanding gained prominence and have exerted greater influence on policy, though not to the extent seen in common law systems.¹¹⁷ Some scholars have noted that Superior Court decisions have expanded the constitutional scope of the limitations and exceptions provided by the Brazilian Copyright Law in holding that the list of limitations and exceptions is illustrative, rather than exhaustive.¹¹⁸ For example, in a 2011 dispute opposing the Escritório Central de Arrecadação e Distribuição (ECAD), Brazil's national copyright collection agency, the Court determined that "limitations &

¹¹² Ibid.

¹¹³ Supra note 7.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Supra note 98.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

exceptions must be read in light of fundamental rights,” relying on Article 9(2) of the Berne Convention and Article 13 of TRIPS, which articulates the three-step test.¹¹⁹ While this, in theory, broadens the scope of limitations and exceptions beyond the explicit cases articulated in the Brazilian Copyright Law, it leaves educators and students to piece together an assortment of legal decisions that are not traditionally central to a civil law system. It also reflects the broader limitations previously identified in connection with the three-step test.

IP considerations are undeniably important for Brazil, as IP-intensive industries contribute heavily to national output, employment, and trade. Between 2014 and 2016, the most recent period studied, these industries accounted for an average of 44.2% of total gross value added, and they directly employed more than 36% of the national workforce.¹²⁰ Copyright considerations are equally important for Brazil, particularly as the Brazilian publishing sector continues to expand and increase its presence in global markets. Yet, the implications of educational inequality and limited access to TLM are profound. The Brazilian labor market is experiencing a significant labor shortage, with companies lacking qualified workers.¹²¹ Moreover, significant teacher shortages further constrain Brazil’s ability to realize education for all. Access to TLM is central to addressing both of these challenges, as it supports educational quality and the development of a skilled workforce.

VIb. South Africa

South African copyright tradition emerged out of British copyright law as a consequence of the country’s colonial history.¹²² South Africa’s first IP law, the Patents, Trademarks, Designs and Copyright Act No. 9 of 1916, adopted the British Imperial Copyright Act of 1911.¹²³ When South Africa gained independence, its copyright framework was replaced, but it still remained modeled on British copyright law. Today, the Copyright Act No. 98 of 1978 as amended is the primary instrument governing copyright. Even so, the South African copyright environment reflects the British tradition of fair dealing, which operates to balance creators’ rights with public interest considerations, including educational access.¹²⁴

While South Africa is a signatory of both the Berne Convention and TRIPS, it has failed to ratify other international instruments, such as the WIPO Internet Treaties and the Marrakesh treaty.¹²⁵ This reflects a greater trend of South Africa deliberately avoiding measures that go beyond the minimum standards set forth in TRIPS and preserving flexibility in shaping domestic limitations and exceptions to improve educational outcomes.

¹¹⁹ Ibid.

¹²⁰ Supra note 7.

¹²¹ Fabio Lucas Carvalho, *The Explosion of Labor Shortages in Brazil: Worker Shortages Reach Historic Levels*, CPG CLICK PETRÓLEO E GÁS (Nov. 23, 2025), <https://en.clickpetroleogas.com.br/lack-of-labor-in-Brazil-flpc96/>.

¹²² Denise Rosemary Nicholson, *The South African Copyright Law: A Historical Overview and Challenges to Address Access to Knowledge Issues in a Country in Transformation* (2015), <https://repository.ifla.org/handle/20.500.14598/5601>.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

The South African IP policy was created in connection with development goals, as evidenced by its inclusion in the National Development Plan (NDP) 2030.¹²⁶ Copyright is included in Phase 1 of the IP policy, where exceptions and access to knowledge will be routinely monitored and evaluated to promote alignment between the policy and intended reforms.¹²⁷ However, an analysis of the educational use exceptions as listed in the NDP reveals that the proposed reforms will likely not contribute to the attainment of SDG4.¹²⁸

However, South African copyright law has recently undergone significant changes. For the first time in 50 years, the proposed Copyright Amendment Bill is the first exhaustive effort to modernize South Africa's copyright law.¹²⁹ The proposed legislation, which expands limitations and exceptions regarding the reproduction of copyrighted works, increases disability access, and accounts for orphan works and digital uses could have significant effects on the realization of SDG4.¹³⁰ Expressly, teachers and students would face less legal barriers in accessing TLM. President Cyril Ramaphosa has not signed the Bill into law; instead, he referred it to the Constitutional Court to determine whether the included educational exemptions are consistent with the international copyright framework.¹³¹ Two public interest organizations, the Centre for Child Law and the Unesco Chair: Education Law in Africa have submitted amicus briefs asserting that the President's considerations of the bill's compliance with international standards fails to account for South Africa's core obligations under international human rights law.¹³²

Where Brazil's protection-oriented approach has been criticized for being too restrictive, South Africa's proposed fair-use reforms have been criticized for unduly weakening authors' rights, devaluing works by permitting additional uses without compensation, and prioritizing access at the expense of the country's creators, culture, and creativity.¹³³ Critics often cite the protection of authors' rights as human rights that should be given equal weight, highlighting the tensions between copyright and other human rights claims. Nevertheless, the proposed legislation is seen as a victory for users' rights for a myriad of reasons. Firstly, the educational exceptions are intended to facilitate access to TLM for persons with print and visual disabilities, reflecting a commitment towards the inclusive and quality standard set forth by SDG4. Such explicit commitment is incredibly important, as South Africa's legacy of apartheid remains clearly evident in educational spaces, and poor citizens struggle to access affordable TLM. If enacted, the Copyright Amendment Bill will reconstruct South African copyright law's

¹²⁶ Desmond Oriakhogba & Lonias Ndlovu, *Copyright, Access to Knowledge, and SDG 4 in Southern Africa*, in THE ELGAR COMPANION TO INTELLECTUAL PROPERTY AND THE SUSTAINABLE DEVELOPMENT GOALS 142 (Matthew Rimmer, Caroline B. Ncube, & Bitu Amani eds.), <https://doi.org/10.4337/9781803925233.00013>.

¹²⁷ Ibid. at 162.

¹²⁸ Ibid.

¹²⁹ CISAC Statement on the South African Copyright Amendment Bill | CISAC, (Feb. 24, 2024), <https://www.cisac.org/Newsroom/news-releases/cisac-statement-south-african-copyright-amendment-bill>.

¹³⁰ South Africa, Copyright Amendment Bill B13B-2017 (as introduced in the National Assembly).

¹³¹ *Educational Exceptions in Copyright Amendment Bill Are Mandated by International Law and the Constitution*, <https://infojustice.org/archives/46400> (last visited Dec. 2, 2025).

¹³² Ibid.

¹³³ Supra note 129.

normative focus towards development and the attainment of SDG4.¹³⁴ However, the controversy it has generated, combined with pressures from global and domestic publishing industries and the President's assessment of its conformity with international standards, demonstrates how the display how the international copyright framework constrains states' capacity to reorient their copyright policies toward development and exercise the flexibilities the international framework purports to allow.

VII. Reorienting Copyright Frameworks to Support Access to TLM

The international copyright regime, and its normative orientation toward trade and protection-first principles, is unable to meet the urgent imperatives surrounding the attainment of SDG4 and the realization of the right to education. Beginning with the Berne Convention, through TRIPS and later international instruments, limitations and exceptions have been employed as narrow flexibilities rather than meaningful tools that enable access to TLM, particularly in the Global South. Consequently, the international IP system is structurally unequal, with TLM flowing unidirectionally from IP-rich states to developing nations, often without meaningful impact on educational or developmental outcomes.

As such, the case studies of Brazil and South Africa illustrate how this global regime shapes, and often constrains, domestic choices. Brazil's protection-oriented approach has consistently expanded creators' rights while limiting educational exceptions, whereas South Africa's attempts to expand access through expansive exceptions and fair use has triggered backlash emerging from international copyright norms and rightsholders' concerns. Yet in both cases, pervasive inequality, teacher shortages, and skills gaps exhibit the costs of limited access to TLM, fortifying the insight that copyright policy choices increasingly conflict with human rights outside of their domain, including education. In this vein, international human rights law, as articulated in the ICESCR and clarified by the Committee on Economic, Social and Cultural rights offers guidance into how states must achieve the balancing act: the protection of authors' moral and material interests must not undermine states' core obligations to fully realize the human right to education.

Thus, a "principled approach" to determining limitations and exceptions must begin from this human-rights based understanding of copyright's social function, and meaningfully consider how policy choices affect educators and students' ability to access TLM. Nevertheless, such an approach must also recognize copyrights utilitarian, or economic function, and the "intrinsic factors that affect the realm of copyright."¹³⁵ This approach "demands fairness," and not "flexibility for the sake of flexibility." As noted by South Africa's approach, "fairness and flexibility are distinct issues," and "while flexibility may support fairness, it also may give rise to shortcomings."¹³⁶

¹³⁴ Supra note 126.

¹³⁵ Supra note 39, at 15.

¹³⁶ Eleonora Rosati, *Copyright Reformed: The Narrative of Flexibility and Its Pitfalls in Policy and Legislative Initiatives (2011–2021)*, 31 ASIA PACIFIC LAW REVIEW 33 (2023).

Ultimately, the international copyright regime must be reoriented toward development if states are to attain SDG4. Education remains a foundational driver of human capability, and its developmental costs grow when access to TLM is restricted. As countries face widening inequalities and rapidly evolving digital learning needs, the shortcomings of the current framework have become increasingly visible. At the same time, the rising global pressures to reform the IP system at large presents a critical opportunity to rethink copyright in ways that support development, and all emerging IP reforms must be assessed for their impact on educational access. Ultimately, education is a right in and of itself, but it is also a means of realizing other human rights; as such, it is both an “empowerment right” and a “development imperative.”¹³⁷ Reconsidering copyright through this lens is a necessary step toward building a global regime in which innovation, access, and development can amplify one another.

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