probably most, if not all, of what I shall have to say will prove irrelevant to the subject of this conference. There are several reasons for this lack of congruity.

The first is that I really have nothing to tell you. The second is that my experience in the area of school finance is limited to a single foray, some years ago, into the question of the constitutional obligation to equalize school funds throughout a state. I was in the minority then in believing, first, that it wasn't a good idea, and, second, that it certainly was not yet a constitutional mandate.

The Supreme Court of the United States agreed with me on the constitutional question—or at least five of nine of them did in the Rodriguez case. The Supreme Courts of California and New Jersey—perhaps others—disagreed with me and have ordered their state school systems to equalize. So far, I think that these states can report only much chaos and little benefit. The problem with equality, it seems, is that it is more easily attained by reducing all to the lowest common denominator than by raising all to the highest.

The third reason I have so little to contribute is that my experience in the field of education has been limited to the university level, and the private university level, at that. Moreover, I am not a teacher whose subject is law, but rather a lawyer who teaches.

Finally, I am out of joint because all I have to tell is a twice-told tale. And, if I may quote the words of Byron's *Hints from Horace:*

'Tis hard to venture where our betters fail,
Or lend fresh-interest to a twice-told tale;
And yet, perchance, 'tis wiser to prefer
A hackney'd plot, than choose a new, and err.

You may readily see, therefore, why my place at this conference is rather that of the court jester at a council of state: out of the mouths of fools and babes may come—accidentally—some words that may be transmuted into words of wisdom when touched by the catalyst of minds with experience and sophistication.

To fit my talk into the subject of the conference, what I shall speak to is a cost of finance. I do not mean, of course, to expatiate on bonds and interest rates. What I do mean is that the attainment of funds, even in these straitened times, is not an end in itself. And care should be taken that the means and ends of education are not distorted or frustrated by the price of the moneys available. Were I before a different audience, I should tell them that my subject is not academic freedom but the freedom of the academy. And I apologize further if what I shall

*William R. Kenan, Jr. Distinguished Service Professor. This paper was originally presented to the Conference on Dilemmas in School Finance: Illinois and the Nation, on February 18, 1977, in Chicago.
have to say is reported not only in the context of law, but the context of constitutional law. For while I do not know a lot about that subject, I know more about that subject than about any other.

Neither academic freedom nor freedom of the academy is mentioned in the Constitution of the United States. After all, public education is a late nineteenth-century growth, and the American university did not really come into existence until the twentieth century was almost upon us. It would have required greater prescience than even the Founding Fathers had to make adequate provision for these educational institutions.

Academic freedom, however—the right of faculty to be free from control by government of their teaching, their research, and their public utterances—has received judicial protection through the First Amendment of the United States Constitution. A concurring opinion by Mr. Justice Frankfurter, one of only two Supreme Court Justices ever to be elevated directly from the chair to the high court bench, is instructive as to the reasons for such protection:

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the endurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. [Wieman v. Updegraff, 344, U.S. 183, 196-97 (1952)]

Thus, academic freedom is thought to be incorporated into the protection of the Constitution because it is an essential underpinning for all of those freedoms that are specified in the First Amendment.

Then the Justice shifted from freedom of the academic to freedom of the academy, which he concluded with an extensive quotation from the testimony of Robert M. Hutchins before a sub-committee of the House of Representatives. The shift from the rights of teachers to the rights of universities was an elision without a halt, but also without a recognition of any difference:

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations [i.e., the First Amendment limitations] upon State and National power. These functions and the essential conditions for their effective discharge have been well described by a leading educator:

“Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must
fail is that no totalitarian government is prepared to face the consequences of creating free universities.

"It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment. . . .

"A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves." [Id. at 197-98]

In still another case, we find Mr. Justice Frankfurter espousing the same cause of academic freedom and freedom of the academy (Sweezy v. New Hampshire, 354 U.S. 234, 263 [1957]). This time he borrowed from Sir Thomas Henry Huxley, including a definition of the essential freedoms necessary to a university:

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.

To suggest, however, that these are but examples of Supreme Court extrapolation of the meaning of the Constitution so far as academic freedom and freedom of the academy are concerned would be misleading. There is not much in Supreme Court jurisprudence to specify the proper realms and limits of this freedom of the academy.

When one seeks a reason for this paucity of judgments on the subject, it is not hard to find. There would seem to have long been a general acceptance of the concept of freedom of the academy from governmental infringement which needed no judicial protection because it was not threatened. Until the Second World War, the "four essential freedoms" of the academy, stated by Huxley, "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," were as fully protected as if they had been written into the Constitution. A fifth freedom, unspecified by Huxley because he spoke before the growth of the modern university, the freedom to determine the subjects of research, was equally assured.

In part, the common understanding, custom as constitution, protected the academy. In part, the academy was protected from federal government interference by the recognition that the national government's limited powers afforded no basis for federal interference in the academic world. Until the birth of the service state in the 1930s and 1940s, the federal role in education was pretty much limited to its contributions to land-grant colleges dating back to the Northwest Ordinance of 1787.

Two congeries of events brought the federal government into the field of education in the 1940s. The first was a change of constitutional doctrine of no small importance. It may lie within the memories of some of you that the Supreme Court of the United States invalidated the New Deal's AAA program in a decision which announced that the constitutional provision that the national government could spend money for the general welfare was not an authorization to it to spend money on subjects other than those enumerated in the list of congressional powers in Article I of the Constitution. The spending power was deemed supplementary to, and not in addition to, the enumerated powers (United States v. Butler, 297 U.S. 1, 44 [1936]). As Robert H. Jackson—not yet, but soon to be, a member of the Court—wrote: "the original Butler decision, more than any to that date, had turned the thoughts of men in the (Roosevelt) Administration toward the impending necessity of a challenge to the Court" (Jackson, The Struggle for Judicial Supremacy 139 [1941]).

The Roosevelt court-packing plan came. Whether or not it succeeded depends on the measure of success invoked. The proposed statute was defeated, but the New Deal came to have its way in a vastly changed membership on the Court. In 1937, in an opinion written for a split Court by Mr. Justice Cardozo, the Constitution was revised (Steward Machine Co. v. Davis, 301
U.S. 548 (1937)). The day of the service state was upon us. The "general welfare clause" was established as an independent ground for the federal spending power which need not be tied to any specific authority granted to the national government by the Constitution.

Much later came another change in the Constitution. The law came to recognize that there were rights that might be asserted against the academy by individuals. And the national government, through the guise of the Fourteenth Amendment, began to impose on universities duties that clearly invaded Huxley's "four freedoms." Universities were, in effect, being told who they must have on their faculties, not measured by academic considerations, and who they must have in their student bodies, not measured by academic considerations, among other things. But I shall go no further down this line, because today we are concerned with finances, the power and curse of the almighty dollar.

After the Second World War, the government went about the business of buying up the academy. And, one can ask, why not? It is an arm's-length transaction between a willing buyer and a willing seller. There is no Thirteenth Amendment to prevent the academy from selling itself into bondage. There is no Labor Relations Act to prevent the exercise of economic coercion by one on the other. Professor Edward Shils re-
cently described the condition of which I speak (Shils, “Government and the University,” International Council on the Future of the University, Newsletter, Vol. III, No. 5 [December 1976]):

The universities of the United States have allowed themselves to be placed in a very vulnerable position by the federal government. Always eager to extend the sphere of their activities, always eager to be of service to society, they have become dependent on the federal government for the conduct of certain activities which are integral to their program of discovery, teaching and training, mainly in scientific research and in training for the learned professions. They have become dependent on the federal government for funds to such an extent that they feel themselves constrained to respond to every programmatic proposal of the federal government in order to relieve their immediate financial embarrassment. Many of these proposals promise only transient relief from this embarrassment; they add to administrative expenses, they are of marginal intellectual interest if of any interest at all, and some of them bring the universities into further financial difficulties once the government decides to bring them to an end. If the universities are to help establish “a new constitution of government and university according to the idea of each,” they must come to a better understanding of what is their own “idea.” The idea is certainly not the idea of being a “service station” to the federal government, performing services which do not even pay for their actual cost in monetary terms and which deform the conception of the “idea” by which they should conduct themselves.

It might appear offensive to counsel restraint to the impoverished and the desperate who have no unity among themselves in the face of a monopolistic and often harsh dispenser of momentary relief from poverty and desperation. The government as a monopolist is in a strong position in dealing with a multitude of separate applicants for its support. The existing constitution of government and university developed out of good intentions on both sides but it has developed into a condition which is inimical to the long-term interest to both sides. It is even repugnant to the nature of a contract; it becomes a relationship between sovereign and subject, between a suitor for largesse and a dispenser of it. There must be a restoration of balance which renders unto Caesar what is Caesar’s and unto understanding what is necessary to it.

Having already borrowed at great length from Professor Shils, as I confessed I should in my quotation from Hints from Horace, allow me to afford you a little more of his language, because I cannot improve on it:

[T]he government must discontinue its piecemeal intrusion into the affairs of universities, intruding into the details of admissions, appointments, curriculum, etc. These intrusions are infringements into a sphere of action which universities can justly claim to be one in which their traditions, their experience and the record of their judgment entitles them to autonomy. They are also fields in which the civil service has little likelihood of acting wisely or foresightfully. They are moreover disturbing to the interior life of universities, they consume a great deal of time and they are fruitlessly vexatious.

The recent intrusions of the federal government into the making of academic appointments is too well known to require extended treatment here. It is of a piece with the rest of the “policy” of the federal government with regard to universities, in the ineptitude of its conception, in its piecemeal character, in the hostility and harassment with which it is executed and in the comprehensively damaging character of the sanctions which are threatened against the universities for failure to comply. I think there is no government in the world, even in the communist countries or in the oligarchies of Latin America, Africa or Asia, which threatens the universities of its country with such large-scale sanctions for infringements of any of the very numerous demands which are made of them.
Mr. Shils dwelt on generalities. As always, he took the high road of principle. Let me take the low road of example by recounting a specific case of the moment.

Let us suppose that the national government, in its wisdom, decides that there are too few doctors being trained for the good of the nation. And let us suppose that the government decides to afford monetary inducements to students to attend medical schools. And let us suppose that, recognizing the fact that tuition pays only a small part of a medical school education, it affords capitation grants to medical schools to help them bear the cost of training the additional medical students. The cost to the medical school still, of course, far exceeds the income from both tuition and capitation grants. But university medical schools, being dedicated to societal good as well as research and training, expand their facilities and their faculties to provide the additional education.

So far, so good. Up to this point, the government has shared with the university the cost of training additional doctors. The university has, perhaps not wisely, committed resources not only for the period of commitment to the proposed government subsidies but for the indefinite future. Hospitals, laboratories, and faculties are not negotiable paper. A university that builds them and hires them has a very long-term commitment on its hands, a commitment which is in no way compensated by the federal moneys received.

Let us suppose the government then decides that it really is interested not just in more doctors but in more doctors with particular specialties or more doctors who will commit themselves to work in specific parts of the country, and the capitation grants as well as the scholarships are so conditioned. And let us suppose the government discovers that a large number of Americans incapable of securing admission to American medical schools decide to go abroad to medical schools, most notoriously those where admission is secured by making large monetary contributions. Necessarily their medical training is primarily in a foreign language.

Let us suppose, finally, that the statute renewing the capitation grants therefore adds still one more condition. The capitation grants for all students will depend upon the commitment of the university to accept as upper-class students American students who had completed two years of training at a foreign medical school and who had passed the first boards.

The American universities were not required to accept all such students, but only those who met all the university’s standards, except the standards for residence and academic qualifications. Moreover, the students to be accepted were not to be chosen by the university but were to be named by the Secretary of Health, Education, and Welfare. The reason given by Congress for the imposition of these students on the universities was succinctly—but not cogently—stated:

It is not the conference’s intent, in including this requirement, either to encourage or condone the practice of U.S. citizens receiving their medical education in foreign medical schools if such persons intend to practice medicine in the United States. Rather, it is intended to remedy an unfortunate situation which currently exists. In the view of the conference, the current situation, in which thousands of U.S. citizens are presently enrolled in foreign medical schools where, in most cases, the education they are receiving is not of the quality provided by U.S. medical schools and is being taught in languages other than English, is a situation which deserves the immediate attention of the Department of Health, Education, and Welfare, the American Medical Association, and the Association of American Medical Colleges.

And so, until the next time the statute comes up for renewal, the decision of Congress is that American universities must make new places—certainly they are not expected to displace students who have had training in this country and have met the academic requirements of the university—for poorly trained students who do not meet the academic requirements, and who are to be selected by the Secretary of Health, Education, and Welfare.

Now, it’s true that the universities are not required to take these students. They are free to reject them and thereby reject also not merely the capitation grants for these additional students but
the totality of the capitation grants.

The question I would address now is whether the condition in the statute I have just described should be regarded as invalid. My heart, as well as my mind, being with the universities, I believe that the conditions in the capitation grant statutes are unconstitutional. But, as with equal financing requirements, I cannot predict with certainty that the courts will be with me. (I am prepared here, as I was in Rodriguez, to settle for a plurality of one.)

The argument for the validity of the imposed conditions is not difficult to state. It takes the form of an aphorism that is almost as popular on the campus of the University of Chicago as "There is no such thing as a free lunch." It is the related principle of classical economics that "he who pays the piper calls the tune." But I submit that the proposition is—or should be—inapplicable here for two reasons.

The first is that, as a matter of fact, the university is "paying the piper" every bit as much, if not more than, the government. Each is contributing a large sum of money and assets for the education of additional medical students. The program for expansion was undertaken as a partnership arrangement, not for the benefit of the university but rather for the benefit of the society for which the government is purportedly the representative and the university is not. As between the university and the government, it is the government that is the beneficiary of the program, not the university. But both university and government are financing work in it.

Second, the proposition about the payer and the piper implies that the payer is spending his own money and is, therefore, entitled to condition the payment. That is not the case here. The money paid by the government no more belongs to the bureaucrats who spend it or the legislature that appropriates it than money in the control of private or corporate trustees belongs to the trustees rather than to the beneficiary of the trust. A trustee's funds are held by the trustee to be expended not at the whim or will of the trustee but only in accord with the will of the grantor and for the best interests of the beneficiary. Even where there is great discretion in the trustees, the expenditures are valid only if they fall within the charter of the trust document, which in this case would be the Constitution of the United States.

It seems clear to me that the Constitution does not give to the government any authority to tell the academy what courses should be taught or which students it should teach. On the contrary, if we take seriously the dicta from the Supreme Court's opinions that I have already read to you, such actions by the government are not only not authorized, they are specifically forbidden as violations of the First Amendment.

The argument goes, however, that the government is not imposing curricula or choosing students. It is simply offering to buy from the university its freedom. And surely, it is said, we have known since the reversal of the AAA opinion, that Congress can authorize the purchase of anything that it wants, so long as it decides that the expenditure is for the "general welfare."

It was years ago, before Charles Reich turned from lawyer-philosopher into a flower child who sought to "green" America, that he perspicaciously noted in a law review article:

The most clearly defined problem posed by government largesse is the way that it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must not have power to "buy up" rights guaranteed by the Constitution. It should not be able to impose any condition on largesse that would be invalid if imposed on something other than a "gratuity." [Reich, "The New Property," 73 Yale L.J. 733, 779 (1964)]

The fact is that at a lower level of society the actions of the government to use its spending power to get the academy to do what the government could not legitimately order it to do would be not only immoral, but illegal. Blackmail, at common law, is the threat of the use of force to compel the victim to perform an act, even an act that the victim is otherwise under a duty to perform.

My proposition that the conditions on the government grant are invalid is not without support in Supreme Court decisions. There is a judicial doctrine of "unconstitutional conditions" that is applicable to the example I have cited. Were it not for the fact that the doctrine has taken a bifurcated path in the Supreme Court, I should be
more certain of my conclusion. Unfortunately, the two lines of decision have never been fully reconciled. Perhaps the time has come.

The line of authority that I would follow derives from a mundane case entitled *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583 (1926). There a state, with undisputed “power to prohibit the use of the public highways in proper cases,” attempted to require a trucker to become a common carrier as a condition of using the highways. The Court said that the State could not do by indirect direction what it could not do directly.

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

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. [271 U.S. 593-94]

The doctrine has been not infrequently invoked, and at least once in the area of academic freedom, when the Court held that a state may not remove a professor from his job because he invoked his Fifth Amendment privilege.

There is another line of decisions that dates back to still another of Oliver Wendell Holmes’s unfortunate witticisms that have all taken so heavy a toll on the development of constitutional law. Holmes was on the Supreme Judicial Court of Massachusetts when he ruled that a police official could be compelled to surrender his right of free speech as a condition of his employment (*McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 [1892]). A policeman, said Holmes, “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Although the holding of this case is probably no longer good law, there are recent decisions that sustain the propriety of imposing conditions which destroy constitutional rights that could not be taken directly. Thus, the recent decision of *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Court sustained the power of the government to withhold presidential election funds unless the recipient surrendered his right to spend other moneys in his pursuance of the presidency.

I think that the policeman line of cases is clearly “not a happy one.” I think, too, however, that these cases are clearly distinguishable from my medical school case. For, where the condition of surrender of a constitutional right has been sustained, its surrender was a necessary ingredient in the effectuation of the legitimate statutory scheme in question. That is not the case with the medical school example, certainly so far as the HEW power of appointing students is concerned. That provision was added as an afterthought in conference committee without debate or informed judgment. It offered nothing toward the goals or purposes that the statute was enacted to effect. It would deprive the universities of their constitutional rights without any countervailing values being attained.

Obviously, I have exhausted you, if not my subject, with a legal discourse that you did not come to hear. My point is only that I do not think it incumbent on the universities placidly to submit to invasions of their academic integrity as a condition of receiving financing from the govern-
ment. And I wish that the universities would show a commitment to their function that would afford them the courage to face up to the illegal demands that threaten the destruction of the independence of the academy, an independence which is the only justification for its existence.

I started this tirade with a quotation from Byron. I should properly end it with a quotation from the Faust legend—not Shaw's, but Goethe’s. A human who has sold his soul to the devil is no longer a human. An academy that has sold its will—over the selection of faculty and students, over its curriculum and research—to the government is no longer an academy. In neither case can it be called a fair bargain. Nor should it be thought that the bureaucracy's power is less evil than that of the devil. Certainly it was not the best interest of Faust that brought the devil's offer; nor is it the best interest of the academy that brings forth the government's largesse. It may be, however, that the idea of the university is of consequence only to a free society, a concept which is itself going out of style so rapidly as to be seen only here and there in the United States and almost nowhere else.

In sum, all that I have to say to you could be—and should have been—stated in two sentences. (1) Before you agree to be financed by the devil, find out the true cost of his money. (2) The further away you get from local financing, the closer you come to the devil.