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By Eugene Volokh

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The Proposed "Compact for Academic Excellence in Higher Education" and the First Amendment

By Eugene Volokh

[1.] There's a lot going on in the Trump Administration's proposed "[Compact](#)," and there's a lot that we might want to ask about it. Some questions would have to do with whether particular demands (such as a tuition freeze or a 15% cap on foreign students or mandatory U.S. civics classes for foreign students) are a good idea. Some might be and some might not be. Some might have to do with the way that the Compact would rebalance power between universities and the federal government.

Some might have to do with whether particular demands (for instance, the requirement that universities require all applicants to take standardized admission tests) should be implemented top-down on a one-size-fits-all basis. The federal government may have *the power* to impose certain conditions on the recipients of government funds, but that doesn't mean that it necessarily *should* do so. This question of when conditions become excessive micromanagement perennially arises when it comes to government contracts and grants.

Some questions have to do with whether the *Executive Branch* can impose these conditions through just an announcement, whether this would require notice-and-comment regulatory rulemaking, or whether it would require express Congressional authorization. Similar questions have arisen in the past with regard to whether, for instance, Title IX should be understood to mandate university investigation of alleged sexual assault by students; whether it should be understood as mandating a preponderance-of-the-evidence standard in such situations rather than a clear-and-convincing-evidence; and other matters. In particular, the Compact seems to contemplate conditions on universities' "preferential treatment under the tax code," which I expect would likely require revisions to the tax code. But there too there have been controversies about where the Executive Branch has power to read provisions into tax exemption requirements that hadn't been expressly authorized by Congress (see, e.g., *Bob Jones Univ. v. U.S.* (1983)).

Still, I can at most note such matters—important as they are—since they aren't within my core area of expertise. So let me turn instead to the First Amendment

problems posed by the Compact, which I am more knowledgeable about. I don't want to suggest that these are the most important issues, but that's where the light is best for me, so maybe I can find some keys there.

[2.] As a general matter, when the government is providing funding or other benefits for private parties' speech, it may not discriminate based on viewpoint. Thus, for instance, *Rosenberger v. Rector* (1995), held that when a university funds student newspapers, it can't exclude ones that convey religious viewpoints. The Court there expressly "reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits." Many other precedents say the same.

To be sure, the government may create programs for conveying *its own preferred viewpoints*. As *Rust v. Sullivan* (1991) noted, Congress can set up a National Endowment for Democracy without setting up a National Endowment for Communism. But the Court has distinguished such *government speech*, which the government can select based on viewpoint, from *government programs that subsidize a diverse range of private speech*, as in *Rosenberger*. To quote *Rosenberger* again,

[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, ... that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

Moreover, the government can't impose even viewpoint-neutral funding conditions that seek to restrict the recipient's speech *using its own funds*. Thus, in *FCC v. League of Women Voters* (1984), the Court struck down a law that barred editorializing by the recipients of public broadcasting subsidies. The Court acknowledged that the government could provide that *federal funds can't be used to editorialize* (that would be a viewpoint-neutralize restriction). But Congress can't provide that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing."

It is unconstitutional for Congress to thus bar a partly federally subsidized station "from using even wholly private funds to finance its editorial activity."

[3.] In the Compact, the government isn't just awarding grants for promoting particular government-supported viewpoints, which both Democrat and Republican administrations have long done. Rather, it applies to a vast range of funding and benefit programs, such as "(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." Indeed, when it comes to tax exemptions, *Rosenberger* expressly made clear that "Congress' choice to grant tax deductions" was subject to "the requirement of viewpoint neutrality"; and see also the similar holding in *Matal v. Tam* (2017) with regard to the nonmonetary benefit of trademark registration.

[a.] This suggests that the Compact's requirement that, as a condition of getting benefits, signatories must "commit themselves" "to transforming or abolishing institutional units that purposefully ... belittle ... conservative ideas" is unconstitutional: It targets particular viewpoints (those that "belittle ... conservative ideas"), however vaguely defined those viewpoints may be.

[b.] I think the same is likely true about the demand that universities "shall adopt policies prohibiting incitement to violence, including calls for murder or genocide or support for entities designated by the U.S. government as terrorist organizations." To be sure, "incitement" may constitutionally be even criminalized outright, if it's limited to speech intended to and likely to produce *imminent illegal action*, which is to say action in the coming hours or days, as opposed to speech that advocates such action "at some indefinite future time." (See *Brandenburg v. Ohio* (1969) and *Hess v. Indiana* (1973).) But in context, that doesn't seem the likely meaning of the demand: After all, basically no speech in the U.S. involves advocacy of *imminent* genocide by the listeners (as opposed to calls for genocide at some indefinite future time), and even calls for murder on college campuses are almost invariably calls for violence at some indefinite future time.

Likewise, while "material support" for foreign terrorist organizations, in the sense of providing personnel, training, and the like, is constitutionally unprotected (see

Holder v. Humanitarian Law Project (2010)), "support" in the lay sense—which is to say independent expression of endorsement of a terrorist organization's position or actions—remains constitutionally protected. Indeed, *Holder* several times stressed that the law upheld in that case "does not cover independent advocacy" supporting a foreign terrorist group's position.

So unless the "shall adopt policies prohibiting incitement to violence, including calls for murder or genocide or support for entities designated by the U.S. government as terrorist organizations" is read very narrowly indeed, this demand would require universities to suppress fully protected student speech. And even if a private university could suppress such speech on its own (simply because a private university isn't itself constrained by the First Amendment), the government can't pressure the university into engaging in suppression (see, e.g., *NRA v. Vullo* (2024)).

[c.] I also think the government can't demand that universities, as a condition of getting benefits, "pledge ... screen out [foreign] students who demonstrate hostility to the United States, its allies, or its values."

The government likely can deny visas to prospective students based on their viewpoints; see *Kleindienst v. Mandel* (1972) (I oversimplify matters here somewhat). Whether the federal government can deport already-admitted people based on such speech is [a separate matter](#), but it likely can reject them when they're just applying for a student visa.

But that's something the government can do itself, because of its special power over immigration. I don't think it can demand that universities, in exercising their own decisions about whom to associate with and whom to speak to, exclude foreign students based on the students' viewpoints.

[d.] The Compact also requires that universities receiving federal benefits "shall maintain institutional neutrality at all levels of their administration," including "all colleges, faculties, schools, departments, programs, centers, and institutes." This means "that all university employees, in their capacity as university representatives, will abstain from actions or speech relating to societal and political events except in cases in which external events have a direct impact upon the university." This expressly *does not* apply to "students, faculty, and staff"

commenting "in their individual capacities, provided they do not purport to do so on behalf of the university or any of its sub-divisions."

This requirement, unlike the ones I discussed in items (a) to (c) above, is facially viewpoint-neutral; and I think the government could require that *no federal funds* be spent on ideological commentary by university departments. That would be much like the requirement, upheld in *Regan v. Taxation with Representation* (1983), that *no tax-exempt contributions*—which are in effect subsidized by the government through the charitable tax exemptions—be spent on advocacy for or against a candidate, or on substantial advocacy for or against legislation. To be sure, *Regan* involved only candidate- and legislation-related speech, not all ideological advocacy, but I think such a viewpoint-neutral requirement would be permissible even if it covers ideological advocacy more broadly.

But as I read the Compact, it contemplates that universities "abstain from ... speech relating to societal and political events" *even when such speech is paid for solely with their own funds* (of which universities have plenty). And that's precisely the sort of broad condition on funding that the Court struck down in *FCC v. League of Women Voters*, when it held that the government couldn't use its subsidies to public broadcasters to prohibit all editorializing by the broadcasters (including editorializing paid for from other funds).

I appreciate the rationale the Compact offers for the mandate, quoting the President of Dartmouth:

Consider a student interested in majoring in a certain subject. Upon going to the department homepage to discover course offerings, the student is slapped in the face with an official statement excoriating his own political ideology. How comfortable would that student feel taking a class in that department? Our Principles of Institutional Restraint permit departments to issue public statements only on limited issues directly related to their academic expertise. Rather than publishing these proclamations on their homepages, departments must create new webpages specifically dedicated to public statements and endorsements. This ensures that departments promote their academic missions, not their social or political beliefs.

I generally support such ideological neutrality mandates for university administrations and departments myself as a policy matter, partly for this very

reason. But whatever the value of institutional neutrality mandates as a means of promoting uninhibited discourse among students and faculty, I don't think that this value can justify suppressing speech by the universities themselves. And, as *FCC v. League of Women Voters* makes clear, that remains so even when the universities are receiving government money to support some of their operations.

[e.] The Compact also seems to broadly call for universities to promote a "broad spectrum of ideological viewpoints." As I'll be blogging this coming week, I have a forthcoming law journal article in which I argue that *ideological diversity mandates* are generally a bad idea and likely unconstitutional, even when they are imposed as a condition on access to government funding. This having been said, it's not completely clear whether the Compact outright demands enforceable viewpoint mandates (which the April letter to Harvard [appears to have contemplated](#)), or whether it sets forth viewpoint diversity as an aspirational goal, the way one might set "excellence," "openmindedness," and the like as an aspirational goal.

The Compact states, in relevant part, that funding recipients must "commit themselves to fostering a vibrant marketplace of ideas on campus," to engaging in a "rigorous, good faith, empirical assessment of a broad spectrum of viewpoints among faculty, students, and staff at all levels," to "sharing the results of such assessments with the public," and to "seek[ing] such a broad spectrum of viewpoints not just in the university as a whole, but within every field, department, school, and teaching unit." It also states that "A vibrant marketplace of ideas requires an intellectually open campus environment, with a broad spectrum of ideological viewpoints present and no single ideology dominant, both along political and other relevant lines." The question here, I think, will largely turn on how such a call for a vibrant marketplace of ideas and a broad spectrum of viewpoints will be operationalized.

[* * *]

In any event, these are just some tentative thoughts about some of the provisions; I look forward to seeing more discussion of the Compact in the months ahead.

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