

TITLE IX SEX DISCRIMINATION REGULATIONS: PRIVATE COLLEGES AND ACADEMIC FREEDOM

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The publication of the Title IX sex discrimination regulations,¹ aimed at the eradication of sex discrimination in education, has been characterized as “an affirmation of the principles of equality upon which our nation was founded.”² This view is consistent with the hope of those who had lobbied for the original legislation that the regulations would “be far reaching . . . in mitigating the subtle and all-pervasive effects of sex discrimination.”³ There are, however, those who have maintained the regulations “would impose a strait jacket that would deprive private education of the diversity and flexibility that it must enjoy to make a successful contribution to American Higher Education.”⁴ This statement is symptomatic of a growing concern among those associated with private colleges and universities. Their objection is not with the ends to which the Title IX regulations are directed but with the means chosen to achieve those ends. The fear is that the increasing federal regulation of universities will destroy the qualities of distinctiveness, diversity and pluralism engendered by the private institution.⁵

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1. 45 C.F.R. § 86 (1975). The regulations were signed on May 27, 1975. Designed to enforce Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (Supp. II 1972), they became effective July 21, 1975. For an account of the legislative debate, see N.Y. Times, July 10, 1975, at 32, col. 4; *id.*, July 15, 1975, at 38, col. 2.

2. Press Release, U.S. Dep't of Health, Education & Welfare, June 3, 1975.

3. *Hearings on House Concurrent Resolution 330 (Title IX Regulations) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 74th Cong., 1st. Sess. 54 (1975).

4. *Hearings on Sex Discrimination Regulations Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 228 (1975) [hereinafter cited as *Hearings on Sex Discrimination Regulations*].

5. Some educators believe that federal legislation affecting educational institutions is being enacted with insufficient consultation with the colleges and universities involved. The legislation is seen as encroaching on their autonomy in a number of ways, including the privacy requirements of the Buckley Amendment, Internal Revenue Service anti-

This Note will analyze the competing legal interests of the federal government in preventing discrimination and those of private colleges and universities in preserving their autonomy. The balancing of these principles in cases involving anti-bias legislation may to a great extent determine the level of institutional compliance required under Title IX.

I. THE BASIS OF FEDERAL INVOLVEMENT

Congress has enacted numerous pieces of legislation aimed at eradicating class-based discrimination. A fundamental departure from tradition, however, has been its effort to regulate private discrimination.⁶ To reach private activity, Congress has utilized its power to regulate commerce among the states⁷ and the power to condition federal contracts upon compliance with Federal legislation.⁸

Pursuant to the commerce power, Congress enacted Title VII of the 1964 Civil Rights Act⁹ which prohibits discrimination in hiring, firing, compensation, terms, conditions and privileges of employment.¹⁰ Prior

bias regulations and the hurried implementation of affirmative action programs. EDUC. REC. Spring 1975, at 89.

Academic institutions are vulnerable because of the federal government's power to cut off funds in order to enforce compliance with these laws. 121 CONG. REC. S3515 (daily ed. March 10, 1975) (remarks of Kingman Brewster). Although the issue has become more acute since 1972, the first implications of government involvement in education were observed through the federal subsidies of research activity following the launching of Sputnik in 1959. The issue involved the extent to which government funding of research would tend to artificially determine which topics would be pursued. Kirk, *Massive Subsidies and Academic Freedom*, 28 LAW & CONTEMP. PROB. 607 (1963). For a short history of federal aid to education, see K. ASHWORTH, SCHOLARS AND STATESMEN 14-21 (1972).

6. 117 CONG. REC. 8459-61 (1971) (statement of Congressman Carl Perkins).

7. U. S. CONST. art. 1, § 8: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states." *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

8. U.S. CONST. art. 1 § 8: "The Congress shall have the Power to . . . pay the Debts and provide for the . . . general welfare of the United States." *See, e.g.*, *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

9. 42 U.S.C. § 2000(e) to 2000e-15 (1970).

10. Title VII applies to employers retaining at least fifteen employees for twenty calendar weeks per year in an industry affecting commerce between states or in which a labor dispute would hinder or obstruct commerce. *Id.* §§ 2000e (b), 2000e (h). Title VII was amended in 1972 to reach state and local governments and the federal government. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e (b), 2000c (h) (1970)). The Title is enforced administratively through Executive Order 11,246, 3 C.F.R. 169 (1974). *See* 29 C.F.R. § 1601 (1976) (Equal Employment Opportunity Commission); 45 C.F.R. § 82 (1976) (Dept. of Health, Educ. and Welfare). In *Preseisen v. Swarthmore College*, 386 F. Supp. 1337 (E.D. Pa. 1974) a private college was held subject to Title VII and the commerce clause because it enjoyed a national reputation and attracted students from throughout the United States.

to 1972, Title VII provided an exemption for religious associations and all educational institutions,¹¹ but in 1972 was extended to reach academic employment.¹²

In accordance with the federal power to attach conditions to federal contracts, Title VI of the 1964 Civil Rights Act¹³ and Title IX of the Educational Amendments of 1972 were enacted.¹⁴ Title VI prohibits any discrimination under federally assisted programs on the grounds of race, color or national origin,¹⁵ and applies to schools receiving federal assistance. Title IX in effect amended Title VI to include sex and was designed to enforce equality in hiring, promotion, admissions, rules of conduct, use of facilities, access to educational and athletic opportunities and a variety of additional academic endeavors.¹⁶ The effect was to apply detailed regulations substantially affecting internal governance procedures to private, as well as public educational institutions.¹⁷

II. THE EFFECTS ON DIVERSITY

It is not only the pervasiveness of the federal legislation that is

11. 42 U.S.C. § 2000(e)-1 (1970) (amended 1972).

12. *Id.* § 2000(e)-1 (Supp. II 1972).

13. *Id.* § 2000(d).

14. 20 U.S.C. § 1681 (Supp. II 1972).

15. 42 U.S.C. § 2000(d) (1970). Title VI is enforced pursuant to regulations at 45 C.F.R. § 80 (1973) (applicable to schools).

16. 20 U.S.C. § 1681 (Supp. II 1972); 45 C.F.R. § 86 (1975). See Sandler, *Sex Discrimination, Educational Institutions, and the Law: A New Issue on Campus*, J. L. & EDUC. 613 (1973); Note, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806 (1976); 49 TEMP. L.Q. 207 (1976). See also WEALABZUG PRELIMINARY ANALYSIS OF PROPOSED TITLE IX REGULATIONS reprinted in 120 CONG. REC. E4863-69 (daily ed. July 18, 1974).

Congress had been presented with evidence of widespread discrimination in education. *Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., pts. 1 & 2 (1970). The Carnegie Council found that whereas the average salary for male faculty was \$16,000 per year in 1974-75, women were receiving \$13,000, 82.5% of the male figure. The Council also determined that women were hired predominantly in the lower faculty ranks, at the level of instructor and assistant professor. Two-thirds of the academic departments surveyed employed no women at the rank of professor. The situation is improving. Both the percentage of females hired and their faculty rank have continued to improve throughout the last ten years. One of the contributing factors to this rise in status was federal legislation and its associated affirmative action programs. CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, MAKING AFFIRMATIVE ACTION WORK IN HIGHER EDUCATION 20-27, 48-54 (1975) [hereinafter cited as CARNEGIE COUNCIL].

17. The Title IX regulations apply to over 16,000 public schools and 2,700 institutions of higher education. Hicks, *Women's Groups and Educators Urge Approval of Sex Bias Rules*, N.Y. Times, June 26, 1975, at 37, col. 1.

alarming to private colleges and universities, but also the very critical nature of the activity which is regulated.¹⁸ It has been suggested that allowing the federal government, through Title IX, to determine the internal governance of private colleges and universities will homogenize and dilute the quality and diversity of American education.¹⁹

Among other functions, private colleges and universities serve to maintain a market place of ideas in education,²⁰ restrain political influence in education by acting independently and providing a refuge for the unpopular idea,²¹ encourage academic innovation in the absence of

18. Yale University President Kingman Brewster describes the activities regulated as "institutional diversity, autonomous trusteeship and faculty self-determination" which are "the essence of the envied vitality of American higher education." 121 CONG. REC. S3515, S3516 (daily ed. March 10, 1975) (remarks of Kingman Brewster). See also R. LESTER, ANTIBIAS REGULATION OF UNIVERSITIES, FACULTY PROBLEMS AND THEIR SOLUTIONS (1974). The pervasiveness of regulation is exemplified by HEW's eight pages of regulations written to enforce a statute only one paragraph long. 29 U.S.C. § 794 (Supp. III 1973), requiring affirmative action to end discrimination against the handicapped. 41 Fed. Reg. 29,548 (1976). Universities are subject to regulations promulgated to enforce legislation covering pensions, taxes, student aid, occupational health and safety, and veteran's benefits; regulations to control discrimination issued by the Departments of HEW, Labor and Agriculture; regulations protecting the rights of human subjects in government financed research; and regulations guarding the privacy of student records. HEW speculates that 40 sets of regulations will be written solely to enforce the Education Amendments of 1976. Winkler, *Proliferating Federal Regulation: Is Government Now the Enemy?*, Chronicle of Higher Education, Dec. 13, 1976, at 3, col. 1.

19. To a large extent the theory that the influence of government in education destroys educational diversity has been borne out by empirical studies comparing both large and small state colleges and universities with other types of institutions. State schools ranked low on measures of liberal education, personal and social development, critical thinking, knowledge, independence, human relations, individuality, faculty interaction and campus involvement. C. PACE, THE DEMISE OF DIVERSITY? 108-111, 130-31 (1974). See generally G. ROCHE, THE BALANCING ACT-QUOTA HIRING IN HIGHER EDUCATION (1974).

20. K. ASHWORTH, SCHOLARS AND STATESMEN-HIGHER EDUCATION AND GOVERNMENT POLICY 13-16 (1972); Muller, *The Purposes of the Independent Institution*, EDUC. REC. Summer 1975, at 145-48.

21. Many states vest in their lawmakers decisions as to tuition rates, campus location, building design and placement, and space utilization standards. State auditors, centralized purchasing facilities and civil service jurisdiction over non-academic employees also serve to influence educational policy. CARNEGIE COMM'N, THE CAPITOL AND THE CAMPUS 101-102 (1971). In addition, legislators frequently attempt to oversee school administrators and become involved in corrective measures, including the disciplining of students and professors. H. EULAU & H. QUINLEY, STATE OFFICIALS AND HIGHER EDUCATION 61-65 (1970) [hereinafter cited as EULAU]. Some universities may be protected from such political influence by state constitutions and state courts. See, e.g. Regents of Univ. of Mich. v. State, 47 Mich. App. 23, 208 N.W.2d 871 (1973). See also O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975).

bureaucratic strictures,²² and help to socialize individuals from a variety of cultural, religious and educational groups into self-fulfilling members of society.²³ The need for government regulation of private colleges and universities to eliminate discrimination must be balanced against the potential impairment of these functions.²⁴

A. *The Effect of The Title IX Regulations*

Colleges and universities are touched by Title IX in a variety of ways. They will not be able to utilize any scholarships that lead to an imbalance in funds for women students.²⁵ Counseling texts, procedures and tests must be evaluated to determine their sexual neutrality while the school must assure that any disproportionate enrollment by sex in a particular class is not a result of their counseling procedure.²⁶ It is thus more difficult for counseling programs to serve a selected social or religious goal.

Private institutions also assert that the Title IX regulations will prevent them from maintaining their educationally diverse character. Many private colleges and universities maintain that rules pertaining to conduct and morality are important parts of the educational environment.²⁷ Yet the Title IX regulations prohibit the use of dress codes, rules of conduct, dormitory hours or other rules of morality which make distinctions on the basis of sex.²⁸ Nor are institutions allowed to discipline a female professor or a female student for being unmarried

22. EULAU, *supra* note 21, at 99-105; M. KEETON, *MODELS AND MAVERICKS* 51-52 (1971).

23. *See generally* W. GELLHORN & R. GREENAWALT, *THE SECTARIAN COLLEGE AND THE PUBLIC PURSE* (1970).

24. *See* P. REINERT, *TO TURN THE TIDE* 13-25 (1972); Muller, *The Purposes of the Independent Institution*, *EDUC. REC.*, Summer 1975, at 145-46.

25. 45 C.F.R. § 86.37(b) (1975). Universities may use scholarships restricted to a particular sex so long as the overall effect is non-discriminatory.

26. *Id.* § 86.36(c).

27. Educators suggest the private institutions will henceforth be unable to establish its own moral climate. *Hearings on Sex Discrimination Regulations, supra* note 4, at 255. Some courts have found appearance codes permissible. *E.g.*, *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971); *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Ark. 1970). Most courts have not. *E.g.*, *Lansdale v. Tyler Junior College*, 318 F. Supp. 529 (E.D. Tex. 1970); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969); *Zachry v. Brown*, 299 F. Supp. 1360 (N. D. Ala. 1967). Phyllis Schlafly, National Chairman, National Committee to Stop ERA, described the dress code regulations as "nonsense," and believes the effect of the regulations is to force schools to introduce role reversals between men and women. 121 CONG. REC. S12296 (daily ed. July 10, 1975).

28. 45 C.F.R. §§ 86.31(b)(4), .31(b)(5), .32 (1975).

and pregnant or for undergoing an abortion.²⁹ Prohibiting such rules may alter the nature of a student body and jeopardize both parental and alumni support.³⁰

The high cost of compliance with anti-bias legislation will also have an effect on an institution's allocation of financial resources.³¹ A two year effort to comply with federal anti-discrimination laws cost the University of California system more than four million dollars.³² Other estimates of compliance costs run from one percent to four percent of a school's budget each year, a national total of two billion dollars in 1974.³³ Because this money could have been applied to institutionally selected activities rather than those required by the federal government, the university's autonomy was correspondingly undermined.³⁴

B. *The Regulations and Faculty Selection*

Most critical of all, however, is Title IX regulation of faculty hiring and promotion. The regulations require that colleges and universities evaluate their hiring, promotion and admission procedures to detect any sexual bias and "take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies or practices."³⁵ Should discrimination be

29. *Id.* §§ 86.21(c)(2), .21(c)(3), .40(b) (student), .57(b) (faculty).

30. Parents will frequently choose a college or university for their children precisely because of its restrictive environment. Many students themselves will select a school for these reasons. C. PACE, *THE DEMISE OF DIVERSITY?* 51-105 (1974).

31. The University of Iowa, for example, has determined that the paperwork involved in accepting funds under the Veterans' Benefits Act, 38 U.S.C. § 1651-1697 (1970), requires an expenditure of \$17 per veteran more than the government will allow for administrative expenses. In 1974-75 Harvard University estimated that 60,000 hours of faculty time were devoted to complying with federal regulations. Winkler, *Proliferating Federal Regulations: Is Government Now "the Enemy"?*, *Chronicle of Higher Education*, Dec. 13, 1976, at 3, col 1. See INTELLECT, Sept. 1975, at 76, col. 2 (describing the compliance problems involved with I.R.S. regulations, Rev. Proc. 75-50, 1975-2 C.B. 587, issued to prohibit institutional discrimination).

32. CARNEGIE COUNCIL, *supra* note 16, at 169. Washington University, with an enrollment of only 12,000, spent \$250,000 for computer time in collecting information. Memorandum from Peter H. Ruger, general counsel of Washington University, to United States Dep't of Labor, Fall 1975, on file with the *Urban Law Annual*.

33. See Saunders, *Association View of Federal Impact*, EDUC. REC., Spring 1975, at 91. The paperwork demanded by the regulations is substantial. See, e.g., 45 C.F.R. § 86.3(d) (1975); 41 C.F.R. §§ 60-2.11, 60-2.25 (1971).

34. Walsh, *Counting the Costs of Compliance*, SCIENCE, Oct. 31, 1975, at 444-47. See note 31 *supra*.

35. 45 C.F.R. § 86.3(c) (iii) (1975). One continuing source of friction between HEW, Equal Employment Opportunity Commission (EEOC) and colleges is that affirmative action plans are applied to non-academic personnel, students, and faculty all in the same manner. College and university administrators suggest that plans developed for indus-

found to have existed at any time, the school must devise a plan to correct any underrepresentation of women among its faculty.³⁶ Although the Department of Health, Education and Welfare (HEW) denies it, an institution almost of necessity will have to apply some special treatment in favor of women in order to achieve these goals.³⁷

The attempt to comply with affirmative action hiring goals may present the most serious problem to private colleges. Within the American college system, the faculty literally is the school.³⁸ The faculty makes decisions on policy, curriculum, hiring and tenure of professors and admissions of students.³⁹ Research-oriented univer-

trial situations cannot be applied to professional educators without causing a decrease in faculty quality. It is all but impossible to develop objective standards by which to judge the scholastic quality of a professor. In *Peters v. Middlebury College*, 409 F. Supp 857 (D. Vt. 1976), a female professor's dismissal was held permissible upon the finding that she could not adequately lecture in her Renaissance literature class upon John Donne and Ben Johnson. In *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152 (D. Mass. 1975), dismissal was justified upon the department chairman's assessment of the quality of the plaintiff's thesis. Professional criteria are difficult to codify and may be misleading if codified in indicating that an objective test will be used to determine promotion when a subjective decision on academic quality is in fact being made.

36. 45 C.F.R. § 86.3(a) (1975). Although courts may order certain affirmative action plans to be implemented by schools as a remedy for past discrimination, *e.g.*, *United States v. Hazelwood School Dist.*, 534 F.2d 805 (8th Cir. 1976), *cert. granted*, 97 S. Ct. 730 (1977), most academic affirmative action plans have been required by Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *as amended*, Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967). The Executive Order applies to contractors holding federal contracts of \$10,000 or more and employing at least 50 people, including colleges, prohibits discrimination by each contractor, and requires that affirmative action be taken to eliminate the effects of past discrimination. The extensive and costly requirements of an affirmative action plan are indicated in Revised Order No. 4, 41 C.F.R. § 60-2 (1976). *See also*, proposed regulations, 41 Fed. Reg. 40,348 (1976); *Chronicle of Higher Education*, Jan. 24, 1977 at 8, col 1.

37. In its Memorandum to College and University Presidents, 40 Fed. Reg. 2,459 (1975), HEW notes that it would be unacceptable for a school to advertise a position by stating that "women and minorities are preferred" or "this is an affirmative action position" because the affirmative action process should not restrict consideration to women and minorities only. This seems inconsistent with some of the HEW-approved affirmative action plans which set goals so specifically that they contemplate the hiring of fractions of persons. *CARNEGIE COUNCIL*, *supra* note 16, at 209. In June, 1975, Washington University was told to develop an affirmative action plan whereby women and minorities would be promoted at least at 80% of the rate non-minorities were promoted. The University protested that because failure to comply with the numerical ratio would result in a conclusive presumption of discrimination, it was no more than an unfair quota. Memorandum from Peter H. Ruger, general counsel of Washington University, to United States Dep't of Labor, fall 1975, on file with the *Urban Law Annual*.

38. *See Note, Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1048-49 (1968).

39. Although practices vary greatly, schools with high reputations tend to vest a greater amount of authority in the tenured faculty than do community colleges. The

sities typically give tenure to only a small group of faculty recognized as experts in their respective fields. Recruitment is limited to the handful of similar research institutions at which those experts presently teach.⁴⁰ Institutions use a similar method for hiring untenured assistant professors, relying not so much on reputation but upon confidential recommendations and other subjective information.⁴¹ Religious schools and small liberal arts colleges also must rely on subjective information in making faculty decisions and recruiting among somewhat limited sources to ensure the success of their particular programs.⁴²

Affirmative action hiring may require colleges and universities to expand their recruitment efforts to reach virtually the entire country.⁴³ If many universities attempt to hire additional female faculty mem-

larger research institutions put a great deal of weight on the decisions of the faculty in each respective department. In making hiring decisions, the faculty search committee must look at a candidate's academic qualifications and must also consider the candidate's particular qualifications in terms of the instructional objectives of the institution. Achieving a diversity of faculty is generally a prime consideration in faculty selection. R. LESTER, *ANTIBIAS REGULATION OF UNIVERSITIES, FACULTY PROBLEMS AND THEIR SOLUTION* 14-25 (1974); CARNEGIE COUNCIL, *supra* note 16, at 56-62.

40. This method of selection has been referred to as the "old boy network" which may indirectly serve to perpetuate racism and sexism in academic employment. White, male faculty keep in contact with their white, male colleagues about people who are performing well and are the most highly qualified in a particular field. *See* Goodwin, *The Great White Marshmallow*, 1 *WOMEN L. REP.* 1.253 (1975).

41. Although some confidential material is used by a faculty search committee when selecting an individual to fill a *tenured* position, it is not as critical at that level because of the candidate's reputation and exposure. When hiring a new professor, however, the faculty search committee will rely heavily upon confidential assessments solicited from the candidate's supervising instructors at his graduate institution. R. LESTER, *supra* note 39, at 23.

42. For example, Fordham College has traditionally drawn heavily from the Jesuit community. In the 1967-68 school term, 17 of 24 faculty members in the philosophy department and 23 of 32 in the theology department were Jesuits. W. GELLHORN & R. GREENAWALT, *supra* note 23, at 98-99. Wheaton College, in attempting to establish an environment consistent with "a citadel of Evangelical faith and fervor," requires that its faculty sign a religious creed annually. M. KEETON, *MODELS AND MAVERICKS* 14-15 (1971).

43. Rather than rely upon traditional sources of faculty supply, federal regulations require colleges and universities to actively advertise job openings among a variety of new groups and associations. 41 C.F.R. § 60-2.24(e) (1) (1971). Such recruiting, premised as it is on largely physical characteristics, presents its own problems. Upon receiving a letter from Swarthmore College stating, "Swarthmore College is looking for a black economist," Professor Thomas Sowell of UCLA, a black, replied to the college that "your approach tends to make the job unattractive to anyone who regards himself as a scholar or a man . . . Swarthmore-quality faculty members are found through Swarthmore-quality channels and not through mimeographed letters of this sort." G. ROCHE, *THE BALANCING ACT, QUOTA HIRING IN HIGHER EDUCATION* 40-41 (1974).

bers, the pool of well qualified candidates may quickly dry up. Extensive reliance upon confidential recommendations may be precluded because personnel records will be subject to inspection in discrimination suits and may therefore lack candor⁴⁴ which would probably have an immediate effect on hiring practices, subsequent effects on tenure decisions, and might even lead to a deterioration of faculty quality and distinctiveness.⁴⁵

Many educators believe that the preservation of the attributes of private education should be recognized as more than just social policy. Yale president Kingman Brewster suggested an inherent constitutional source of support when he noted that: "I'm not sure what constitutional grounds could be asserted to resist this leverage. But it does outrage constitutional values."⁴⁶

III. CONSTITUTIONAL SUPPORT OF EDUCATIONAL AUTONOMY

The freedom of private education has, in fact, been recognized and afforded protection under a number of constitutional principles. The three most significant sources of protection derive from the first amendment free speech guarantees,⁴⁷ the state action requirement of the fourteenth amendment,⁴⁸ and the separation of church and state

44. HEW regulations for proceedings under Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d) (1970), or Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965), make no provision for maintaining the confidentiality of records, and such documents, as personnel records, may be subpoenaed. 41 C.F.R. § 81.63(K) (1967). Compare EEOC v. University of New Mexico, 504 F.2d 1296 (10th Cir. 1974) (court required the school to provide copies of faculty personnel records), with *McKillip v. Regents of Univ. of Cal.*, 386 F. Supp. 1270 (N.D. Cal. 1975) (court found that the personnel files of the art department's faculty were privileged under state law as "official information" the disclosure of which "is against the public interest"). For an example of the use of confidential material in an academic discrimination dispute, see *Rubenstein v. University of Wis. Bd. of Regents*, 422 F. Supp. 61, 64 (E.D. Wis. 1976); *Peters v. Middlebury College*, 409 F. Supp. 857, 860-64 (D. Vt. 1976).

45. Professor Lester describes a number of feared consequences including: (1) To the extent affirmative action hiring deviates from standards of merit in selecting faculty, it will cause other faculty to lose faith in the integrity of the promotion system; (2) a two-status faculty would soon be established; faculty chosen because of their academic potential faculty chosen because of their physical characteristics; (3) faculty discontent, reduced faculty effectiveness and less drawing power for able students and faculty. R. LESTER, *supra* note 39, at 81-82. But see Biehn, Ostriker & Ostriker, *Sex Discrimination in the University: Faculty Problems and No Solution*, 2 WOMEN'S RIGHTS L. REP. No. 3, at 3 (1975).

46. 121 CONG. REC. S3515 (daily ed. March 10, 1975) (remarks of Kingman Brewster).

47. The free speech guarantee has been described as a design for "safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

48. The fourteenth amendment has been used to implement a policy opposed to

required by the first amendment's establishment clause.⁴⁹

These are not absolute rights, however, and may be held subject to appropriate governmental regulation. To the extent that federal anti-bias legislation attaches only to the economic aspects of the university function, rather than attempting to directly regulate the exercise of these constitutional rights, that legislation has been held constitutionally permissible.⁵⁰ But it is this deference to *economically* based infringements upon constitutional values which concerns many educators.⁵¹

A. *Free Association and Academic Freedom*

The Association of Independent Colleges and Universities has argued that recognition of a first amendment right in academic freedom requires private institutions to be free from "the imposition of federal direction, supervision or control over the . . . administration, or personnel of any educational institution."⁵² It is the remedial affirmative action component of Title IX which relates most significantly to the administrative and personnel practices of the regulated institution. The goal hiring, data reporting and grievance resolution procedures of affirmative action plans appear to be contrary to the theory of academic freedom.

That theory, as established in *Sweezy v. New Hampshire*⁵³ and *Keyishian v. Board of Regents*,⁵⁴ denied the government authority to require university professors to take loyalty oaths. Such a practice, it was reasoned, interfered with the professor's academic freedom. That freedom retains the character of free speech and is applicable where

judicial intervention in the control and "administration of discipline and the selection of members of the faculty of universities and colleges". *Greene v. Howard Univ.*, 271 F. Supp. 609, 615 (D.D.C. 1967), *rev'd on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969).

49. The establishment clause has been applied to preclude "active involvement of the Sovereign in religious activity" including the educational activity of religious colleges. *Walz v. Tax Comm'r*, 397 U.S. 664, 668 (1970).

50. *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975). Construing Title VI, the court found there is "no judicial support for the proposition that the First Amendment protection for the free exercise of religion is any more inviolable . . . than the First Amendment's secular protection of freedom of association which results in similar privately sponsored racial exclusion." *Id.* at 607.

51. "My fear is that there is a growing tendency for the central government to use the spending power to prescribe educational policies. These are matters which they could not regulate if it were not for our dependence on their largesse." 121 CONG. REC. S3516 (daily ed. March 10, 1975) (remarks of Kingman Brewster).

52. *Hearings on Sex Discrimination Regulations*, *supra* note 4, at 235.

53. 354 U.S. 234 (1957).

54. 385 U.S. 589 (1967).

the government seeks to restrict professional access to the classroom.⁵⁵ The government has no more authority in those situations that it does to restrain free speech generally.⁵⁶ Academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁵⁷

The institution itself may be able to assert the right of academic freedom pursuant to a parallel right of free association.⁵⁸ Cases dealing with the right of free association have held that governmental regulation is impermissible when it subjects members of a group “to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”⁵⁹ adversely affecting the group’s ability to foster its beliefs. Additionally, in *Buckley v. Valeo*,⁶⁰ the Supreme Court held that a campaign finance law could not restrict individual economic decisions in respect to campaign donations because it was the expenditures themselves which were the speech protected by the first amendment.⁶¹ Similarly, it is the selection of faculty by colleges and universities which is the substance of associational freedom and it is precisely this selection of faculty which Title IX

55. *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968); *Whitehill v. Elkins*, 389 U.S. 54, 62 (1967); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956). *But see Barenblatt v. United States*, 360 U.S. 109, 129 (1959); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399, 408 (1958); *Adler v. Board of Educ.*, 342 U.S. 485, 494 (1952).

56. *See Murphy, Academic Freedom—An Emerging Constitutional Right*, 28 *LAW & CONTEMP. PROB.* 447, 464-65 (1963); Note, *Developments in The Law—Academic Freedom*, 81 *HARV. L. REV.* 1045 (1968); Note, *Academic Freedom—Its Constitutional Context*, 40 *U. COLO. L. REV.* 600 (1968).

57. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

58. In *Shelton v. Tucker*, 364 U.S. 479 (1960), Arkansas attempted to require all public school teachers to disclose their membership in various organizations. Aimed at disciplining members of the NAACP, the court struck the scheme down as an infringement of the right of free association. In *NAACP v. Button*, 371 U.S. 415 (1963), the NAACP itself asserted the right. The state sought to require the NAACP to disclose the names of its members along with financial data. The court, however, held that the intent of the legislation was to subject the members to public intimidation and as such was an impermissible impingement on their right of association.

59. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). *See also Healy v. James*, 408 U.S. 169 (1972) (college must recognize right of student groups to organize, under reasonable conditions); *United Transp. Union v. State Bar*, 401 U.S. 576 (1971) (right extends to the ability of union members to assist each other in asserting rights).

60. 424 U.S. 1 (1976).

61. The Congressional legislation sought to limit individual campaign contributions to \$1000 per candidate, 18 U.S.C. § 608(b)(1) (1975), and \$25,000 for all candidates combined, *id.* § 608(b)(3). The court, however, reasoned that the reality of contemporary political expression through the mass media required that an individual, to most effectively express his views, must be allowed to exercise his right of speech through monetary expenditures.

seeks to regulate.⁶² To the degree that Title IX dictates faculty selection processes through affirmative action or remedial employment practices, it is arguably an impermissible restriction on the rights of free association. The *Buckley* analysis supports a finding that the relationship of speech to employment is so close that to allow a distinction between its economic and speech elements would frustrate first amendment rights.⁶³

In closely analogous situations, however, this conflict between anti-bias regulation and associational freedom has been consistently resolved in favor of government regulation. One theory for reaching this result was applied by the Supreme Court in *Runyon v. McCrary*.⁶⁴ Private academies had denied admission to plaintiff's child solely on the basis of the child's race.⁶⁵ Plaintiff sought injunctive and compensatory relief pursuant to a federal statute.⁶⁶ Aimed at an economic relationship, the legislation guaranteed blacks the same right to contract "enjoyed by white citizens."⁶⁷ The Court characterized the

62. "It prohibits recipients from granting preferences to employment applicants who are graduates of particular institutions. . . . [The school] shall take remedial action to recruit members of the sex discriminated against until the effect of such past discrimination no longer exists." Statement of HEW, 40 Fed. Reg. 24,146 (1975).

63. *Buckley* distinguished two previous cases which found government regulation of private conduct permissible when the government was acting from economic motives. *Civil Ser. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973), upheld Hatch Act restrictions on the political activities of federal employees as a valid means of controlling patronage and promoting merit and efficiency in government service. *United States v. O'Brien*, 391 U.S. 367 (1968), legislation prohibiting the burning of draft cards approved because it served administrative convenience with respect to the Congressional duty to raise armies. *Buckley* narrowed *Letter Carriers* application to situations in which the conduct regulated did not threaten expression but only the time and place of its delivery. 424 U.S. at 48 & n.54. *O'Brien* was distinguished because in that case the government had not intended to regulate expression. In *Buckley*, however, Congress sought to limit contributions and that was the protected expression. *Id.* at 65 & n.76. *But see* *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 97 S. Ct. 555, 563 & n.10 (1977) (the Court implicitly suggested that *O'Brien* would be limited to situations in which the legislature acted with the purpose of impinging rights of free speech. Any legislation which inadvertently impinged upon those rights would not violate the first amendment).

64. 427 U.S. 160 (1976).

65. These academies developed as a result of the integration of southern school districts between 1965 and 1970. In the 1963-64 school year only 17 such schools existed with an enrollment of 2,362. By 1970, 155 had been established, enrolling 42,000 white students. *Norwood v. Harrison*, 413 U.S. 455, 457 (1973).

66. 42 U.S.C. § 1981 (1970). This section was enacted pursuant to U.S. CONST. amend. XIII, § 1: "Neither slavery nor involuntary servitude . . . shall exist within the United States."

67. 42 U.S.C. § 1981 (1970). Section 1981 was first recognized as applying to private conduct when its counterpart, § 1982, was held to prohibit private acts of discrimination in the field of housing. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968). Section

school-student relationship as contractual and therefore enjoined the schools from discriminating in their policy of admission.⁶⁸

When confronted with the argument that the white parents possessed a right of free association allowing them to send their children to schools emphasizing the value of racial segregation, the Court distinguished between the speech and the conduct element of free association. The Court acknowledged that Congress could not abridge the right of the school to promote a belief in racial segregation, but could, nonetheless, regulate the *practice* of segregation.⁶⁹ Thus, the faculty may instruct pupils in the values of racial separation, but they must address those ideas to an integrated classroom. The Court reasoned there was no inconsistency involved since "there is no showing that discontinuance of the discriminatory admissions practices would inhibit in any way the teaching in these schools of any ideas or dogma."⁷⁰ *McCrary* suggests that private discrimination can be protected under the first amendment as an expression of belief. This protection, however, requires only that the discrimination be tolerated; it is not to be accorded affirmative constitutional protection.⁷¹ Legislation enacted consistent with any explicitly expressed constitutional policy, therefore, is to be given priority over any discriminatory practices inherent in the exercise of free association.⁷²

A second theory permitting government regulation of associational freedom relies not on a speech-conduct dichotomy but upon a balanc-

1981 has only been applied to cases of racial discrimination, not sex discrimination. *Johnson v. Railroad Express Agency*, 421 U.S. 454, 459-60 (1975). Some commentators have suggested, however, that § 1981 should also apply to sexual classification because the thirteenth amendment applies to *all* U.S. citizens. See Stanley, *Sex Discrimination and Section 1981*, 1 WOMEN'S RIGHTS L. REP., No. 4, at 2 (1973).

68. The successful attorney for plaintiffs in *McCrary*, George S. Leonard, suggests that the effect of this decision may actually aid the academies. He believes there are no blacks willing to attend these schools, yet the fact that the schools cannot now discriminate may restore previously denied tax exemptions. Landau, *Decision on Integration Ineffective*, *Kansas City Star*, July 23, 1976, at 38, col. 5. It may not be that easy. I.R.S. regulations require more than just subjective non-discrimination. Discrimination in the selection of faculty is a prima facie case for showing discrimination in admissions. *Rev. Proc. 75-50*, 1975-2 C.B. 587.

69. 427 U.S. at 176.

70. *Id.*

71. *Id.*, citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (state's loan of textbooks to such schools constituted impermissible affirmative support).

72. Such policy includes that expressed in the fourteenth amendment, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed sub nom. Coit v. Green*, 400 U.S. 986 (1971); the thirteenth amendment, *Runyon v. McCrary*, 427 U.S. 160 (1976); and the fifteenth amendment, *United States v. Raines*, 362 U.S. 17 (1960).

ing of interest test.⁷³ This theory recognizes academic freedom as a defense to government sanctions when the regulatory scheme attempts to require the beliefs and ideas of instructors to conform to state conceptions of propriety. The government may, however, develop a narrower statutory scheme proscribing only that speech which presents a clear and present danger to the public.⁷⁴ The government then possesses a legitimate interest in the proscription of speech which outweighs the countervailing guarantee of academic freedom. In the context of anti-bias regulation the government's interest in eliminating discrimination is similar to its interest in protecting the public from clearly dangerous speech.

In *Green v. Connally*,⁷⁵ under facts similar to *McCrary*, the parents' right of free association for their children was found insufficient to allow private schools an exemption from Title VI sanctions.⁷⁶ *Green* held that the government could regulate the education of children in the interest of the public welfare, based on the fourteenth amendment's policy of protection of the individual from class-based discrimination.⁷⁷ In light of that interest the federal government could withdraw economic benefits from a school shown to discriminate in its admissions.

Both *McCrary* and *Green* dealt with the admission of students rather than the selection of faculty. That distinction may be critical, as *McCrary* found that the admission of certain students may not inhibit the teaching of particular ideas.⁷⁸ That element could be absent in a challenge to a Title IX faculty affirmative action program.⁷⁹

73. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) establishes the test usually applied when balancing free expression against governmental interest. The government's regulation is justified when (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on first amendment freedom is no greater than is essential to the furtherance of that interest.

74. *Dennis v. United States*, 341 U.S. 494, 508 (1951).

75. 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

76. The government assistance involved in *Green* was a tax exemption provided to educational institutions. I.R.C. §§ 170, 501. *See also* Horvitz, *Tax Subsidies to Promote Affirmative Action in Admission Procedures for Institutions of Higher Learning—Their Inherent Danger*, 52 TAXES 452 (1974).

77. 330 F. Supp. at 1167. "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination. . . . That government interest is dominant over other constitutional interests. . . ."

78. 427 U.S. at 176; *see* text at note 70 *supra*.

79. *Compare McCrary* (students) with *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974) (faculty).

Green indicates that a claim of academic freedom may succeed where legislation seeks to proscribe activity which is discriminatory solely in its effect.⁸⁰ While Titles VI and VII may be violated by a practice discriminatory in effect, the fourteenth amendment prohibits only conduct which purposely discriminates.⁸¹ An affirmative action program, required to remedy the past effects of discrimination and not mandated by finding of present discrimination,⁸² would thus not be required by the fourteenth amendment. It would instead be a statutory remedy. That remedy, however, by looking to objective effects rather than subjective intent, would shift the burden of proof from the government to those asserting the right of free association. The *Green* rationale might then be used to find an impermissible infringement of academic freedom.

Although a defense of free association in faculty selection has never

80. 330 F. Supp. at 1166-67. *Green* reasoned implicitly that an academic freedom argument may succeed where the legislative scheme did not provide that the government would assume the burden of proof in establishing that the defendant school was subjectively engaging in discrimination. The *Green* court discussed *Speiser v. Randall*, 357 U.S. 513 (1958), in which the state was not allowed to attach to a tax exemption a provision that the taxpayer not advocate the overthrow of the government by unlawful means because such a provision might include both protected and unprotected speech. The *Green* court noted that the defendant school did not deny discriminating on the basis of race. Thus, *Speiser* was not applicable. The *Green* court did find that "[i]f schools sincerely terminate those harmful activities they may obtain the exemption." 330 F. Supp. at 1166 (emphasis added).

81. *Washington v. Davis*, 426 U.S. 229 (1976). The Court held that a police department qualifying test, designed to further police efficiency rather than to implement a discriminatory intent, was not invalid if it produced a discriminatory effect. In accord with *Washington*, the California Supreme Court found subjective discrimination would have to be established before preference could be given minorities. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 2d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, cert. granted, 97 S. Ct. 730 (1977). The fact that minorities are underrepresented "would not suffice to support a determination that the University has discriminated against minorities in the past." *Id.* at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

82. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 97 S. Ct. 555 (1977), the Court established a variety of methods by which subjective intent may be shown. They include (1) stark evidence the official action bears more heavily on one group than another; (2) evidence that there is a past series of official actions taken for invidious purposes; (3) evidence of the specific sequence of events leading up to the challenged decision; (4) evidence of departures from the normal procedural sequence; and (5) evidence of an administrative history, statements by members of the decision-making body and minutes of its meetings or reports indicating a discriminatory intent. *Id.* at 564-65. The Court placed a further qualification upon a finding of discriminatory intent in dicta, stating that even if there is a finding of discriminatory purpose the court must also determine whether that purpose was the cause in fact of the harm to plaintiff. *Id.* at 567 & n.26. For an application of these tests in an academic employment context, see *EEOC v. Tufts Inst.*, 421 F. Supp. 152 (D. Mass. 1975); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976).

been raised explicitly in the context of academic anti-bias regulation,⁸³ the legitimacy of the defense may be implicitly recognized in the implementation of affirmative action plans. Responding to similar policy arguments courts have accorded schools a broad professional exemption in respect to remedies for discrimination in faculty selection and have subjected remedial hiring plans to particularly stringent standards.

Title VII analysis provides that a plaintiff need not show purposeful class bias to establish a charge of discrimination. It normally will be enough to show statistically that a hiring practice, although neutral on its face, nonetheless results in a discriminatory effect.⁸⁴ Having shown such discrimination, the burden of proof is shifted to the employer to either rebut the inference of discrimination or to demonstrate the necessity of the discriminatory effect.⁸⁵

In a number of academic discrimination cases, however, an otherwise adequate showing that plaintiff's discharge resulted in a statistically verified pattern of discrimination was held insufficient to justify judicial interference into the faculty selection process.⁸⁶ While this

83. In *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 607 (D.N.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), the court asserted in dicta that freedom of association was no defense to a valid civil rights action. This argument was based on reasoning from the opinion in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green* 404 U.S. 997 (1971). There the court found that since the fourteenth amendment was ratified subsequent to the Bill of Rights, it was "dominant over other constitutional interests to the extent that there is complete and unavoidable conflict." *Id.* at 1167. In *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 353 N.E.2d 598, 386 N.Y.S.2d 685 (1976), however, the court relied upon the right to academic freedom and held that an administrative agency did not have the capacity under a state civil rights law to order tenure be given to a professor. Despite the state's "strong and important" public policy against discrimination, the remedy was declared erroneous as a matter of law. "Only under the gravest of circumstances, where all other conceivable remedies have proved ineffective or futile should the commissioner enter the campus to impose the conferring of tenure." *Id.* at 321, 353 N.E.2d at 603-04, 386 N.Y.S.2d at 609.

84. *United States v. Hazelwood School Dist.*, 534 F.2d 805 (8th Cir. 1976), *cert. granted*, 97 S. Ct. 730 (1977); *Gilmore v. Kansas City Terminal Ry. Co.*, 509 F.2d 48 (8th Cir. 1975); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974). See generally A. LARSON, 2 EMPLOYMENT DISCRIMINATION § 50.30 (1975); Dorsaneo, *Statistical Evidence in Employment Discrimination Litigation*, 29 Sw. L.J. 859 (1975).

85. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). See generally Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146 (1974); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach*, 84 YALE L.J. 98 (1974).

86. *Faro v. New York Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974); *EEOC v. Tufts Inst.*, 421 F. Supp. 152 (D. Mass. 1975); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976); *Labat v. Board of Higher Educ.*, 401 F. Supp. 753, 757 (S.D.N.Y. 1975); *Green v. Board of Regents*, 335 F. Supp. 249 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th

perhaps would be sufficient in an industrial employment case,⁸⁷ colleges have been permitted to justify the dismissal of a minority professor upon such highly subjective grounds as "teaching ability," "publications and scholarly activity" and "service to the community."⁸⁸ Schools need only demonstrate that faculty selection criteria are reasonable, bear a rational relationship to the duties of a college instructor, and that "the *dominant* considerations in the decisions not to grant the plaintiff a contract are professional."⁸⁹

The extent of judicial reluctance to interfere in the faculty selection decision is graphically illustrated by *Pace College v. Commission on Human Rights*⁹⁰ and *Labat v. Board of Higher Education*.⁹¹ In *Pace*, the plaintiff produced statistics showing that only seventeen percent of the school's female faculty was tenured, in contrast to seventy-three percent of the male faculty.⁹² It was shown in *Labat* that seventy-two percent of the white faculty at Queen's College was tenured, but only fifty-five percent of the black faculty had obtained this distinction.⁹³ Both courts held, nonetheless, that in the absence of a showing that the schools had specifically taken their class membership into consideration in denying tenure, plaintiffs could not obtain judicial relief.⁹⁴

Cir. 1973); *Pace College v. Commission on Human Rights*, 38 N.Y.3d 28, 339 N.E.2d 880, 377 N.Y.S.2d 471 (1975). *But see* *Wagner v. Long Island Univ.*, 419 F. Supp. 618 (E.D.N.Y. 1976); *Dyson v. Lavery*, 417 F. Supp. 103, 112-13 (E.D. Va. 1976).

87. *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *United States v. Wood, Wire and Metal Lathers Local 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973). *See also* 41 C.F.R. § 60-5.21 (1970) (Washington Plan); *id.* § 60-6.21 (1971) (San Francisco Plan).

88. *Green v. Board of Regents*, 335 F. Supp. 249, 250 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973).

89. *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976); *accord*, *Franklin v. Atkins*, 409 F. Supp. 439, 452 (D. Colo. 1976); *Chung-Lin Yu v. Criser*, 330 So.2d 198 (Fla. Ct. App. 1976); *New York Inst. of Tech. v. State Div. of Human Rights*, 40 N.Y.2d 316, 353 N.E.2d 598, 386 N.Y.S.2d 685 (1976); *Maloff v. Commission on Human Rights*, 38 N.Y.2d 334, 342 N.E.2d 563, 379 N.Y.S.2d 792 (1975); *Board of Higher Educ. v. Carter*, 14 N.Y.2d 138, 199 N.E.2d 141, 250 N.Y.S.2d 33 (1964). *See also* *Carrion v. Yeshiva Univ.*, 535 F.2d 722 (2d Cir. 1976); *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976).

90. 38 N.Y.2d 753, 342 N.E.2d 566, 377 N.Y.S.2d 471 (1975).

91. 401 F. Supp. 753 (S.D.N.Y. 1975).

92. 38 N.Y.2d at 31, 339 N.E.2d at 884, 377 N.Y.S.2d at 477. Plaintiff brought an action both for an individual remedy and a class action. For the strategy behind this type of action, see B. Phillips, *Discovery, Evidence and Trial Techniques—The Plaintiff Position*, in *HANDLING THE EMPLOYMENT DISCRIMINATION CASE* 82 (G. Holmes & Q. Story ed. 1975).

93. 401 F. Supp. at 757.

94. In *Pace* the court found the statistics presented by plaintiff unpersuasive and so

"Neither the commission nor the courts should invade, and only rarely assume academic oversight, . . . in such sensitive areas . . ."95

Recognizing this privilege in the context of academic discrimination solves the problem of free association presented by both *McCrary* and *Green*. *Pace* and *Labat* indicate that courts will emphasize neutral procedures rather than the federal agencies' emphasis on neutral effect. By rejecting as irrelevant the issue of discriminatory effect, *Pace* defers to professional judgment the decision as to what constitutes proper faculty qualifications. This deference restrains any tendency by the court to prescribe the nature of proper scholastic criteria, thus avoiding interference with academic expression that seems to have concerned the *McCrary* court.

Green also suggested that colleges and universities must be given an opportunity to establish that they were not purposely engaged in discrimination. Private schools might otherwise be penalized for innocent conduct thereby frustrating their associational freedom. *Pace* solved this same problem by providing an opportunity for the university to establish a rational relationship between the alleged discriminatory criteria and the duties of a college instructor. Such a showing establishes that there was no intent to discriminate but rather a permissible attempt to determine bona fide academic qualifications.

Perhaps the most difficult problem the Department of Health, Education and Welfare (HEW) faces in enforcing affirmative action plans stems from the increasing tendency among courts to invalidate plans they believe cause reverse discrimination.⁹⁶ The difficulty with some plans is that they must go beyond assuring sexual neutrality and actually require preferential treatment to achieve the desired results. Examples of such treatment include expanding recruitment efforts to

denied her class action claim. The court did, however, grant relief to plaintiff in her action as an individual. The court found subjective discrimination as to her, relying on evidence that her superior found her a "trouble-maker," that he felt he could not use four letter words in her presence, and that he discharged her for appealing her denial of tenure. 38 N.Y.2d at 34-35, 339 N.E.2d at 882-83, 377 N.Y.S. 2d at 474-75.

95. *Id.* at 38, 339 N.E.2d at 885, 377 N.Y.S.2d at 478.

96. *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976); *Board of Regents v. Dawes*, 522 F.2d 380 (8th Cir. 1975); *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976); *Bakke v. Regents of Univ. of Calif.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, cert. granted, 97 S.Ct. 730 (1977); *Alevey v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976). *But see Stewart v. New York Univ.*, 44 U.S.L.W. 2481 (S.D.N.Y. March 16, 1976); *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312 (1974).

uniquely sexually or racially oriented sources,⁹⁷ maintaining data on all hiring, firing and promotions along class lines,⁹⁸ and compliance with very specific hiring goals and timetables. Although HEW maintains that these goals are not quotas but flexible guidelines,⁹⁹ the distinction in many cases may be hard to draw. In the University of California—Berkeley plan for instance, a hiring goal as precise as 3.9 additional female faculty was set for the school's history department.

The resemblance of some goals to quotas was not overlooked by the court in *Cramer v. Virginia Commonwealth University*.¹⁰⁰ In *Cramer* the university sought to comply with its affirmative action plan by setting aside all requests for faculty appointments from white males and considered instead only those applicants that were female.¹⁰¹ The court found that although the federal guidelines had been correctly interpreted by the university, the regulations themselves violated the equal protection clause by giving paramount consideration to sex preferences, quotas or goals.¹⁰² By disapproving the affirmative action plan, the court not only checked government intervention, but also dictated the use of reasonable standards in faculty selection. The university was obligated to consider "equally *qualified* candidates for *competitive* positions."¹⁰³ Similarly, it was held in *Flanagan v. Presi-*

97. See 40 Fed. Reg. 2,459 (1975) (Guidelines for Colleges and Universities). 41 C.F.R. § 60-2.24(e) (1971).

98. See 41 C.F.R. § 60-1.7 (1971); note 36 *supra*.

99. 40 Fed. Reg. 37,064 (1975); *id.* 2,460. See *Mandel v. HEW*, 411 F. Supp. 542, 551-52 (D. Md. 1976).

100. 415 F. Supp 673 (E.D. Va. 1976).

101. Apparently the tenured faculty members involved in making employment decisions were told the university would be required to increase its ratio of female faculty. The selection committee first selected all applicants who appeared to be qualified, then put aside all white males and eventually selected three women. *Id.* at 676.

102. The federal regulation at issue was Executive Order 11,246, 3 C.F.R. 164 (1974). The court also found the order contrary to the intent of Congress as expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1970). That section provides that no employer is required to grant preferential treatment to any individual because "of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin". 415 F. Supp. at 678. See Note *Title VII and Preferential Treatment: The Compliance Dilemma*, 7 TEX. TECH. L. REV. 671, 684-99 (1976); 11 Urban L. Ann. 333, 334-36 (1976).

103. 415 F. Supp. at 677 (emphasis added). The court, citing *Kahn v. Shevin*, 416 U.S. 351 (1974), reasoned that since sex was not a suspect classification, the government, through Title VII, could make a classification by sex if there was merely a rational basis for the distinction. The court in *Cramer* could find no reason whatsoever for making the classification. "The court can conceive of no rational relationship between gender and suitability for being hired . . . as an instructor." 415 F. Supp. at 677-78. The implication that sex cannot be a rational qualification for selection as an instructor may

dent of Georgetown College¹⁰⁴ that an affirmative action plan giving special consideration to race in financial aid applications was an impermissible form of reverse discrimination. The case illustrates a judicial preference for decisions based on merit, decisions by admissions committees based on the applicant's academic potential, rather than the dictates of anti-bias regulation.¹⁰⁵

To the extent that courts accept a rationale similar to that applied in *Cramer* and *Flanagan*, the scope of affirmative action plans may be severely restricted.¹⁰⁶ The *Cramer* opinion seems to allow HEW to achieve Title IX compliance only through requirements that university procedures be non-discriminatory and free from inherent bias. *Flanagan* might provide more leeway by allowing that "separate treatment

prevent the government from requiring colleges and universities to consider sex in place of other, more rational, criteria. By allowing the school to determine who is qualified upon any basis other than subjective class discrimination, the court granted the school the same deference as did the *Pace College* court.

104. 417 F. Supp. 377 (D.D.C. 1976). The court found that "where an administrative procedure is permeated with social and cultural factors . . . separate treatment for 'minorities' may be justified." *Id.* at 384.

105. *Id.* The college asserted that its affirmative action program was required by regulations written to enforce Title VI, 45 C.F.R. § 80.3(b) (6) (1975). The court, however, felt that even though the school had discretion to apply a variety of social and cultural factors in selecting students for admission, it was a violation of the Title VI non-discrimination clause to use a racial distinction in allocating aid funds. Once a student had shown financial need it could not be said that a minority student's lack of money was any more severe than any other student's. While a school could use compensating social factors in order that all students could be realistically judged on the "same basis" (e.g., merits in the admissions process), racial distinctions could only serve to provide an irrational advantage to one race over another where a "scarce resource" was involved (e.g., jobs, financial aid).

106. The *Cramer* court held that a congressionally imposed affirmative action program requiring distinctions, based upon sex violated the equal protection clause. See note 103 *supra*. The *Flanagan* court held that such a plan was a violation of Title VI and, by implication, of the parallel language in Title IX. See note 105 *supra*.

In both *Rosenstock v. Board of Governors*, Civ. 75-483 D (M.D.N.C. Dec. 17, 1976), and *Timmerman v. University of Toledo*, 421 F. Supp. 464 (N.D. Ohio 1976), the courts adopted a reasoning similar to *Flanagan*. In *Rosenstock* the court held that a university could adopt an admissions policy giving special preference to minorities. Since the effect in that situation would have been to promote racial equality rather than inequality the state school needed to show only a rational basis for its distinction. That rational basis was established by the state's interest in educating its citizens. In *Timmerman*, the university was found to be exercising permissible discretion when it placed less emphasis upon the LSAT scores and grade-point averages of minority applicants than it did for other students. "A law school is not bound by any . . . mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment." 421 F. Supp. at 466. *But see* *Hupart v. Board of Higher Educ.*, 420 F. Supp. 1087 (S.D.N.Y. 1976); *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *cert. granted*, 97 S. Ct. 730 (1977).

for 'minorities' may be justified in order to ensure that all persons are judged in a racially neutral fashion."¹⁰⁷ Both cases, however, hold that subjective bias, even if compensatory, is an impermissible departure from professional standards of merit.

HEW has encountered significant public opposition in its attempts to require universities to comply with affirmative action programs. HEW has had to back down from a compliance ultimatum in the face of an adverse public reaction and was upbraided in the press for its "reflexive, oppressive and unproductive way" of regulating academic discrimination.¹⁰⁸

B. *The State Action Requirement*

A second constitutional principle that may reinforce the claim of autonomy of private education derives from the fourteenth amendment.¹⁰⁹ That amendment requires only that *governmental* activity

107. 417 F. Supp. at 377.

108. Statement of Chancellor Edwin Young in *Revolt of the Chancellors*, Washington Post, at A-14, col. 1. HEW has experienced a number of compliance problems. Because of understaffing and inexperience, a rather large backlog of cases has built up. By December, 1973, only 18 of 201 affirmative action plans submitted had been officially approved and 169 were still to be acted upon. Furthermore, of 358 individual complaints submitted to HEW under Executive Order 11246, 159 had not been resolved by the end of fiscal year 1975. CARNEGIE COUNCIL, *supra* note 16, at 155-57. In an attempt to alleviate the backlog, HEW proposed in June, 1975, to cease investigating individual complaints and concentrate instead on patterns of discrimination. 40 Fed. Reg. 24,136 (1975). Reaction to the proposal, however, was so "overwhelmingly negative" that it was dropped nine months later. Hicks, *H.E.W. Drops Curb on Bias Inquires*, N.Y. Times, March 17, 1976, at 9, col. 1.

On February 17, 1977, Secretary of HEW Joseph Califano announced that HEW would begin to accelerate enforcement of Title IX. The Secretary ordered a list compiled of colleges and school systems that have assured HEW they are complying with the Title IX regulations. Those who do not comply within 60 days after March 15 "will face the initiation of legal proceedings leading to termination of federal funds." Hicks, *H.E.W. Warning of Funds Cutoff*, N.Y. Times, Feb. 18, 1977, at A-16, col.1.

109. "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". U.S. CONST. amend. XIV, § 1. A similar prohibition applicable to the federal government is derived from the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Purely private conduct is left free from due process requirements. 42 U.S.C. § 1985(3) (1970), however, may be an exception. Although passed to implement the fourteenth amendment, it reaches private conduct when there has been a private conspiracy to deprive an individual of his rights under the law. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). In *Pendrell v. Chatham College*, 386 F. Supp. 341 (W.D. Pa. 1974), § 1985 was held adequate grounds for an employment sex discrimination remedy even though no state action was found. *But see* *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975) (state action applies to § 1985 to the extent that a state guaranteed right is frustrated).

meet standards of due process and equal protection. The exemption of private education from the due process and equal protection requirements of the fourteenth amendment is the result of its classification as private conduct.¹¹⁰ The freedom of conduct allowed private colleges and universities releases them from the requirement of maintaining procedures for validating the fairness of all hiring, discharge and admissions decisions.¹¹¹ They will be allowed to discriminate on the basis of religious affiliation and social, political, or intellectual beliefs. Most crucial of all is the extent to which they are freed of legislative and judicial interference. The policy behind this public-private dichotomy relates to "the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot."¹¹²

It is not accurate to say that due process standards apply only to state and federal government, however, for the government will not be allowed to accomplish indirectly through aid to a private institution what it is constitutionally prohibited from doing directly.¹¹³ Courts are often faced with the dilemma of determining when the connection between a private institution and the government is so close that the institution's conduct will be attributed to the government and held to due process standards. The distinction between public and private activity is usually preserved through a requirement that before due process rights will be enforced against a school, there must be a finding that the conduct involved is directly connected to the government's assistance¹¹⁴ or is serving a public function the government would

110. See *Faccenda & Ross, Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U.L. REV. 539, 543-48 (1975); Gallagher, *Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges*, 18 ST. LOUIS U.L.J. 41 (1973); Note, *Private Universities: The Right to be Different*, 11 TULSA L.J. 58 (1975). See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (the state was not allowed to remake the college into a public entity). Justice Marshall found the relationship between the state and the private trustees one protected by the constitution's prohibition on state interference with the right to contract. *Id.* at 627-29, 637-39.

111. *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973) (not court's function to regrade student's exams); *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *rev'd on other grounds*, 412 F.2d 1128 (D.C. Cir. 1969) (disciplining of faculty). See *pierce v. Society of Sisters*, 268 U.S. 510 (1925) (fourteenth amendment prevents state from prohibiting private schools to exist); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (fourteenth amendment prohibits state from restricting school's ability to teach German).

112. H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 30 (1969).

113. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725-26 (1961).

114. Cases in which the government was found not to be directly involved in the

otherwise undertake.¹¹⁵ In addition, policy considerations may be implicitly weighed. The state action determination seeks to balance "the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions."¹¹⁶

challenged conduct include *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975); (university used state name and financial aid); *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975) (government aid and contracts); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974) (government research contract); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973) (school on site acquired at public sale); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) (state granted charter); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970) (state required college to publically file plan for student discipline); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (shared campus with state college); *Winsey v. Pace College*, 394 F. Supp. 1324 (S.D.N.Y. 1975) (state aid); *Pendrell v. Chatham College*, 370 F. Supp. 494 (W.D. Pa. 1974) (state charter and aid); *Furumoto v. Lyman*, 362 F. Supp. 1267 (N.D. Cal. 1973) (state gave tax exemptions and power to change tuition); *Brownley v. Gettysburg College*, 338 F. Supp. 725 (M.D. Pa. 1972) (government scholarship assistance); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970) (government aid); *Torres v. Puerto Rico Junior College*, 298 F. Supp. 458 (D.P.R. 1969) (federal loans and aid); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) (state and federal aid). *But see* *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965); *Braden v. University of Pittsburgh*, 392 F. Supp. 118 (W.D. Pa. 1975) (lower tuition for in state students; state named some trustees); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974) (federal aid and tax exemptions); *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973) (athletic conference dominated by state colleges and universities).

115. *Evans v. Newton*, 382 U.S. 296 (1966); *Belk v. Chancellor of Washington Univ.*, 336 F. Supp. 45 (E.D. Mo. 1970); *Ryan v. Hofstra Univ.*, 67 Misc.2d 651, 324 N.Y.S.2d 964 (1971).

116. *Wahba v. New York Univ.*, 492 F.2d 96, 102 (2d Cir. 1974). *Compare* *Grafton v. Brooklyn Law School*, 478 F.2d 1127 (2d Cir. 1973) (inappropriate for courts to interfere with the student grading process), *with* *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975) (discrimination charges susceptible to a judicial remedy).

The implicit use of this policy oriented test may help explain the results of otherwise inconsistent cases. In *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973), for instance, Boston University was held to due process standards when the school declared varsity hockey players ineligible pursuant to an NCAA rule. The opinion reasoned that since 85% of the NCAA membership consisted of state institutions, the university's conduct was mandated by a governmental rule, the NCAA regulation. Furthermore, although the court noted that state aid to Boston University totaled only \$55,000 annually, the university was found to be fulfilling a public function as if it were a state agency. In contrast, however, Columbia University has been held not to be operating as a public entity, although almost 50% of its income in 1967 was obtained from the federal government. *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968). Similarly, the government was found not to be a direct participant in New York University's dismissal of an instructor despite the fact that he was working on a project funded by and for the benefit of the federal government. *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974). The distinction between *Grossner*, *Wahba* and *Buckton* is principally that Columbia and New York University were performing traditional academic functions (student discipline and faculty dismissal) while Boston University was merely conducting a sports program of minimal relevance to its education goals.

Although perhaps not intended by Congress, Title IX may have assumed a similar, judicially bestowed, state action requirement. Title IX, in language modeled after Title VI, provides that no person "on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" ¹¹⁷ The decision as to what constitutes a "benefit" and when a particular department or program is receiving federal "assistance" presents issues similar to those involved in the state action analysis.

In *McGlotten v. Connally*¹¹⁸ the court determined that before the Department of the Treasury could terminate certain tax exemptions afforded the Elks Club, it would have to be established that the exemptions actually constituted federal support of the Club's racially discriminatory membership policy in contravention of Title VI.¹¹⁹ The court decided that some of the exemptions indicated governmental support of the Club's policies and amounted to federal benefits for purposes of Title VI.¹²⁰ A deduction for funds generated only from club members, however, was characterized as a mere failure of the government to tax and could not be classified as federal assistance of discrimination.¹²¹ In holding that "assistance" required affirmative government support and not just a failure to act, Title VI acquired a state action component similar to that of the fourteenth amendment.

The advantages of such a state action theory to private colleges and universities are illustrated by *Stewart v. New York University*.¹²² The *Stewart* court found that despite the presence of federally derived student loans, grants, tax advantages, and other financing there was an insufficient connection between the assistance and the school's alleged discriminatory admissions policy to warrant application of a Title IX

117. 20 U.S.C. § 1681 (Supp. II 1972).

118. 338 F. Supp. 448 (D.D.C. 1972).

119. The Elks Club does not allow blacks to become members. Although plaintiff did not seek standing due to any injury he suffered from being denied Elks membership (there is no indication he even sought it), he was given standing as a taxpayer to challenge indirect government support for such conduct through tax exemptions. *Id.* at 452.

120. 338 F. Supp. at 456. I.R.C. § 170 requires the government to decide whether the organization has complied with its regulations, which requires the government to approve or reject the organization's application for exemption.

121. 338 F. Supp. at 458. "No income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, both within the same pair of pants." *Id.*

122. 44 U.S.L.W. 2481 (S.D.N.Y. March 16, 1976).

remedy. This theory may thus allow private universities to participate in a variety of federal programs free from Title IX sanction, where the programs do not amount to governmental "assistance" to a particular discriminatory activity.

Selective participation in federal programs may also be an attractive option for private colleges and universities to the extent that Title IX remedies are directed only towards the specific programs that fail to comply with the statute. While the regulations require compliance by every program and department within a university receiving federal benefits,¹²³ the Title IX enforcement provisions state that a finding of discrimination will result in a cut-off of funds limited "to the particular program, or part thereof, in which noncompliance has been so found"¹²⁴ Although HEW might prefer to require broad compliance,¹²⁵ courts have been cognizant of the narrow remedies afforded by the statute.

In a case arising under Title VI, *Board of Public Instruction v. Finch*,¹²⁶ HEW cut off all federal funds to the school district for failure to successfully integrate its schools. The Fifth Circuit reversed the Secretary's decision, finding that two of the programs involved were integrated and had no connection with the discrimination existing in the district's other schools. HEW was required to make findings of discrimination specific to individual programs and terminate only that assistance associated with the discriminating program.¹²⁷

123. Federal benefits now reach even the most obscure university function. HEW regulations (45 C.F.R. § 100a.10 (1973)) list 33 separate programs providing funds for such various activities as bilingual education, educational broadcasting, facilities for the handicapped, ethnic heritage studies and drug abuse programs. Participation by a university in any one of these programs requires compliance with Title IX.

124. 20 U.S.C. § 1682 (Supp. II 1972).

125. HEW suggests that discrimination in *any* university program may cause federally assisted programs to become infected by a discriminatory environment, thereby justifying termination of funds. HEW's treatment of athletic programs is a notable (and controversial) example of this principle. The federal government does not assist any college varsity athletic programs. College coaches, therefore, have been particularly upset over the application of Title IX regulations to athletics. 45 C.F.R. § 86.41 (1975). See 121 CONG. REC. S11,055 (daily ed. June 19, 1975) (statement of the Head Football Coaches). HEW, however, insists that athletic programs fall within Title IX's jurisdiction. "These sections apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department." 40 Fed. Reg. 52,655 (1975). *E.g.*, *Brenden v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973) (holding Title IX requires that females be allowed to participate on cross country ski team). See Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 458-84 (1975).

126. 414 F.2d 1068 (5th Cir. 1969); *accord*, *Mandel v. HEW*, 411 F. Supp. 542, 556-57 (D. Md. 1976).

127. 414 F.2d at 1076-78. For a discussion of Title VI administrative enforcement see

On the basis of *Finch*, universities may be encouraged to forego federal assistance for particular programs in which they prefer not to submit to regulation, but still accept assistance for other programs. *Finch* added a word of caution to its holding, however, stating that an agency may cut off aid to a non-discriminating program if it "is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."¹²⁸ This theme was further developed in *Bob Jones University v. Johnson*.¹²⁹ The university's racially discriminatory admissions policy was held so directly connected with the payment of student veteran's benefits that such funds were ordered terminated resulting in a loss to the school of \$397,800. The court reasoned that Title VI applied to any federal funding which would defray the costs of the educational program (thereby releasing institutional funds for other purposes) or would allow the participation of students who would not otherwise enter the educational programs.¹³⁰

In some cases very remote connections between discrimination and federal aid will be said to require termination.¹³¹ Rigorous adherence to the *Bob Jones* rationale could dilute the "state action" protection afforded private universities. The enforcing agency will nonetheless be required to make findings of discrimination specific to a particular program and to limit the effect of termination to the noncomplying activity.¹³² Furthermore, the reasoning of *McGlotten* indicates that state action analysis should continue to insulate private universities against government regulation.¹³³

Slippen, *Administrative Enforcement of Civil Rights in Public Education: Title VI, HEW, and the Civil Rights Reviewing Authority*, 21 WAYNE L. REV. 931 (1975). In *Mandel v. HEW*, 411 F. Supp. 542, 556-59 (D. Md. 1976), HEW began administrative proceedings against Maryland's state university system seeking to bar the system's receipt of \$65 million. The court held that HEW must make its charges of discrimination specific to a program within an institution rather than to a school or the state system of higher education generally. Furthermore, HEW must make specific charges prior to initiating enforcement proceedings. To do otherwise, the court reasoned, would compel a preparation of a defense for each program irrespective of an allegation of discrimination relating to the program.

128. 414 F.2d at 1079. This is the language HEW relies upon in its interpretation of the case. 40 Fed. Reg. 24,128 (1975).

129. 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

130. *Id.* at 600-03.

131. *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

132. See note 125 *supra*.

133. *Wahba v. New York Univ.*, 492 F.2d 96, 100 (2d Cir. 1974); *Green v. Connally*,

C. *The Religious Exemption Clause*

The free establishment of religion clause in the first amendment is a third constitutional guarantee that serves to inhibit civil interference with the function and operation of private colleges and universities.¹³⁴ Educators associated with some private colleges have suggested that the abortion, pregnancy, dress, and morality codes prohibited by Title IX are associated with the religious nature of their institutions and should therefore be free from regulation.¹³⁵ Although Title IX provides an exemption where its standards "would not be consistent with the religious tenets of such organizations,"¹³⁶ the regulations require that to obtain an exemption a statement must be sent to HEW "identifying the provisions of [Title IX] which conflict with a specific tenet of the religious organization."¹³⁷ Schools complain that through this section "a government agency reserves the right to judge the content and application of a religious tenet, and presumably to deny an institution's assertion that its religious belief compels a certain action or teaching."¹³⁸

330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971); *McLeod v. College of Artesia*, 312 F. Supp. 498, 502 (D.N.M. 1970); *Green v. Kennedy*, 309 F. Supp. 1127, 1136-37 (D.D.C. 1970), *appeal dismissed sub nom. Coit v. Green*, 400 U.S. 986 (1971).

134. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Thomas Jefferson saw the amendment as making explicit "a wall of separation between church and state." L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 119 (1953). See also W. GELLHORN & R. GREENAWALT, *supra* note 23, at 131-66; Note, *Private Colleges, State Aid, and the Establishment Clause*, 1975 DUKE L.J. 976.

135. *Hearings on Sex Discrimination Regulations*, *supra* note 4, at 250, 255 (statement of American Association of Presidents of Independent Colleges and Universities). The Missouri Baptist Convention was motivated to pass a motion prohibiting the four Missouri Baptist colleges from participating in any program of public aid that requires nondiscriminatory acceptance of students, hiring of faculty regardless of their religious affiliation, or the isolation of religion from the rest of the college program. Adams, *Baptist Group to Challenge Tuition Action*, St. Louis Post-Dispatch, Oct. 21, 1976, at 21, col. 1.

Title IX has also been disruptive in a number of other contexts relating to traditional sex roles. The most notorious case dealt with HEW prohibition of father-son school banquets. President Ford personally reversed the regulation, N.Y. Times, July 7, 1976, at 15, col. 8, and Congress subsequently enacted an express exception to Title IX permitting such events. Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2234 (amending 20 U.S.C. § 1681(a) (8) (Supp. II 1972).

136. 20 U.S.C. § 1681(a) (3) (Supp. II 1972).

137. 45 C.F.R. § 86.12(b) (1975). It has been feared this "grants to the Director the right to decide whether the religious levels of a faith justify any exception to the regulations, and there is no guarantee that the university's decision will meet the Director's criteria." *Hearings on Sex Discrimination Regulations*, *supra* note 4, at 255.

138. *Hearings on Sex Discrimination Regulations*, *supra* note 4, at 231.

It is doubtful, however, that the Title IX exemption could be permissibly fashioned in a more liberal form. Shortly before the Title IX exemption was adopted, Congress attempted to broaden the religious activities exemption in Title VII to keep religious institutions from being required to accept atheist instructors. The exemption was expanded to employment practices connected with any aspect of the religious institution's activities irrespective of a particular activity's connection with religion.¹³⁹ In *King's Garden v. FCC*,¹⁴⁰ this change was held to be overly broad since it favored religious groups over secular groups and thereby violated both the establishment clause and the equal protection guarantee.¹⁴¹ The earlier exemption had been limited to employment actually connected with the group's religious activities¹⁴² and as a result had been sustained by the courts.¹⁴³ The Title IX exemption, however, will probably be found permissible. While the scope of religious "tenets" is broader than "activities," the fact that Title IX uses bona fide religious justifications for its exemption should preclude any finding that it is overly expansive.

The Title IX exemption also raises the issue of excessive government entanglement with religion. In cases dealing with government involvement in the financing of sectarian colleges, the Supreme Court has held that governmental associations with religious colleges are permissible only if such ties serve a secular purpose, have a primary effect distinct from the advancement of religion and do not excessively

139. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 3, 86 Stat. 103 (amending 42 U.S.C. § 2000(e)-1 (1970)). See 118 CONG. REC. 1977-93 (1972); BUREAU OF NATIONAL AFFAIRS, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 332-33 (1973).

140. 498 F.2d 51 (D.C. Cir.) *cert. denied*, 419 U.S. 996 (1974).

141. *Id.* at 57. Defendant was an Evangelical Christian organization operating a radio station. In order to obtain even a non-religious job with the station, applicants were required to affirm that they were Christian. An applicant alleged discrimination and the FCC ordered the station to institute non-discriminatory hiring practices. The court concluded that to apply Title VII differently among business competitors on the basis of religion constituted a violation of the equal protection clause. *Id.* Cases construing similar state statutes have arrived at a seemingly contrary result by applying such exemptions broadly. See, e.g., *Fair Employment Practices Comm'n v. Tenerovitz*, 25 111. App. 3d 471, 323 N.E.2d 353 (1975) (religious hospital exempt irrespective of the non-religious nature of its activity); *Cowen v. Lily Dale Assembly*, 44 App. Div. 2d 772, 354 N.Y.S.2d 269 (Sup. Ct. 1974) (religious society exempt even in respect to the rental of recreational facilities to the public).

142. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 702 (July 2, 1964): "This title shall not apply to . . . a religious corporation, association or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . society of its religious activities."

143. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

entangle the government in sectarian affairs.¹⁴⁴ *Roemer v. Board of Public Works*¹⁴⁵ involved a state administrative agency that was authorized to determine which portions of a college's program were secular and which were sectarian. The standard established in *Roemer* requires that "the secular and sectarian activities of the colleges [be] easily separated."¹⁴⁶ As applied in that case, the content of most classes and activities such as athletic events were presumed to be secular so that the administrative officials were not required to monitor particular classes or programs for religious content.¹⁴⁷ Further, in *Kings Garden* the court held that the religious exemption should extend principally to "those who will advocate, defend or explain the group's beliefs or way of life, either to its own members or to the world at large."¹⁴⁸ It therefore appears that HEW would have to honor a request for an exemption unless the secular and sectarian aspects of the activity clearly could be separated.¹⁴⁹

While many private colleges and universities may not be satisfied even with this amount of leeway, the application to the Title IX exemption still provides substantial protection for religious institutions. Universities are restricted in the degree to which they may be sectarian without qualification and still accept public funds,¹⁵⁰ but that proscription is based upon the constitutional mandate of separation of

144. *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

145. 426 U.S. 736 (1976).

146. *Id.* at 764

147. *Id.* at 762. *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971), noted that colleges, compared to secondary schools, are characteristically more secular since college students are less susceptible to religious indoctrination, therefore minimizing the problem of government encouragement of, and entanglement with, religion.

148. 498 F.2d at 56.

149. In *EEOC v. Pacific Press Publishing Ass'n*, 10 E.P.D. 10,289 (N.D. Cal. 1975), *rev'd in part*, 535 F.2d 1182 (9th Cir. 1976), the court construed the exemption in a fashion similar to *Kings Garden* to exempt a religious publishing firm from Title VII only in regard to discrimination with respect to actual membership in the church. In *Pacific Press* the central authority of the church had passed a resolution specifically condemning member employees as "at variance with the church" because they had filed sex discrimination complaints with the EEOC. To determine the validity of the religious grounds for exemption, EEOC and the court ignored the resolution and relied instead upon the official church manual and a general assertion that no "doctrine, tenet or teaching" was inconsistent with equal employment for women. The court did hold that the church need not assign the employees editorial duties. *See also* *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho), *aff'd*, 520 F.2d 894 (9th Cir. 1975) (the court held that Title VII did not apply to religious discrimination in any context, without any reference to 42 U.S.C. § 2000e-2(a) (1) (1970)).

150. W. GELLHORN & R. GREENAWALT, *supra* note 23, at 13-15.

church and state and not from Title IX.¹⁵¹

CONCLUSION

Courts have reached varying results in numerous discrimination cases presenting similar facts.¹⁵² An attempt to draw a consistent theory from a particular line of lower court cases necessarily requires qualification and exception. The cases analyzed in this Note, however, indicate some general principles that may be useful in reconciling the interests mandated by Title IX with the preservation of academic freedom.

One general proposition is that colleges and universities, particularly private universities, should be allowed discretion in setting their own terms of professional employment. Arguably, the unwillingness of the *Pace College* court to interfere in tenure decisions absent a showing of specific discrimination coupled with a broad reading of the speech-conduct dichotomy of *McCrary* to include hiring decisions as part of protected speech supports such a proposition. The *Cramer* court held that government-imposed faculty selection criteria must be related to professional qualifications. A second general proposition is that courts should look beyond the literal terms of Title IX and instead examine the effect of terminating federal assistance on a university.

In applying these general propositions to the Title IX regulations, an agency finding of discrimination could not rest merely upon a statistically verified hardship to women. An actual showing of subjective bias would have to be established.¹⁵³ Furthermore, any remedy imposed would have to be limited to a specific administrative unit within the university. Finally, regulations could not be applied to the morality and

151. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

152. *Compare* *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), with *Flanagan v. President of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976). *Compare* *Stewart v. New York Univ.*, 44 U.S.L.W. 2481 (S.D.N.Y. March 16, 1976), with *Cramer v. Virginia Commonwealth Univ.*, 415 F. Supp. 673 (E.D. Va. 1976) (reverse discrimination). *Compare* *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), with *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970) (Title VI fund terminations). *Compare* *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975), with *Cohen v. Illinois Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975) (state action element of § 1985). *Compare* *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971), with *Belk v. Chancellor of Washington Univ.*, 336 F. Supp. 45 (E.D. Mo. 1970) (state charter of university constitutes state action). *Compare* *Cannon v. University of Chicago*, 406 F. Supp. 1257 (N.D. Ill. 1976), with *Brenden v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973) (Title IX provides a remedy in a suit by an individual).

153. *Washington v. Davis*, 426 U.S. 229 (1976); *Green v. Connally*, 330 F. Supp. 1150, 1166 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

conduct of faculty members whose "secular and sectarian activities . . . are easily separated"¹⁵⁴ or who "advocate, defend or explain" religious or moral beliefs.¹⁵⁵

The implementation of Title IX regulations will deprive private colleges and universities of some degree of diversity and flexibility. But constitutional recognition of the value of diversity and autonomy has not been totally discarded. In *McCrary* four justices specifically expressed the view that the legislation in question should not be extended to private schools.¹⁵⁶ In a case where the activity challenged is less offensive than that in *McCrary*, a majority of the Court might restrict congressional intrusion into private education. Perhaps at that point the existence of a constitutional basis for the protection of diversity in private education will be specifically established.

154. 426 U.S. at 764.

155. 498 F.2d at 56.

156. 427 U.S. at 192 (White & Rehnquist, JJ., dissenting); *id.* at 186 (Powell, J., separate opinion); *id.* at 189 (Stevens, J., separate opinion).

