View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Valparaiso University

ValpoScholar Valparaiso University Law Review

Volume 9
Number 3 *Symposium on Law and the Private School* pp.539-559

Symposium on Law and the Private School

Constitutional and Statutory Regulation of Private Colleges and Universities

Philip J. Faccenda

Kathleen Ross

Follow this and additional works at: https://scholar.valpo.edu/vulr

 Part of the Law Commons

Recommended Citation

Philip J. Faccenda and Kathleen Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 Val. U. L. Rev. 539 (1975).
Available at: https://scholar.valpo.edu/vulr/vol9/iss3/4

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Valparaiso University

CONSTITUTIONAL AND STATUTORY REGULATION OF PRIVATE COLLEGES AND UNIVERSITIES

DR. PHILIP J. FACCENDA*
KATHLEEN ROSS**

INTRODUCTION

In March of 1974 the President of the National Association of College and University Attorneys, Dr. Norman L. Epstein, said:

> That the Academy has become litigious is by now a circumstance too pronounced to be disputed. Those administrators who are not aware of the increased litigation by direct involvement in it, are aware of its incidence through any of the several publications which daily come over their desks.[1]

Institutions of higher education both public and private, whose contacts with the courts were for all practical purposes limited to their business relationships with those outside the university, have in recent years seen a dramatic increase in judicial and administrative review of their internal policies. Most of this increased scrutiny can be ascribed to the federal government's desire to protect the constitutional rights of the individuals within, whether student, faculty or employee. The federal government has enforced this policy by way of federal court decisions which protect the constitutional rights of the individual and mandate action by the college or university, as well as with decisions by executive and administrative federal agencies empowered by Congress to enforce statutes either directly or by the withholding of federal subsidy.

Our purpose in this article is to consider the main thrust of these recent developments for the benefit of the administrators

---

*B.S.M.E., University of Notre Dame, 1951; J.D., Loyola University, 1957. Dr. Faccenda came to Notre Dame in 1967 as Special Assistant to the President; in 1970, he assumed his present position as General Counsel to the University.

**Third-year student, University of Notre Dame Law School; Research Assistant.

1. Address by Norman L. Epstein, Vice Chancellor and General Counsel of the California State University & Colleges, at the National Conference of the American Association for Higher Education, March 12, 1974.

Produced by The Berkeley Electronic Press, 1975

of private institutions, setting forth the exceptions presently applicable to private institutions and not enjoyed by public institutions. The authors will attempt to substantiate their conviction that private institutions would be well advised to comply voluntarily with laws which admittedly only apply to the public institutions, because to do so will allow an orderly transition and prevent the risk of stricter enforcement which always attends an unfavorable judicial determination.

The authors have used footnotes extensively to enable lay readers to master the essential ideas from the text, with the sources listed to assist college and university counsel to research on their own the basic sources of our conclusions.

CONSTITUTIONAL REGULATION OF PRIVATE COLLEGES AND UNIVERSITIES JURISDICTION

The overwhelming majority of the decisions involving constitutional rights have involved public institutions because, as agencies of a state, their actions are normally "actions of the state" and subject to the protection of the fourteenth amendment.[2]

It should be noted that the word "decision" is used with precision since we do not know how many actions have been brought in federal court against private institutions and found wanting for jurisdiction, because such cases are not generally reported. The critical issue in litigation brought by individuals against private schools is jurisdiction.[3]

Traditionally, suits against private educational institutions have been contract, tort or property actions. An individual alleging that a private educational institution has deprived him of his constitutional rights must show that the institution acted on behalf of the state—as an arm of the state, which if proven, subjects the private school to the jurisdiction of federal court. As a result, in nearly every suit against a private school, the plaintiff

2. U.S. CONST. amend. XIV, § 1. This amendment provides:
[N]or shall any State 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.

3. Jurisdiction can be defined as the authority by which courts and judicial officers take cognizance of, and decide cases. *See generally* Mobil Oil Corp. v. Kelley, 493 F.2d 784 (5th Cir. 1974); Stone & Adler, Inc. v. Cooper, 20 Ill. App. 3d 576, 315 N.E.2d 56 (1974); Kaelin v. University of Pittsburgh, 421 Pa. 220, 218 A.2d 798 (1966).

alleges that the actions of the institution were those of the state.[4] If state action is not shown, a private school can be sued only as an individual citizen and the reservoir of constitutional protections and procedural tools available when the private school is sued as an agent of the state are not available to the plaintiff.[5]

Historically, the courts have been reluctant to interfere in controversies arising between individuals and institutions of higher education and therefore have rarely made a finding of state action.[6] This policy was established in 1934, when the United States

---

4. *See* Hendrickson, *State Action and Private Higher Education*, 2 J. LAW & EDUC. 53 (1973), wherein it is stated:

> The Fourteenth Amendment to the Constitution specifies that the states cannot deny certain rights guaranteed under the due process and equal protection clauses. A corporation as well as a private citizen generally does not come under the ambit of Fourteenth Amendment responsibilities. However, state action, a concept derived from that Amendment, deals with a connection between the state and the private individual which so insinuates the state into the affairs of the private sector that it is made into an agency of the state subject to the Fourteenth Amendment.

5. Once the private school's actions have been determined to be state actions, constitutional challenges against the institution can be maintained. Most such allegations are brought under the fourteenth amendment and claim a denial of the rights to due process or equal protection. First, however, the plaintiff must satisfy the court that the denial has resulted from action of a governmental or quasi-governmental body. Public school actions are certainly state action within the fourteenth amendment of the United States Constitution.

The acts of a private educational institution *may* be state actions if a certain degree of governmental involvement is shown:

> That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. Newton, 382 U.S. 296, 299 (1966).

6. For an instance in which a court did find "state action" on the part of a private college, *see* Buckton v. National Collegiate Athletic Assoc., 366 F. Supp. 1152 (D. Mass. 1973). *Buckton* involved a suit brought by private university ice hockey players seeking to enjoin the university and the NCAA from declaring them ineligible for intercollegiate sports due to their former participation on Canadian major junior A hockey teams. Plaintiffs alleged, *inter alia*, a deprivation of their constitutional rights under the fourteenth amendment. The federal district court concluded that state action did exist on the part of the private university and hence recognized plaintiffs' fourteenth amendment claim. The court reasoned that the university,

> [t]hough a private institution, clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students. It may be constrained, therefore, by the requirements of the constitution.

Supreme Court in *Hamilton v. Regents of the University of California*[7] declared that school administrators possess inherent authority to establish standards for the internal organization and governance of their institutions. So long as courts are hesitant to assume jurisdiction over private institutions, they will be saved an enormous amount of potential litigation; once the jurisdictional barrier is broken, however, and precedent established for assertion of federal jurisdiction, private institutions can look forward to increased litigation, but without the protective shield of sovereign immunity which state colleges and universities enjoy.[8]

Jurisdictional Requirements

As has already been indicated, proof of state action by a private school is essential if the suit is to be brought in federal

366 F. Supp. at 1156. The court also stressed the fact that the university had received funding from both the state and federal governments. "State support to these defendants, through any arrangement, management, funds, or property would inject state action into their conduct." 366 F. Supp. at 1156. This decision is clearly contrary to the majority of cases however. Most courts have held that a mere showing of receipt of government aid does not *ipso facto* indicate the existence of state action. Thus, the District Court for the Southern District of New York has recently held that the "[R]eceipt of money from the state is not without a good deal more, enough to make the recipient an agent or instrumentality of government." Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 547 (S.D.N.Y. 1968). *See also* Blackmun v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Counts v. Voorhees College, 439 F.2d 723 (4th Cir. 1971); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 294 F. Supp. 1269 (W.D.N.Y. 1968), *modified*, 407 F.2d 73 (2d Cir. 1968).

For other recent cases which have refused to recognize state action on the part of a private university, *see* Robinson v. Davis, 447 F.2d 753 (4th Cir. 1970); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

7. 293 U.S. 245 (1934).

8. The eleventh amendment to the United States Constitution protects any state from suit by a private citizen in the federal courts. The amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

U.S. CONST. amend. XI. *Ex parte* Young, 209 U.S. 123 (1908), surmounted this eleventh amendment barrier for injunctive relief by use of the fiction that when a state official acts unconstitutionally, he is stripped of his official capacity. But this fiction has not been extended to suits against state officials where money damages or restitutions have been sought. Edelman v. Jordan, 415 U.S. 651 (1974). In that case, the Court held that the eleventh amendment barred retroactive welfare payments.

court.[9] Once state action has been established, the federal courts enter the dispute when a violation of federal constitutional rights has been shown.[10] Yet, when seeking to find state action in disputes between individuals and institutions, the courts remain cautious.

Recently an individual argued that a private university, because of federal funds and public interest in education, was bound because of these state actions to afford its employees their rights guaranteed by the federal and state constitutions. The court rejected this line of reasoning:

> The plaintiff suggests that there is a recent trend in the law binding private institutions to constitutional standards previously applied only to state institutions. It is doubted that there is a recent trend in the law as the plaintiff suggests. There are a number of recent cases holding unequivocally that private institutions are not bound by constitutional standards for the protection of private persons and institutions unless there are strong indications of state control.[11]

State Action

The jurisdictional barrier prohibits, or at least makes it very difficult, for a plaintiff to bring suit against a private school in a federal court. The strength of that barrier lies primarily in the vagueness of exactly what will be considered state action. A

9. The first instance when state action was suggested (albeit unsuccessfully) on the part of a private educational institution was Guillory v. Administrators of Tulane University, 212 F. Supp. 674 (E.D. La. 1962). Several black students who were fully qualified but denied admission to Tulane University, asked for injunctive relief on the theory that they could not be constitutionally excluded from Tulane solely on the basis of race. The Court held that the fourteenth amendment limits its application to states and the courts have no right to interfere when private individuals choose to discriminate.

> Indubitably the Tulane Board is free to act as it wishes since neither this nor any other court may exercise its power to enforce racial restrictions in private covenants.

212 F. Supp. at 687. Earlier cases emphasized the contractual relationship between individuals and a private university as a basis for jurisdiction.

10. The fourteenth amendment expressly proscribes state action only. Likewise, the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1974), which proscribes deprivation of any federal constitutional or statutory right, is concerned only with state action.

11. *Culver v. Hamline*, 2d Judicial District, Minn., Nov. 19, 1974.

Produced by The Berkeley Electronic Press, 1975

precise definition of state action has never been formulated."[12] Moreover, the courts have declined to develop a definition:

> [T]o fashion and apply a precise formula for recognition of state responsibility . . . is an impossible task which this Court has never attempted. . . . [O]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.[13]

The courts will evaluate, individually, the actions of a private institution to determine whether state action is present. The only guidance a plaintiff contemplating suit against a private institution can find in determining whether the private institution's actions will be considered state actions is an examination of precedent for similar fact situations.

Generally, the actions of a private institution are held to be state actions when the private institution is an integral part of the public purpose or when the state has such an active role in the private institution that the state is deemed to have "so insinuated itself into a position of interdependence"[14] with the private institution that it must be recognized as a joint participant in the challenged activity.

Plaintiffs have suggested diverse theories for proving state action by private schools: state funding,[15] state control,[16] and the

12. *See* Brownley v. Gettysburg College, 338 F. Supp. 725, 726 (M.D. Pa. 1972).

13. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

14. *See generally id.;* Browns v. Mitchell, 409 F.2d 593, 595 (10th Cir. 1969); Penny v. Kalamazoo Christian High School Association, 48 Mich. App. 614, 210 N.W.2d 893, 895 (1973).

15. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) (state funding found not to constitute state action); Powe v. Miles, 294 F. Supp. 1269 (W.D.N.Y. 1968), *modified*, 407 F.2d 73 (2d Cir. 1968) (state funding found not to constitute state action); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968) (state funding found not to constitute state action). But, state funding has on occasion been found to constitute state action in cases not involving private schools. *See, e.g.*, Sams v. Ohio Valley General Hosp. Ass'n., 413 F.2d 826 (4th Cir. 1969) (hospital); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964) (hospital).

16. *See, e.g.*, Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Sigerson v. Sarah Lawrence College, — F. Supp. —, (S.D.N.Y. Sept. 1973).

granting of tax exempt status[17] by the government. It is not evident in the decisions what degree and type of governmental participation would prompt a finding of state action. But an examination of the cases clearly shows that state or federal funds flowing to a private institution without other direct involvement does not create government action.[18] *Grossner v. Trustees of Columbia University* indicates that "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government."[19] *Broderick v. Catholic University of America* suggests that:

> Although money and tax considerations are given to defendant, this is a far cry from any influence on policy or decision making or the encouragement of any specific policy.[20]

To date, no court has found sufficient influence as suggested by *Broderick* or the "good deal more" required in *Grossner* in addition to state funding, that would support a conclusion that the private institution was indeed involved in state action.

Similarly, exemption from taxation does not transform a private university into a state institution.[21] Nor does action by a private entity become state action merely because the private entity receives some benefit or service from the state or is subject to regulation.[22] Even state regulation such as sanitary regulations and controlling the certification of teachers, when considered in conjunction with tax exempt status, is not sufficient entanglement with the government to constitute state action.[23] Rather it is considered as "[t]he State . . . merely exercising a legitimate interest in the education of children."[24] Likewise, the state's grant of property to assist the construction of an educa-

17. *See, e.g.*, Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971), where the court stated: "State involvement sufficient to transform a 'private' university into a 'state' university requires more than merely . . . granting . . . tax exemptions. . . ." *Id.* at 123. Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

18. Broderick v. Catholic University of America, 365 F. Supp. 147 (D.D.C. 1973). *See also* note 6 *supra.*

19. 287 F. Supp. 535, 547 (S.D.N.Y. 1968).

20. 365 F. Supp. 147, 155 (D.D.C. 1973).

21. *See* note 17 *supra* and accompanying text.

22. *See, e.g.*, Penny v. Kalamazoo Christian High School Ass'n., 48 Mich. App. 614, 210 N.W.2d 893 (1973).

23. *See, e.g.*, Family Forum v. Archdiocese of Detroit, 347 F. Supp. 1167 (E.D. Mich. 1972).

24. *Id.* at 1171.

Produced by The Berkeley Electronic Press, 1975

tional facility has not been considered sufficient state involvement to convert its action from a private one into state action.[25]

The plaintiff in *Furumoto v. Lyman*,[26] sought to prove state action by showing that the private institution, Stanford University, performs a public function—higher education, which the state would otherwise have to provide, thus making the action of the private university governmental in nature. The opinion is possibly the most tolerant view to date of governmental participation in a private school which did not result in a finding of state action:

> A finding of general state action here would require more than an accumulation of the state benefits or regulations cited by plaintiffs. These factors do not establish state control or the inherently governmental nature of the University. Plaintiffs have not demonstrated that Stanford is controlled by the state of California or that Stanford does not have a substantial sphere of private, independent authority and initiative. The State's grant to Stanford of corporate powers and privileges is not evidence of State control. The State has thus merely given Stanford substantially the same corporate powers and privileges given to any corporation formed under its laws.[27]

Cracks In the Jurisdictional Barrier

Two cases decided in late 1973 found state action on the part of private universities in suits brought by collegiate athletes seeking redress for alleged violations of their constitutional rights.[28] The first case to find state action on the part of a private university, *Buckton v. National Collegiate Athletic Association*,[29] involved the rights of two Canadian nationals to play ice hockey for Boston University following a declaration of their ineligibility by the NCAA. The court found that Boston University had become so permeated with a governmental character that its actions were indeed the actions of the state and subject to the constitutional limitations placed upon state action:

25. *See* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Blackmun v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971).

26. 362 F. Supp. 1267 (N.D. Cal. 1973).

27. *Id.* at 1278.

28. Howard University v. National Collegiate Athletic Ass'n, 367 F. Supp. 926 (D.D.C. 1973); Buckson v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973).

29. 366 F. Supp. 1152 (D. Mass. 1973).

> [Boston University], though a private institution clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students. It may be constrained, therefore, by the requirements of the Constitution . . . Moreover, state support of these defendants through any arrangement, management, funds or property, would inject state action into their conduct.[30]

The court in *Buckton* chose to overlook the *Broderick*[31] requirement of governmental influence on policy and the cumulative weight of factors suggested by *Grossner*.[32]

Less than a month later, Howard University and a foreign soccer player, who had been declared ineligible by the NCAA, sued the NCAA for denial of plaintiff-athlete's right to due process and equal protection.[33] The court found that while the NCAA is a voluntary, non-profit association, its influence and activities are national in scope and fifty percent of its membership is comprised of state-supported institutions. Because of its membership in this organization, state action was attributed to Howard University:

> Under all of these circumstances, while Howard [University] is not itself a governmental institution, its athletic affairs and related educational policies are affected by the concerted action of the many state and federal institutions that participate as NCAA members in the promulgation and enforcement of the Association's rules, regulations and procedures. This involvement by state and federal institutions is pervasive and bears directly upon the subject matter of the complaint. The actions of these institutions, in short, caused the alleged injuries. Thus, government action is clearly shown and the Court has jurisdiction.[34]

It appears that the rationale for finding state action on the part of Howard University came not so much from the University's own actions, but rather, from the University's identity with the NCAA, whose membership clearly showed involvement with the state.

---

30. *Id.* at 1156.
31. 365 F. Supp. 147 (D.D.C. 1973).
32. 287 F. Supp. 535 (S.D.N.Y. 1968).
33. Howard University v. NCAA, 367 F. Supp. 926 (D.D.C. 1973).
34. *Id.* at 929.

Produced by The Berkeley Electronic Press, 1975

Plaintiffs seeking to show state action by a private institution should use caution, relying on *Buckton* and *Howard* only when the school can be shown to be affiliated with or controlled by a body that is itself subject to governmental control and its actions therefore those of the state. This chain-link approach, although available to show state action only in a narrow set of facts, provides an alternative to the individual scrutiny of private actions which courts have previously relied upon and in which state action was unpredictable, seldom found, and never defined. Caution must also be employed in any utilization of *Buckton;* for, as has been shown, this case is contrary to well-established precedent.

STATUTORY REGULATION OF PRIVATE COLLEGES AND UNIVERSITIES

Federal Regulations

Private institutions of higher education, like many other social institutions, are becoming aware of the demands of an expanded relationship with the federal government. Most of the recent federal regulations require greater accountability for, and commitment to, social programs. While universities and colleges have always been committed to social progress, government regulations demanding accountability necessitate organization on an institution-wide basis for a result-oriented program, rather than on a departmental basis as has been the custom.

The last fifteen years have fostered vast governmental campaigns to improve the plight of the American worker.[35] Federal regulation in the areas of equal employment opportunity,[36] wage and hour control[37] and occupational safety and health[38] has caused greater involvement by the executive departments and agencies of government in the affairs of educational institutions than has been the case until recently.

Private colleges and universities come within the scope and authority of federal regulation in these areas since they are by

35. FEDERAL REGULATIONS AND THE EMPLOYMENT PRACTICES OF COLLEGES AND UNIVERSITIES (published by National Ass'n of College and University Business Officers, 1974).

36. Civil Right Act of 1964, 42 U.S.C. § 2000-e (1974).

37. Fair Labor Standards Act, 29 U.S.C. § 206 (1965).

38. The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1975).

definition "employers".[39] Some private educational institutions, particularly the larger colleges and universities because they are government contractors, are subject to even more comprehensive federal regulation. The executive branch of the federal government has shown a marked desire to use the existence of federal subsidies as a springboard for federal regulation, not only of the programs subsidized, but of all programs within the institution. Thus the government is able to regulate the racially and sexually discriminatory policies, for example, of private schools even though the area in which the race or sex issue arises may be entirely separate from the area pertaining to the contract.

Since private colleges and universities have traditionally led the way toward voluntary social reform, accomplishing the objectives of the various federal regulations presents no major difficulty. Indeed, most of the objectives have probably long been routine practices for educational institutions. Literal compliance with federal regulations does present a problem for private colleges and universities, however, because of the additional staff and facilities necessary to maintain the oppressive volume of records and control mechanisms required by the executive and administrative orders.[40]

Executive Orders

Vast areas of governmental control over private institutions come by way of executive orders. Private colleges are subject to the authority of executive orders because of the jurisdictional boundaries established within each individual order. For example, Executive Order 11246[41] with its consequent legal and prac-

39. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000-e (1974), originally applied only to private employers. In 1972, it was amended to promote equal employment opportunities by extending coverage to state and municipal employees and educational institutions. See also the Fair Labor Standard Act's definition of employer, 29 U.S.C. § 203(d) and that found in the Occupational Safety and Health Act, 29 U.S.C. § 652(5) (1975).

40. All federal regulations to date include sweeping penalties: imposition of heavy fines, sizable financial awards to aggrieved parties and suspension or cancellation of federal contracts. The practical effect of such penalties is to make compliance inevitable.

41. Executive Order 11246 (Affirmative Action) was signed by President Johnson in 1965. This order prohibited discrimination on the basis of race, color, religion or national origin in employment and required affirmative action on the part of all contractors. Amended by Executive Order 11375 in 1967 to add sex as a prohibited basis for discrimination, this regulation is enforced by HEW. Detailed guidelines for the Order have been issued by the Office of Federal Contract Compliance of the Department of Labor, 41 C.F.R. § 60 (1973).

Produced by The Berkeley Electronic Press, 1975

tical problems applies to institutions of higher education with individual federal contracts or subcontracts in excess of $10,000[42]. The enforcement jurisdiction extends to all federal contracts with institutions of higher education, regardless of their source.

This order was expanded on January 13, 1973[43] to require all educational institutions with one or more federal contracts of $50,000 or more and fifty or more employees to maintain a written affirmative action plan.[44] Even though the written plan is not required unless all the jurisdictional requirements mentioned are met, the Department of Health, Education and Welfare and the Equal Employment Opportunity Commission (EEOC) advise maintenance of such a written plan, since responding to individual and class complaints would be much more difficult without a concrete program.[45]

The Employment Standards Administration of the Department of Labor published final rules in June, 1974[46] requiring federal contractors and subcontractors to take affirmative action for the employment of the mentally and physically handicapped, including out-reach and positive recruitment. All institutions holding government contracts or subcontracts exceeding $2,500 will be subject to this ruling.[47] Additionally, contractors with agreements providing for performance in ninety days or more must establish an affirmative action program, publish it, and designate an official responsible for the program and permit Labor Department inspections.[48] Contracts with agreements of $500,000 or more must submit a *written* affirmative action program within ninety days after the contract is awarded.[49]

Title VII

Private educational institutions, being "employers," are subject to the equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964.[50] Title VII is the major federal statute designed to provide all persons an equal opportunity for

42. *Id.*
43. 41 C.F.R. § 60-2.1 (1973).
44. *Id.*
45. Hanson, *Executive Order 11246, as Amended,* FEDERAL REGULATIONS AND THE EMPLOYMENT PRACTICES OF COLLEGES AND UNIVERSITIES (1973).
46. Pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 793(a) (1975), regulations were enacted setting forth the duties of subcontractors and contractors under the Act. 20 C.F.R. § 741 (Supp. 1974).
47. *Id.*
48. *Id.*
49. *Id.*
50. 42 U.S.C. § 2000-e (1964), *as amended,* (Supp. III, 1973).

meaningful employment, regardless of race, religion, color, sex or national origin. Although educational institutions were not previously within the act, the 1972 amendment[51] included virtually all employers who employ fifteen or more full-time employees.[52]

The impact of sudden inclusion within Title VII illustrates our contention that private institutions should strive to predict those laws to which they may become subject and comply voluntarily to thereby avoid compulsion. As mentioned earlier, Title VII as enacted in 1964 specifically exempted educational institutions. The 1972 amendment revoked that exemption and suddenly the law applied to private schools in its current state of development.[53] Private schools had to immediately assume a level of development in their employment practices commensurate with the law and without the eight-year build-up enjoyed by those employers included since the Act's inception in 1964. Had private schools noted the application of Title VII to business employers and voluntarily complied, the sudden inclusion would certainly have been less traumatic and possibly not even necessary.

The application of many provisions of Title VII are speculative, since no cases involving universities or colleges have yet gone to trial on the merits. But there is no apparent reason why Title VII will be applied any differently to educational institutions than to other employers:

> [E]mployment discrimination in the college or university setting is the same as employment discrimination on the assembly line, or in the executive suite of any major corporation, and must be dealt with in the same manner. The root problems are the same ones that have

---

51. *Id.*

52. Under 42 U.S.C. § 2000e-2 (1964), *as amended,* (Supp. III, 1973), an employment practice, *inter alia,* is unlawful if it: 1) results in failure or refusal to hire any individual because of such person's religion, color, sex or national origin; 2) results in the discharge of any individual because of such person's race, color, religion, sex or national origin; 3) differentiates between individuals with respect to compensation terms, conditions, or privileges of employment because of such person's race, color, religion, sex or national origin; 4) limits, segregates, or classifies employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such person's employment status, because of such person's race, color, religion, sex or national origin.

53. Sape, *Title VII of the Civil Rights Act of 1964, as Amended,* FEDERAL REGULATIONS AND EMPLOYMENT PRACTICES OF COLLEGES AND UNIVERSITIES, at 22 (1974).

Produced by The Berkeley Electronic Press, 1975

> plagued other businesses and other employers, the conditions which have led to these problems are the same, and the solutions cannot be far different.[54]

Private schools would be well advised, then, to look to litigation involving businesses. Recruitment, compensation, maternity, health and retirement policies, as well as tenure, will likely be the areas of greatest concern to educational institutions when striving to comply with Title VII.

Revenue Procedures

The Internal Revenue Service, by issuing Revenue Procedures, can bind private institutions. At the risk of jeopardizing their tax exempt status, private instituions must comply. A recent example of such compulsion is the Proposed Revenue Procedure[55] setting forth guidelines and record keeping requirements for determining whether private schools applying for exemptions under §§ 501(a) and 501(c)(3)[56] of the Internal Revenue Code of 1954 not only have racially nondiscriminatory policies, but whether this fact is known to the general public.

The Proposed Revenue Procedure notes that the Internal Revenue Service has found the necessity for specific guidelines because:

> Service experience with private school operations has shown a need for more specific guidelines to insure a uniform approach to the determination whether a private school has a racially nondiscriminatory policy as to students.[57]

To achieve this assurance, the procedure requires that every exempt private school maintain for at least three years all ap-

---

54. *Id.*

55. 40 Fed. Reg. 6991 (1975).

56.

> (a) Exemption from taxation. An organization described in subsection (c) or (d) or section 401 (a) shall exempt from taxation under this subtitle unless such exemption is denied under section 502, 503 or 504. . . .
>
> (c) List of exempt organizations.—The following organizations are referred to in subsection (a) . . . (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals. . . .

26 U.S.C. § 501(a), (c) (1967).

57. 40 Fed. Reg. 6991, 6992 (1975).

plications for general admission, with rejections being annotated to indicate the reason for rejection; requests for all forms of financial aid and note of the amounts awarded or the reasons for rejection; all applications for employment with an annotation of the reason for rejection; all advertising; and copies of all contribution solicitations.[58] This Revenue Procedure says that the existence of a racially discriminatory policy with respect to faculty and administrative staff is evidence of a racially discriminatory policy toward students. Further, a school must be able to show that none of its facilities and programs permit or encourage racial discrimination. Failure to maintain or produce the required records and information will warrant the presumption that the institution has failed to comply with the guidelines,[59] a presumption rebuttable only by clear and convincing evidence to the contrary.[60]

Conflicting Regulations

Private colleges and universities are subject to the regulations of the Office of Civil Rights, the Department of Health, Education and Welfare, the Office of Federal Contract Compliance of the Department of Labor, the Equal Employment Opportunity Commission and the Internal Revenue Service. Each agency generates guidelines, rules and regulations. Compliance is difficult because of the complexity and duplicity of the programs developed by the various agencies, which are not always cognizant of the objectives and programs of other federal agencies. For example, those colleges and universities considered federal contractors are subject to the affirmative action requirements of Executive Order 11246, requiring, *inter alia,* recruitment of minorities and women. Yet, the supply of qualified minorities and women cannot fill the present demand. An institution, then, when attempting to offer a high enough salary to attract these groups, may well be simultaneously violating the Equal Pay Act[61] which forbids paying higher salaries to minorities than to non-minorities. Similarly, the proposed Revenue Procedure of the Internal Revenue Service could conflict directly with the recently passed Family Educational Rights and Privacy Act of 1974 (Buckley Amendment)[62] which encourages the disposal of unnecessary ma-

58. *Id.* at 6993.
59. *Id.*
60. *Id.*
61. Equal Pay Act of 1963, 29 U.S.C. § 206 (1965).
62. Educational Amendments of 1974, Pub. L. No. 93-380, § 88 Stat. 484.

Produced by The Berkeley Electronic Press, 1975

terials in student files. Indeed, the American Council of Education and other educational associates have indicated their disapproval of the Revenue Procedure guidelines, because the Internal Revenue Service is requiring duplicate records of information already required by another federal agency. It is entirely reasonable for private educational institutions to assume then, that many if not all federal rules and orders could be the subject of duplicate and diverging enforcement mechanisms from competing agencies of government.

The National Labor Relations Board

Given the incredible rate at which private educational institutions have been swept within the jurisdiction of federal executive and administrative rulings, it is not surprising that issues involving labor on private college campuses have suddenly taken on the appearance of business corporation dealings. Faculty collective bargaining, staff unionism and the National Labor Relations Board have arrived in the last five years on private college and university campuses to irreversibly alter attitudes and relationships within the private educational community.

After nineteen years of rigid abstention, the National Labor Relations Board asserted jurisdiction in 1970 over "private, nonprofit colleges and universities whose operations have a substantial effect on commerce."[63] The employers, Cornell University and Syracuse University, instituted the action by filing representation petitions seeking elections to determine the bargaining representatives of their non-academic employees. To justify the Board's assertion of jurisdiction, the petitioners argued that the operations and activities of educational institutions as a class, and of Cornell and Syracuse Universities particularly, have an overwhelming impact and effect on interstate commerce,[64] and that the operations of universities and colleges have increasingly become matters of federal interest,[65] in conjunction with the failure of the state to adequately recognize and legislate fair labor relations practices within these institutions.[66]

63. Cornell University and Association of Cornell Employers—Libraries et al. v. Syracuse University and Service Employees International Union Local 200, AFL-CIO. 183 NLRB 329 (1970). So important was the breaking of this jurisdictional barrier in the labor area, that thirteen colleges and universities submitted *amicus curiae* briefs supporting the Board's assertion of jurisdiction, while eleven colleges and universities presented briefs in opposition to NLRB assumption of jurisdiction.

64. *Id.* at 332.

65. *Id.*

66. *Id.*

In support of their contention that the impact not only of Syracuse and Cornell, but educational institutions as a class, upon interstate commerce is significant, the employer-universities presented proof of their financial status, payroll, purchases and government contracts.[67] This evidence was critical in the Board's decision:

> Petitioners introduced extensive evidence at the hearing to document their claim that educational institutions as a class have not only a substantial, but massive impact on interstate commerce. After carefully examining all the evidence submitted, we are compelled to conclude that whatever guidance the 1947 Conference Report provided to the situation which existed in 1951 when *Columbia University* was decided, the underlying considerations no longer obtain two decades later.[68]

This reversal of the NLRB's previous refusal of jurisdiction does not signify a change in the statutes of the Board but, significantly, shows a philosophical change, since the Board *could* have asserted jurisdiction in the *Columbia University* case nineteen years earlier:

> [T]he activities of Columbia University affect commerce sufficiently to satisfy the requirement of the statute and the standards established by the Board for the normal exercise of its jurisdiction. . . .[69]

The National Labor Relations Board refused jurisdiction in the *Columbia University* case because they did not believe that it

> [w]ould effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities. . . .[70]

In the intervening decades, the Board has consistently declined jurisdiction over nonprofit universities if the activity under scrutiny was noncommercial and intimately connected with the school's educational purpose.[71]

The opinion of the NLRB candidly acknowledged that, al-

---

67. *Id.*
68. *Id.*
69. Trustees of Columbia University, 97 NLRB 424, 425 (1951).
70. *Id.* at 427.
71. Cornell University *et al.* v. Syracuse University and Service Employees Int. Union Local 200 AFL-CIO, 183 NLRB 329, 332 (1970).

Produced by The Berkeley Electronic Press, 1975

though education is still the primary goal of private educational institutions, to achieve that end the private school has become a business:

> to carry out its educative functions, the university has become involved in a host of activities which are commercial in character.[72]

To buttress this shift in approach to the *Syracuse* and *Cornell* cases, the Board cited the financial status of private institutions of higher education: the operating budget of private educational facilities was $6 billion in 1969; that of the $6 billion revenue private educational institutions realized in fiscal 1966-67, more than $1.5 billion came from government appropriations; that private colleges and universities realized a commercial profit of $70,678,000 from furnishing housing and food services in one year;[73] and that this "[i]ncome is derived not only from the traditional sources such as tuition and gifts, but from the purely commercial avenues of securities investments and real estate holdings."[74] Pivotal in the Board's decision to assert jurisdiction was its recognition of increased federal financial participation in private educational institutions: "Another phenomenon clearly distinguishing the current situation from the one which existed in 1951 is the expanded role of the Federal Government in higher education."[75]

Although the Board declined to develop a jurisdictional standard for subsequent cases when it decided *Syracuse* and *Cornell,* it asserted jurisdiction over private educational institutions because of the apparent need for such services in campus labor disputes:

> The evidence clearly established that universities are enlarging both their facilities and their economic activities to meet the needs of mounting numbers of students. Greatly increased expenditures by the Federal Government also testify to an expanding national interest in higher education. . . . With or without Federal regulation, union organization is already a *fait accompli* at many universities. As advancing waves of organization swell among both nonprofessional and academic employ-

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

ees, it is unreasonable to assume that such disputes will not continue to occur in the future.[76]

The consequences of *Cornell* and *Syracuse* are obviously far-reaching. The assertion of jurisdiction by the NLRB is determined on a case-by-case dollar-volume standard, which should lend itself to a degree of predictability. Surely the large universities will be within the jurisdiction of the Board; small institutions will not unless, of course, like Syracuse University, they are the largest employer in the city where they are located.

Perhaps the greatest effect of *Syracuse* and *Cornell* is tangential. While struggling to bring their institutions within the jurisdiction of the NLRB, these universities seemingly have shown enough federal governmental involvement to strengthen the case of those individual plaintiffs seeking to establish state action as outlined above.

Collective Bargaining

Collective bargaining is yet another area where the outcome in the public and private college spheres will diverge. State employees are not allowed in most states to engage in collective bargaining,[77] while private colleges can undoubtedly expect an increase in such activity as faculties watch the gap between public and private faculty salaries widen. Awareness of this disparity stirs faculty desire to participate in the governance of the private institution. But in breaking out of their collegiate role and pursuing unionization, faculties should be aware that traditional industrial concepts may be applied to the working relationship between the faculty and private colleges to create a business relationship heretofore not experienced between educational institutions and faculty.

CONCLUSION

Legal decisions, as most other matters encountered in college and university governance, require careful balancing of competing rights and responsibilities. Yet, making the necessary legal decisions is extremely difficult because in the present state of development, college and university law is vague, unpredictable, and in many instances conflicting.

---

76. *Id.*

77. Legislation (H.B. 1298, 1975) has currently been passed by the Indiana Senate and House of Representatives which, if signed into law, will allow state employees to engage in collective bargaining.

Produced by The Berkeley Electronic Press, 1975

Presently, a private college or university cannot even know, prior to hearing, whether a federal court will assert jurisdiction under the state action concept. Since this argument is but twelve years old and the courts have insisted on making this jurisdictional judgment a case by case determination, college administrators, in viewing their alternatives, must not only gauge the outcome of their actions but also try to predict whether or not they are within federal jurisdiction. The mere possibility of suddenly being christened an arm of the state, and facing the need to immediately provide all of the constitutional guarantees to every individual with whom the college has contacts, is nearly overwhelming.

College administrators can only hope to predict their state action status by observing carefully case flow considering the issue. Still, no private college will ever know for certain whether or not it has become sufficiently entangled with the state to be its representative until a court either declines or asserts jurisdiction—an oppressive price for certainty. Thus, it would seem advantageous that the administrator of a private institution strive wherever possible to provide the same constitutional protections of the individual required by law at a public institution.

Evaluating the legal ramifications of a private college's actions is further complicated by the vagueness and conflicts within so many of the laws affecting these institutions. This is particularly true of governmental regulations which are by nature broad in scope and sweeping in effect. The applicability of most of these rules and regulations to private colleges and universities has not been tested in court. Until it is, or definitive guidelines issued, the uncertainty as to whether or not to respond and the nature of that response must be among the factors considered by private educational institutions. Again, private college administrators can guide their actions by being aware of analogous cases involving public schools and the business world, on the assumption that private colleges will not be treated any differently.

Since the consequences of many legal decisions by private colleges are unpredictable, as we have been able to show with a few examples in this nondefinitive work, administrators would be well advised to consult college counsel before significant decisions are made.[78] Moreover, counsel might suggest policy changes that

78. Epstein, *The Use and Misuse of College and University Counsel*, XIV JOURNAL OF HIGHER EDUCATION 635 (1974). In this article, Norman Epstein presents an excellent discussion of the role of college and university

would remove private colleges from the impact of certain rules. Such preventative measures may be the ideal means for private colleges to insure certainty in their legal decisions.

---

counsel. A careful reading by all college and university administrators, and implementation of the suggestions made by Dr. Epstein is urged by the authors.

Produced by The Berkeley Electronic Press, 1975