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> "They don't get federal funds."
>
> President Gerald Ford, defending his active membership in a golf club which excludes women.[1]

American government at all levels has long been generous to public and private education; indeed, federal support of education to promote national progress and individual improvement is as old as the Northwest Ordinance. Today billions of dollars in federal financial assistance flow both to educational institutions and to students, and such direct application of the tax dollar is only the most visible form of federal assistance. The tax structure itself gives significant support by encouraging private gifts to both public and nonpublic institutions and by protecting certain private institutions from taxation, thus offsetting the need for even larger amounts of direct governmental assistance.

As federal assistance to education has grown, the federal government has sought to prevent invidious discrimination in the activities benefiting from that aid, acting in its various capacities as grantor, regulator of commerce, and agent of taxation. But over time such federal efforts have become duplicative, inconsistent, and frequently ineffective, and now are regularly attacked by education constituencies, representatives of groups they ostensibly protect, state and local governments, and assorted sectors of the federal establishment itself.[2]

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[1] Press Conference February 17, 1976; *see* "He May Have to Take Up Solitaire," Washington Star-News, February 20, 1976 (A2:1).

[2] The two federal efforts to end invidious discrimination discussed principally here apply where federal funds are granted to an activity and where a federal tax burden is removed from an activity or a donor thereto. Through Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) and

We have learned from the "busing" controversy that challenges to the means of antidiscrimination efforts may encourage challenges to the ends of civil rights as well. Higher education's concerns with the mechanics of federal equal opportunity supervision now raise that danger, and the threat is heightened by tacit embarrassment at the bargain which has occasioned federal scrutiny in the first place—that is, at having opened the campus to federal oversight simply for money. This is all not a little disingenuous, as the verse suggests:

They knew what it meant
When asked out to dine
With candles and wine.
They knew what it meant.
But they went.

But the federal supervision is clumsy at best, and so the government must bear major responsibility for growing disenchantment with it.[3] If a university which accepts federal funds must accomplish the tasks delegated to it as a condition for their receipt, a major federal responsibility is then to define and enforce those tasks intelligently and intelligibly. The various antidiscrimination agencies have not done that, the Congress has permitted them not to, and in the long run the courts cannot do it for them.

If change is to come, the agencies must begin it themselves; this article is meant to illustrate tangibly how the agencies *can* improve. We hope also to demonstrate that more cogent and complementary federal action will add important symbolic legitimacy to all federal antidiscrimination efforts. Finally, our illustration refutes recent suggestions that discrimination is more tolerable in private institutions, notwithstanding their receipt of aid from the state, than in publicly operated ones. Our case study will be the tangle of federal positions regarding student financial aid which is restricted on the bases of race or sex.

I. Federal Benefits and Discriminatory Scholarships

Attempts to bar discrimination against students and staffs in federally supported education have punctuated the growth in federal aid that began with the Great Society. These efforts have a clear constitutional basis, for invidious discrimination in federally assisted programs implicates the government in actions prohibited by the fifth amendment. And they have an analo-

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other more narrowly drawn authorities, Congress has also prohibited employment discrimination by employers and unions involved in interstate commerce and by state and local government agencies, independently of any financial contracts with federal agencies. In the past 15 years over a dozen federal statutes and executive orders have been promulgated to attack discrimination based on race, color, national origin, religion, sex, age, handicap, marital status, and veteran's status; they are administered by almost as many cabinet departments, subagencies, and independent agencies. The courts, the Congress, the General Accounting Office, industry and trade groups, and representatives of persons seeking the protection of these laws all agree that this situation has produced the worst of all possible worlds—ineffective protection of those who engage in the protected activities, yet unnecessary intrusion into the activities' operations.

[3] See Brewster, *Address to the Fellows of the American Bar Foundation* (February 22, 1975), in, THE REPORT OF THE PRESIDENT, YALE UNIVERSITY 1974–75 (Yale University, New Haven, 1975) at 17–24, and the extended discussion of issues Brewster raises in O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education,* 44 CINN. L. REV. 525 (1975).

gous ethical basis from the individual citizen's perspective, for taxpayers should not be coerced into supporting such discrimination under the criminal sanction of the tax laws.[4] As scrutiny of restricted scholarships shows, however, specific federal prohibitions have historically been ambivalent and incomplete.

Title VI of the Civil Rights Act, enacted a decade after *Brown v. Board of Education of Topeka*[5] to speed southern school desegregation, broadly prohibits all discrimination, exclusion, or denial of benefits based on race, color, or national origin in activities receiving direct federal funding. Title VI capped thirty years' effort to use the leverage of federal funding in securing school districts' obedience to the Constitution, a campaign involving at various times such disparate Senators as Robert Taft and Hugo Black.[6] Eight years later, Title IX of the Education Amendments of 1972 extended substantially similar prohibitions to educational sex discrimination.

Parallel attacks on discrimination in educational activities based on their receipt of tax benefits are less comprehensive and stringent. Section 501(c)(3) of the Internal Revenue Code provides for federal tax exemptions for private education institutions; section 170 permits donors of funds to public educational institutions or tax-exempt private ones to deduct such gifts from their taxable incomes, including money to be administered by the institution as scholarships, grants, or loans to students.[7] These incentives reflect the beliefs that charitable support of education is in the national interest in and of itself; that it both enhances and reduces the need for direct federal support for education, and thus should be encouraged as a matter of federal resource allocation; and that it encourages a desirable pluralism that direct governmental support, especially direct federal support, does not.

The Internal Revenue Service nominally denies tax-exempt status to private schools and colleges that discriminate on the basis of race, and thus denies deductions to taxpayers for contributions to such schools. But especially as to scholarships, I.R.S. explicitly permits racially biased educational activities which are banned by the analogous Title VI regulations; and I.R.S. has no rules concerning sex-biased actions.

Federal policy is thus dually inconsistent toward discrimination in educa-

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[4] See Buek and Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 12-14 (1973) (hereafter, *Sex Discrimination*).

[5] 349 U.S. 294 (1954).

[6] *Sex Discrimination* at 2. Taft advocated the Title VI approach partially to promote Southern opposition to federal aid to education, knowing that such a requirement would be unacceptable to the South in the decade before *Brown*. He abandoned this position when he came to favor federal aid. *See* PATTERSON, MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT 261-3, 277, 320-6, 432-3 (1972). For then-Senator Black's earlier belief that a Title VI approach would indeed lose Southern support for federal aid, see KLUGER, SIMPLE JUSTICE 592 (1976).

[7] 26 U.S.C. 501(c)(3), 170. The arguments in the text are best summarized in the analogous context of property tax exemptions for religious organizations, in Walz v. Tax Commissioner, 397 U.S. 664, 687-92 (1970). For pungent consideration of the 501(c)(3) exemption as a matter of taxation theory, see Bittker and Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L. J. 299, 332-35 (1976). The importance of private charity to universities and of the tax structure to that charity can be seen in Fink, *Taxation and Philanthropy—A 1976 Perspective*, 3 J. C. & U. L. 1 (1975), and Steinbach, *Tax Reform and The Voluntary Support of Higher Education*, 8 U. RICH. L. REV. 245 (1974).

tion—stricter standards accompany direct payments than indirect tax assistance, and less latitude is afforded racial practices than sex-biased ones. The matrix is clear as to racially or sexually restricted financial aid. The Title VI regulation of the Department of Health, Education, and Welfare prohibits any racial separatism or different treatment, but I.R.S. rules permit a university to award racially restricted scholarships and still be tax-exempt if the "pooled" result of institutional financial aid to all students as a group is nondiscriminatory; H.E.W.'s Title IX rules apply a similar "pooling" standard for certain types of sex-biased aid, but I.R.S. has no rules pertaining to such aid. Similarly, I.R.S. permits institutions to accept donations of restricted student financial aid, and thus permits taxpayers to deduct them from taxable income, in circumstances where H.E.W. prohibits institutions from awarding such aid.

In sum, government tax policy promotes discriminatory behavior and its attendant waste of human resources, while governmental grant policy condemns those results. Both policies combine to suggest that gender-based discrimination is less odious or deleterious than that based on pigment.

The following discussion first examines H.E.W.'s policies to argue that prohibitions against restricted student financial aid in federally-supported institutions should be equally strict and comprehensive whether based on race or on sex. We then evaluate I.R.S. regulation to demonstrate that viewing colleges and institutions as recipients of charitable or indirect tax benefits does not justify weaker guarantees against discrimination than does viewing them as direct federal grantees. Correspondingly, taxpayers' protections against discriminatory use of their tax money need not and should not be reduced by sanctioning restricted donations as tax deductions.[8] We conclude by arguing that the only appropriate uniform standard, symbolically and substantively, is that adopted by H.E.W. under the race discrimination prohibitions of the Civil Rights Act. Both educationally and equitably, in public institutions and in publicly-aided private ones, the federal standard should bar all discriminatory restrictions in individual scholarship funds and in the terms of donations which support them.

II. Title VI, Title IX, and H.E.W.

H.E.W.'s regulation of restricted financial aid illuminates the need to ban race and sex discrimination with identical stringency, as shown by comparing its rules under Title VI and Title IX. As originally proposed in 1971, Title IX of the Education Amendments of 1972 would simply have extended to sex discrimination Title VI's prohibitions against race discrimination in any federally funded activity, for the results of discrimination do not differ either morally or economically between racial and sexual bias. Invidious discrimination is not simply evil but also inefficient; discrimination in programs benefiting

[8] Deficiencies in I.R.S. standards and procedures are thoroughly reviewed by the U.S. Civil Rights Commission in THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT-1974: VOLUME III, TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY, 142-94 and 363-66 (1975) (hereafter, CIVIL RIGHTS ENFORCEMENT).

from federal grants is not simply wrong but also detracts from the full return on the investment those grants represent.[9]

Nonetheless, though Congress was beginning its long-delayed passage of the Equal Rights Amendment at the same time Title IX was before it, it chose to extend statutory protection against sex-based treatment in federal financed programs only to education, and there with some exceptions. One basis for Congress's hesitancy was that Americans continue to ascribe positive values to separate education of males and females which they do not to racial separation, an attitude reflecting more general reluctance to consistently equate sex-based disparate treatment with invidious discrimination. The major statutory exemptions from Title IX—admission to private undergraduate institutions and traditionally single-sex public colleges, and to individual elementary and secondary schools—derive from this attitude, which persists in the courts as well.[10]

Yet Titles VI and IX have similar goals and share identical prohibitory language. And while Title IX permits private colleges to order admissions policies according to sex, and school districts to retain single-sex secondary schools, the statutes' major protections for students are the same. For example, the Title IX exemptions do not permit private colleges to discriminate on the basis of sex after admission in matters ranging from counseling and job placement to extracurricular activities and athletics; similarly, school systems must provide equal programs even where separate facilities are permitted. None of Title IX's statutory exemptions authorizes sex discrimination in award of financial aid.

Although Title VI and Title IX enforcement in education are both entrusted primarily to H.E.W.,[11] it has different positions regarding race and sex restrictions in scholarships. The Title VI regulation simply bans their administration outright and without exception.[12] While the draft Title IX regulation proposed a similar blanket prohibition, the operative rules permit award of sex-restricted funds established pursuant to "wills, trusts, bequests, or similar legal instruments" (or an act of a foreign government), if the awards are administered so as not to deprive any student of aid for which he or she would have been eligible "but for" the restriction.[13] This so-called "pooling" concept has two elements: the funds must derive from a process which the donor cannot change

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[9] *Sex Discrimination* at 12-15. See also discussion accompanying n. 14 *infra*.

[10] H.E.W.'s regulation implementing Title IX, 20 U.S.C. 1681, is codified as 45 C.F.R. Part 86; an explanatory "Preamble" is at 40 Fed. Reg. 24127-36 (June 4, 1975) and preliminary rules were published at 39 Fed. Reg. 22227-40 (June 20, 1974). The legislative history of Title IX and its exemptions is summarized in *Sex Discrimination* at 4-12, 15-19, and 27. For different attitudes toward the relationship of sex- and race-biased practices, contrast *Sex Discrimination* at 2-3 with Vorcheimer v. School District of Philadelphia, 532 F. 2d 880, 886 (3rd Cir. 1976), holding Philadelphia's provision of "academic" high schools only on a sexually separate but "equal" basis to be constitutional [affirmed without opinion by an equally divided Court, ___U.S.___, 97 S. Ct. 1671, 51 L. Ed. 2d 750 (1977)].

[11] The H.E.W. regulation implementing Title VI, 42 U.S.C. 2000d, is codified as 45 C.F.R. §80.

[12] 45 C.F.R. §80.3(b)(i)-(v).

[13] 45 C.F.R. §86.37(b), explained in the "Preamble" at 40 Fed. Reg. 24122, ¶¶60-62.

(e.g., because he or she is dead, or because favorable tax consequences derived from placing the gift in trust will be forfeited), and matching funds must be assured for any individual who loses an award on the basis of gender.

The regulation's "Preamble" bases this latitude on the hypothesis offered by "numerous . . . colleges and universities" commenting on the proposed rules, that a flat ban on sex-restricted aid "would cause to 'dry-up' a substantial portion of funds currently available" for student financial aid. Beyond this cryptic suggestion the "Preamble" offers neither explanation nor justification. Indeed none appears viable either educationally or as a matter of equal opportunity, as we illustrate here.

First, Title IX's legislative history does not suggest legislative support for any deviation from Title VI's broad proscription on restricted scholarships.

Second, the "Preamble" offers no empirical evidence that the risk it hypothesizes is a real one, either in and of itself or in comparison to any loss of scholarship funds ostensibly caused by the Title VI proscription.

Third, even assuming the hypothesized risk to have some factual basis, neither logic nor the legislative or regulatory histories of Title IX suggest that the risk should be tolerated more readily in discrimination involving women than in discrimination touching racial minorities. The essence of Titles VI and IX here is that discriminatory allocation of student financial assistance in federally financed program both unconstitutionally implicates the government in that discrimination and, as an investment or "quality control" measure, wastes the supporting federal dollars. The propriety of federal supervision to avoid these results is as clear in regard to sex discrimination as in regard to racial animus.

That both kinds of bias produce similar diseconomies bears especial emphasis. Titles VI and IX apply to education programs only because those programs receive federal financial assistance; those funds in turn are designed to enhance opportunities for teaching, learning, and research generally and to provide the full development of individual aptitude, intelligence, and expertise in those activities. But scholarships that limit access to such federally funded opportunities on the basis of race or sex invoke stereotyped rationales that are irrelevant to successful participation in education. In this sense Titles VI and IX may be said to intend more economically efficient allocation of donors' resources, by inducing them to eliminate scholarship criteria that artificially restrict access to education.

This analysis complements evaluation of restricted charitable bequests solely in traditional trust terms. As one commentator has recently summarized the issue:

> [T]he allowance of such a trust is a policy decision, a conscious community choice to permit perpetual dead hand control of property when the purpose of that control is of greater benefit to society than preservation of alienability for the testator's survivors .... The question then arises: Is it ever in the public good to encourage racial or religious discrimination? ... This moment of threshold inquiry is a proper occasion to decide whether "charity" contemplates, for example, a hospital open only to whites. For too long it was simply assumed that the benefits to public health that would accrue from such a trust would outweigh the damage wrought to

the excluded group. This assumption, however, is of questionable validity in light of the Supreme Court's conclusions in *Brown v. Board of Education.*[14]

In sum, if the "dry-up" risk offered by H.E.W. does have a basis in fact, it is one that tolerates constitutionally proscribed inefficiency and inequity in access to federally-supported education programs in which the scholarship funds are used. Title VI withholds acquiescence in just that result for just that reason, and it is for just that reason that H.E.W. should not grant it legitimacy under Title IX.

Fourth, the "Preamble" could embody the prediction that the *cy pres* doctrine will not be applied to permit award of sex-restricted funds on an unrestricted basis, a fear of judicial rather than eleemosynary bias. The law of charity and trust generally permits alteration of a gift bearing racial restrictions if the trust's specific racial purpose is now illegal, impossible, or impractical because intervening law condemns it, and if the donor showed a general intent to benefit an educational institution, or a class of students or teachers, which predominated over a desire to restrict the beneficiaries based on race. Interpreting Title VI to prohibit federally assisted institutions from accepting racially-restricted gifts has provided a basis for "breaking" such limitations. The Title IX speculation would be that courts would not respond similarly to Title IX as a basis for applying the *cy pres* doctrine to sex-restricted gifts; trying to "break" those limits would then result in reversion of gifts rather than their reformation.

The short answer to this guess is that Title IX should be used to induce courts to apply the *cy pres* doctrine, rather than limited on the assumption they will resist the analogy.[15] Certainly H.E.W. will not shape judicial intentions under the current regulation, which does not simply negate the legislated incentive for changing sex-biased trusts but instead provides them statutory sanctuary.

Fifth, the Title IX regulation could reflect the view that nominally irrevocable legal relationships such as trusts should not be interfered with, given the

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[14] Adams, *Racial and Religious Discrimination in Charitable Trusts: A Current Analysis of Constitutional and Trust Law Solutions*, 25 CLEV. ST. L. REV. 1, 4 (1976) (hereafter, *Solutions*).

[15] The Supreme Judicial Court of Massachusetts has recently illustrated two ways in which application of the *cy pres* doctrine may follow from changes in educational or public policy upon which a nondiscriminatory beneficial intent may be constructed. In Wesley United Methodist Church v. Harvard College, 316 N.E.2d 620 (1974), a "men only" trust for students attending Harvard College was reformed where the College had begun to admit women subsequent to the testator's death; presuming the testator had a general intent to enhance educational opportunities at a particular institution, the Court took account of the fact that those opportunities were now available there for both men and women. In Ebitz v. Pioneer National Bank, 361 N.E. 2d 225 (1977), a scholarship fund intended only for male law students was reformed through partial reliance on passage of the Commonwealth's Equal Rights Amendment subsequent to the testator's death. Read together, these cases demonstrate both that courts are not reluctant to apply the *cy pres* doctrine to eliminate sex-based restrictions in educational trusts and that they welcome statutory aid in doing so. *See also* Lockwood v. Killian, 374 A.2d 998, 375 A.2d 998 (Sup. Ct. Conn. 1977). Compare Note, *Restricted Scholarships, State Universities and the Fourteenth Amendment*, 56 VA. L. REV. 1454 (1970), with *Sex Restricted Scholarships and the Charitable Deduction*, 59 IOWA L. REV. 1000 (1974).

attendant danger of lost funds, if nondiscrimination can be achieved through less risky means such as "pooling." Any deviation from a statutory proscription based on a practical hypothesis of this type should be narrow and unavoidable, but H.E.W. adduces no evidence to support its approach other than the inchoate collegial concerns regarding the *cy pres* doctrine cited above.

Part of H.E.W.'s responsibility under Titles VI and IX is communicative, to influence potential donors. But the Title IX exemption scrambles the Department's signals. The regulation correctly bans use of any sex-restricted funds whose limits the donor retains the capacity to remove, thus properly assuming that Title IX should dissuade donors from making restricted gifts. Were H.E.W. to apply the statute consistently, it would and should require that dissuasion of all future donors, including those of testamentary and irrevocable trust gifts.

Sixth, a rationale entirely separate from that articulated in the "Preamble" may derive from H.E.W.'s acquiescing in the view suggested earlier, that sex discrimination is less offensive than racial discrimination, that the stigma attached to the latter is less prominent in the former. Indeed, the Supreme Court has been reluctant to view sex-based differences with the constitutional strict scrutiny assigned to racial ones. But the Court explicitly treats both areas with identical stringency when Congress has condemned them statutorily, as it has done through Titles VI and IX.[16] Under substantially identical statutory proscriptions, H.E.W. has articulated no rationale for different scholarship rules under Title VI and Title IX. In assuring freedom from statutorily disfavored discrimination, "courts ought not to be required to divine" a premise for such disparities.[17]

Finally, an unstated rationale may be that "pooling" is thought necessary for "affirmative action" scholarships limited to women, a rationale which would be consistent with the regulation's authorization of "affirmative action" generally in Section 86.3(b). Given the debate over the constitutionality of affirmative action programs,[18] such an intention should not be accomplished silently.

In any event, no reason appears that federal policy should try *sub silentio* to accommodate such scholarships for women but not for racial minorities, particularly since the Title IX regulation's authorization of affirmative action uses language taken from the Title VI rules. Assuming *arguendo* that restricted affirmative awards are constitutional, the relevant consideration here is identical supervision of scholarships intended for women and subject to Title IX and those intended for minorities and subject to Title VI.

Title IX is broad remedial legislation. Its legislative history narrowly circumscribes its exemptions, and those exemptions do not imply lenient treatment for sex-restricted donated financial aid. Indeed, just the opposite is true, for denial of endowed scholarship assistance to women vitiates the educational

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[16] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431, 436, (1971); Evans v. Sheraton Park Hotel Corp., 503 F.2d, 177, 185-6 (D.C. Cir. 1974); *Sex Discrimination* at 19-25.

[17] Alevy v. Downstate Medical Center, 384 N.Y.S.2d 82, 90 (Ct. App. of N. Y. 1976).

[18] See Flannagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976). For a review of judicial treatment of charitable trusts intended exclusively for minority group members, see *Solutions* at 15-19.

opportunities federal funding is designed to provide and Title IX is designed to guarantee, and does so as surely as racial restrictions do. Sex-based scholarships are no more acceptable than race-based ones; the question remaining is whether the tax structure suggests any reason for not removing governmental sanction altogether from them both.

III. Tax Exemptions and the I.R.S.

The Internal Revenue Service did not begin questioning discriminatory restrictions in tax-exempt institutions or donations to them until after enactment of Title VI, and did so then only as to school desegregation. From October 1965 until August 1967 it suspended action on 501(c)(3) applications from possibly segregated private elementary and secondary schools and thereby denied deductions to their donors. But I.R.S. then announced that a private segregated school could be granted an exemption if it did "not have such a degree of involvement" with the local desegregating school district "as has been determined by the Court to constitute state action for constitutional purposes."[19]

This position was quickly attacked in the courts on three theories: that tax benefits to segregated schools and donors thereto represent unconstitutional "state action" support of segregated education; that a so-called "white flight" school definitionally cannot receive 501(c)(3) exemption, because its purpose is constitutional evasion rather than exclusively educational as the Internal Revenue Code requires; and that exemptions represent federal financial assistance within the meaning of Title VI, and so cannot flow to segregated schools. I.R.S. and the courts then began a minuet of ambiguity that still continues.[20]

First, I.R.S. was preliminarily enjoined from approving tax exemption applications from schools in Mississippi, the test state of the judicial challenge.[21] It then removed the 501(c)(3) exemption from schools engaging in race discrimination.[22] A final decision on the merits in Mississippi then effectively upheld the new prohibition on the general ground that the Internal Revenue Code must be interpreted so as to avoid frustrating other federal policies; the court held that, "There is a declared federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination."[23] Affirmed by the Supreme Court without opinion,[24] *Green* v. *Connally* appeared to mandate a firm I.R.S. prohibition, based at least in part on Title VI considerations.

Both the courts and I.R.S. then retreated. Two years later, in a footnote in *Bob Jones University* v. *Simon*,[25] the Supreme Court suggested that its summary affirmance of *Green* should not be construed as approving I.R.S.'s

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[19] I.R.S. News Release, August 2, 1967, 1967 CCH ¶6734.

[20] See generally CIVIL RIGHTS ENFORCEMENT at 148-50.

[21] Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970), *appeals dismissed for want of jurisdiction sub nom* Coit v. Green, 400 U.S. 986 (1971).

[22] Rev. Rul. 71-447, 1971-2 CB 230.

[23] Green v. Connally 330 F.Supp. 1150, 1163 (D.D.C. 1971).

[24] Coit v. Green, 404 U.S. 997 (1971).

[25] 416 U.S. 725, 740 (n.11) (1973).

broadly prohibitory interpretation of Section 501(c)(3). The Court stated that changes in I.R.S. positions during the *Green* appeal had deprived the Court of an adversary presentation of the issue. It may also have wanted to specify that its affirmance of *Green* did not speak to whether tax exemptions were "state action" or "federal financial assistance" sufficient to invoke the fourteenth amendment or Title VI in the particular situations at issue, since the lower court had not done so.[26] In the latter and likely event, *Green* remains as precedent for the Supreme Court's view that federal policies should attack invidious discrimination in a consistent manner.

It is not clear whether I.R.S. accepts Titles VI and IX as governing law for its antidiscrimination efforts, or simply as federal grant policies from which it has discretion to deviate.[27] In any event, new I.R.S. policy soon after *Bob Jones* showed the ranks broken as to restricted scholarships:

> As a general rule, all scholarship or other comparable benefits procurable for use at any given school must be offered on a nondiscriminatory basis [for the school to retain its 501(c)(3) exemption]. . . . Financial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy will not adversely affect the school's exempt status.[28]

Current I.R.S. policies regarding restricted scholarships may be summarized as follows: Under certain circumstances universities may be tax-exempt even while administering racially-restricted scholarship programs, and thus donors may establish such programs and receive tax deductions for doing so. This permissiveness flies in the face of H.E.W.'s absolute prohibition under Title VI. I.R.S. has no analogous rules with regard to sex-restricted money; its blanket authorization is also substantially broader than H.E.W.'s "pooling" arrangement under Title IX.[29] I.R.S. has drawn strong criticism for these differences from H.E.W.'s Title VI and Title IX rules, as well as for the weakness of its enforcement efforts and its inadequate coordination with H.E.W.[30]

I.R.S. has not articulated its rationales for deviating from per se prohibitions against discriminatory student financial aid. As with possible premises for H.E.W.'s Title IX position suggested earlier, plausible reasons for I.R.S.'s latitude as to both race and sex are not easily found; much of the preceding discussion concerning H.E.W.'s rules undercuts possible I.R.S. rationales as well. (A special irony here is that while I.R.S. refrains from supervising discriminatory fellowships, it gives special advantages to recipients of grants and fellowships by not taxing that money as income—under extensive and

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[26] McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972), had interveningly held that tax exemptions for collegiate fraternities and deductions thereto pursuant to Section 501(c)(8) of the Internal Revenue Code, 26 U.S.C. 501(c)(8), constituted federal financial assistance sufficient to jurisdictionally trigger application of Title VI. Compare Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" The Internal Revenue Code*, 82 YALE L. J. 51 (1972).

[27] CIVIL RIGHTS ENFORCEMENT at 146, 363.

[28] Rev. Proc. 75-50, 1975-3 CB 587.

[29] CIVIL RIGHTS ENFORCEMENT at 154-55, 363.

[30] *Id.* at 192-94, 365-66.

complicated regulation.[31]) The following issues may be specially relevant to I.R.S. regulation.

First, I.R.S. could fear decreases in donations to private education, or curtailment of such activities and of their contribution to public life, if tax benefits are strictly denied for activities involving invidious discrimination. To the extent that private donations derive from the deduction incentive,[32] this position is a crass appraisal of the American taxpayer—that he or she would rather pay taxes than support nondiscriminatory private education. Any such supposition should be supported by data demonstrating that contributions will in fact dry up if discrimination is prohibited; but as is true for H.E.W.'s hypothesized harm under Title IX,[33] no such evidence appears. In any event, were the choice shown to be (1) avoiding public expenditures by countenancing private discriminatory substitutes, or (2) allocating public resources to provide education nondiscriminatorily, the government's proper course clearly would be the latter.

The crux of the matter, as argued variously above, is that H.E.W. and I.R.S. policy should influence the economics of charity in a complementary, nondiscriminatory manner, rather than skewing those economics by allowing discriminatory actions.

> Transposing the *Brown* findings to the charitable trust context, it is at the very least arguable that the burdens of society will not be lessened, on balance, by an otherwise eleemosynary trust which by its language and effect inflicts social and psychic harm upon a racial group and inescapably upon the entire community. Subjecting any charitable trust that bears racial restrictions to a social cost-benefit analysis is especially fitting in view of the indulgent tax exemptions and other support mechanisms available to the charitable trust that are not similarly offered to private trusts. Among the benefits bestowed, for example, are those resulting from the favored position of charitable trusts under various tax laws.[34]

Whether the regulatory scheme accomplishes an appropriate purpose depends importantly on whether it helps deliver the constitutional message that actions based on race or sex are unacceptable. This is particularly true in terms of trust economics, because any change in the trust outcome frustrates the central premise of the trust as a legal device. Specifically, the most familiar results in this area (reversion to the estate, and reformation for charitable use in part inconsistent with the testator's wishes) diverge from the protection of those intentions which the trust is designed to protect.[35] Thus where governmental advice can help donors know with certainty which of their wishes government will continue to honor, integrity demands that the advice be given.

Second, I.R.S. policy could represent deference to the traditional variety of values and intentions in American private higher education. Yet whatever such values might be, the fourteenth II and fifth amendments bar invidious

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[31] See Hopkins, *Scholarships and Fellowship Grants: Current Tax Developments and Problems*, 2 J. C. & U.L. 54 (1974).

[32] Steinbach, *supra* n. 7.

[33] See text accompanying note 13, *supra*.

[34] *Solutions* at 5.

[35] *Id.* at 9-10.

public discrimination, Congress has demanded its exclusion from education directly supported by federal funds, and the Supreme Court has made clear that Congress may require the same result even in privately funded education.[36] The federal government should speak with one voice in this area. If I.R.S. is to condone discrimination under the guise of pluralism, its action should reflect a reasoned public rejection of Congress's apparent intent to the contrary. Again as with H.E.W.'s Title IX policy, no such rationale is provided.

It must be acknowledged here that private universities lack some of their state and civic counterparts' experience with public oversight. Yet American private higher education has always been entwined with government, if only because it is intended to be a principal object of charity induced by the tax structure. That intention has been fulfilled; tax benefits may be as significant a source of income for private institutions as direct federal grants. The import of that largesse should not be obscured simply because direct federal assistance may be more visible. Moreover, gift dollars encouraged by tax policies often have the special benefit, compared to federal grant dollars, of few restrictions as to use.

The plea for greater latitude in private academia may rest partly on the mistaken perception that its supervision by the state is new—or at least that no other generation has suffered so badly from it. But neither governmental support of private colleges nor attempts at public control predicated on that support are recent phenomena. For example, Yale's former President Kingman Brewster, an articulate critic of federal supervision in higher education, would do well to consult his institutional history:

> The early [Yale] College benefited annually from small [Connecticut] Colony grants . . . But political tempers flared, and in 1763 the redoubtable [Yale President] Clap had to beat off attempts to subject the College to the [General] Assembly. Thus was set the precedent for Yale's freedom from government interference—but also the disturbing precedent of no more annual grants from Connecticut.[37]

It is easy to forget how variously and dramatically federal funding has altered higher education—to forget that the new library was built with federal money, that a classroom may be economically and racially integrated only because of federal dollars for tuition. That funding continues to benefit private institutions at least as much as state-supported ones; they should not deny the responsibilities they assume in return.

Third, I.R.S. policies could reflect a reluctance to define or extend the principle that tax benefits constitute "state action" or "federal financial assistance" sufficient to invoke the Fourteenth Amendment or Titles VI or IX as a matter of law. Yet as the *Green v. Connally* court recognized, as a matter of policy I.R.S. should not deviate from the Congressional intent Titles VI and IX express.[38] While our view is that the tax benefits at issue here are sufficient

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[36] See Runyon v. McCrary, 427 U.S. 160 (1976), holding that the "right to contract" section of the Reconstruction Acts, 42 U.S.C. 1981, applies to admissions to private schools.

[37] PIERSON, YALE: A SHORT HISTORY 19 (1976); *See also* Brewster, *supra* n. 3, and sources cited at n. 7.

[38] See text accompanying note 23, *supra.*

to invoke Titles VI and IX as legal mandates, there is a less technical and more principled question—why should an executive agency of the federal government sanction activities which the legislative branch has branded as national evils?[39]

Last, the I.R.S. requirement of "nonderogated racial nondiscrimination"; may be designed to accommodate "affirmative action" scholarships. It is not apparent why federal tax policy should treat such scholarships differently from federal grant policy, just as it is not apparent why policy in both areas should make such scholarships easier to justify for women than for minorities, as discussed earlier.[40]

In this section we have sought to demonstrate that, absent either data concerning diminished donations or logical explanation directly related to the purposes of tax incentives, there is no reason to benefit private discriminatory actions through the tax structure anymore than Congress permits them in educational activities receiving direct federal support. Given the similar illogic of permitting sex discrimination where race discrimination is barred, the sole remaining question is whether either kind of discrimination should be sanctioned, in either context.

IV. Conclusion.

A favorite nineteen-sixties' slogan was that we cannot "legislate morality." Indeed we can—that is, we can define moral conduct and provide powerful government incentives to engage in it. But success in that effort demands that governmental involvement be both cogent and limited. Those conditions do not obtain in the federal government's attempts to end invidious discrimination in higher education. And those who want that federal control to legislate that morality are thus, in Senator Ervin's phrase, "nekkid to their enemies"—and increasingly vulnerable to their own unease at the nature of the federal campus presence.

These circumstances obscure what should be fundamental legal responsibilities. If the government does not effectively assure that its funds are used nondiscriminatorily, does not clearly communicate that such use is integral to its grant in the first place, it is futile to expect those who receive federal money to respect that purpose. Indeed, having staked out a moral position, the government stands to have silence about discrimination interpreted as its consent—to have affirmative governmental support inferred where there is not affirmative governmental opposition.

It is thus in a symbolic context, as well as a constitutional one, that we offer our conclusions concerning restricted scholarships. Wholly apart from what may be constitutionally permissible, all federal antidiscrimination efforts suffer when any one of them is ambiguous, vacillating, or internally inconsistent. The preceding pages have not shown simply that scholarship policy instead can be clear, emphatic, and consistent. The length of argument necessary to derive

[39] See *Constitutionality of Federal Tax Benefits to Private Segregated Schools*, 11 W.F.L. REV. 289 (1975).

[40] See text accompanying note 18, *supra*.

that result from the conflicting federal positions also suggests how little respect is engendered by a system that tolerates those conflicts.

We concluded in Section II that there is no justification for the government's sanctioning sex discrimination in scholarships while it prohibits race discrimination; and in Section III that there is no justification for sanctioning scholarship discrimination through tax policies while prohibiting it in award of federal funds to universities directly, or for differentiating in prohibitions applicable in private and public institutions. The remaining question is what policy should be chosen to uniformly address both race and sex restrictions in scholarships, through both grant and tax policies.

As should be evident, we believe the only justifiable policy to be that currently invoked by H.E.W. with regard to race discrimination under Title VI: absolute nondiscrimination; no exclusionary scholarships; no "pooling" or "nonderogating" formulae to *offset* restricted money, but rather the *absence* of such money. Discrimination contravenes the purposes both of federal aid to higher education and of public incentives for private charity. Education is intended to enhance personal lives and the public life; discrimination disgraces them. Educational philanthropy is intended to enhance an appreciation of life; discrimination denigrates it.

Appropriately, the symbolic and practical benefits of this choice are closely related. Restricted donations for which alteration via the *cy pres* doctrine must be sought, or H.E.W. or I.R.S. opinions required, carry the hidden costs of undertaking those procedures. Ending those costs requires ending the restrictions, and that is best encouraged by a policy that condemns them clearly.

Public respect for governmental goals dissipates when they are sought timidly. If federal financial benefits are to be used as leverage in securing constitutional nondiscrimination, that use must be explicit and complete. It must secure each student's constitutional "personal interest"[41] in a nondiscriminatory education.

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[41] *Brown* v. *Board of Education (II)*, 349 U.S. 294, 300 (1955).