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FEDERAL ANTIBIAS LEGISLATION AND ACADEMIC FREEDOM: SOME PROBLEMS WITH ENFORCEMENT PROCEDURES

by
Howard O. Hunter*

I. INTRODUCTION

Since World War II, changes and developments in various policies of the American government have given rise to a vast array of complex regulations applicable to institutions of higher learning that receive federal financial support.¹ Before World War II the federal government was not wholly divorced from matters of higher education, but financial support came principally from state or local governments and from private sources.² The shift to a more active federal role has profoundly affected the nation's private colleges and universities.³ While state schools have always had a close relationship with their supporting governments, the increased federal role has seriously endangered the institutional autonomy of private universities. As one scholar has noted, "The American university has traverse[d], in recent decades, a considerable part of the road from an autonomous financially independent model to an essentially publicly supported, interdependent institution."⁴

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¹ See, e.g., 45 C.F.R. §§ 80.1-99.67 (1977).

² The history of federal support to higher education and of its interrelationship with private and local government support is documented in a number of sources. See, e.g., A. DUPREE, *SCIENCE IN THE FEDERAL GOVERNMENT: A HISTORY OF POLICIES AND ACTIVITIES TO 1940* (1957); H. ORLANS, *THE EFFECTS OF FEDERAL PROGRAMS ON HIGHER EDUCATION* (1962); B. SMITH & J. KARLESKY, *THE UNIVERSITIES IN THE NATION'S RESEARCH EFFORT* (1977); *THE FEDERAL GOVERNMENT AND HIGHER EDUCATION* (D. Knight ed. 1960). The scope of current federal involvement is made particularly clear by reference to the list of programs to which antibias regulations attach. See 45 C.F.R. § 80 app. A (1977).

³ See generally B. SMITH & J. KARLESKY, *supra* note 2; M. Todorovich, *The University and the State: A Report on the Current Interrelationship in the United States* (Aug. 31, 1977) (unpublished paper presented at Second International Conference of the International Council on the Future of the University, Toronto, Canada, Aug. 29-Sept. 1, 1977). Mr. Todorovich is the Executive Secretary of University Centers for Rational Alternatives, Inc.

⁴ M. Todorovich, *supra* note 3, at 22.

Any gift earmarked for a particular use limits the freedom of choice of the recipient. Diminished institutional autonomy in the last three decades, however, has resulted primarily from government grants conditioned upon requirements unrelated to the use of the funds.⁵ Executive orders have imposed antibias restrictions on government contractors for some time,⁶ but statutes have now expanded the scope of such orders and have added a legislative imprimatur to the executive action.⁷ The antibias policies implemented by these orders and statutes may be laudable; they may also have little or nothing to do with the particular purpose of a government contract or grant.⁸ Present governmental practices reflect the proposition that

⁵ Government grants to institutions are essentially contracts. They may be cast in the form of gifts, but the government pays money in return for the institution's agreement to provide certain services. Although society, rather than the government, may benefit from such payments, there is definitely a quid pro quo. For a discussion of the long-term effects of government grants made for specific purposes, see B. SMITH & J. KARLESKY, *supra* note 2. For a consideration of the problems inherent in result-oriented awards for the advancement of utilitarian concerns, see Brooks, *The Federal Government and the Autonomy of Scholarship*, in *CONTROVERSIES AND DECISIONS: THE SOCIAL SCIENCES AND PUBLIC POLICY* 235 (C. Frankel ed. 1976).

⁶ The use of the government's contracting power as a means for enforcing antibias policies dates from World War II when President Roosevelt established the Fair Employment Practice Committee. Exec. Order No. 8,802, 3 C.F.R. 957 (1938-1943 Compilation), *as amended* by Exec. Order No. 8,823, 3 C.F.R. 968 (1938-1943 Compilation) and Exec. Order No. 9,346, 3 C.F.R. 1280 (1938-1943 Compilation). The Committee was continued by President Truman, *see* Exec. Order No. 9,664, 3 C.F.R. 480 (1943-1948 Compilation), but President Eisenhower created a new committee. *See* Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation). President Kennedy's orders substantially broadened the scope of governmental involvement in seeking to assure equal employment opportunities. *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation), *as amended* by Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation). President Johnson continued the policies of his predecessors, *see* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), and he also issued an order which sought to eliminate sexual bias among government contractors. *See* Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation). President Nixon modified the approach, but generally continued these policies. *See* Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation). President Ford helped carry out the congressional mandate of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976), *see* note 16 *infra*, by directing that regulations be promulgated to prevent discrimination against the handicapped. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1977), *reprinted in* 29 U.S.C. § 794 note (1976). For a brief history of these Executive Orders, legislation in the area, and a plan for the reorganization of the government's handling of such matters, *see* President Carter's *Reorg. Plan No. 1 of 1978*, 43 Fed. Reg. 19,807 (1978).

⁷ *See* notes 14-22 *infra* and accompanying text.

⁸ For example, a research project in subatomic physics may have little to do with race relations, but a university receiving federal support for such a project must abide by federal antibias statutes and regulations. *See, e.g.*, 20 U.S.C. § 1681 (1976) (sex); 29 U.S.C. § 794 (1976) (handicap); 42 U.S.C. § 2000d (1976) (race). The imposition of such requirements on

if the American government pays for certain goods and services, the government also has the right to impose upon the contractor demands which may not have anything to do with what is being procured by the government, i.e., it may impose on the contractor obligations of a most general nature.⁹

This article assumes that collateral terms attached to a governmental grant are proper exercises of sovereignty and that the government may legitimately seek to eradicate discrimination based on sex, race, or physical handicap in both the private and public sectors. Arguments to the contrary, although not without merit, are beyond the scope of this discussion. The concern here is with the *procedures* for enforcement rather than with the substance of the underlying statutes. Procedural regulations may have greater impact than the substantive statutes on institutional autonomy and the freedom of individual teachers and students.

The university that wishes to maintain institutional autonomy and continue to receive government support is faced with a fundamental problem. It must determine what regulations and what enforcement mechanisms may be tolerated consistent with academic freedom and the pursuit of education and research.¹⁰ The govern-

grant recipients has caused concern. See, e.g., Kidd, *The Implications of Research Funds for Academic Freedom*, 28 LAW & CONTEMP. PROB. 613, 616-17 (1963); Kirk, *Massive Subsidies and Academic Freedom*, 28 LAW & CONTEMP. PROB. 607, 611-12 (1963). Kirk expressed general disapproval of assistance because it led inevitably to four problems: (1) pressure to conform to the benefactor's ideology; (2) an emphasis on utilitarian, rather than purely humanistic or scientific results; (3) grant administration that is bureaucratic in the worst sense; and (4) the development by government agencies of a power over university activities that is more difficult to resist than other threats to academic freedom. *Id.* See also E. Shils, *The Governmental Impact on the Universities: Academic Appointments* (Aug. 30, 1977) (unpublished paper presented at Second International Conference of the International Council on the Future of the University, Toronto, Canada, Aug. 29-Sept. 1, 1977).

⁹ M. Todorovich, *supra* note 3, at 3.

¹⁰ For a definition of the term academic freedom, see notes 28-38 *infra* and accompanying text. The main focus of this article is on private universities, but federal regulations also impose significant limitations on the freedom of activity of state colleges and universities. Dr. Fred C. Davison, President of the University of Georgia, has vividly expressed concerns almost identical to those of administrators at private universities.

At the University of Georgia, we have had to create entire new offices staffed by people taken from other essential duties, such as teaching and helping students. To keep track of the mounds of paperwork, we have had to invent whole new systems for receiving, completing, monitoring, filing and cataloging. We have been forced to compose, print and distribute volumes of letters, booklets, brochures, reports, notices and assorted other materials. We have become so bogged down in trying to cope with the morass of paperwork that we sometimes feel we're losing

ment has demonstrated that it has the power to modify some of the policies or activities of aid recipients,¹¹ but it should not have the power to impose limitations that unreasonably infringe upon individual and institutional rights. Federal antibias legislation and the regulations enforcing it have set the stage for resolution of some of the questions concerning the limits of governmental intrusions. Private universities cannot realistically refuse governmental assistance. Costs are too high and endowments are too small to pay the salaries and support the research necessary to sustain the vitality of major centers of learning. Former Secretary of Health, Education, and Welfare, David Mathews, has clearly identified the source of the problem:

sight of what we're really supposed to be doing—teaching and inquiring into the nature of things.

Davison, *The Federal Threat to Higher Education*, Atlanta Journal and Constitution, Jan. 22, 1978 (Magazine), at 24, 26. Nevertheless, state supported schools already have a close relationship with at least one government which gives them a status essentially different from that of private universities. This status may, in fact, provide a better basis for the protection of individual rights than do federal regulations imposed upon recipients. Since public universities are an arm of the state, they are prohibited by the Fourteenth Amendment from infringing civil rights in areas where private schools might not be bound.

It is also interesting to note the different contexts in which concerns about threats to the freedom of universities and teachers have arisen. One of the major efforts of the American Association of University Professors, for instance, has been to protect faculty members from internal and external pressures through tenure. See, e.g., C. BYSE & L. JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* (1959); *ACADEMIC FREEDOM AND TENURE* (L. Joughin ed. 1967); Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279 (1977). During the first 20 years after World War II, the South continuously faced problems with attempts to prevent the racial integration of colleges and universities. See generally Staff of Arthur Garfield Hays Memorial Fund, *Racial Integration and Academic Freedom* (pts. 1 & 2), 34 N.Y.U.L. REV. 725, 899 (1959). Loyalty oaths and attempts to weed communists from the campuses presented problems during the 1950s. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). See generally Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROB. 487 (1963); Orentlicher, *Repealing the Disclaimer Affidavit*, 46 AM. A.U. PROFESSORS BULL. 55 (1960); van den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROB. 515 (1963); notes 50-90 *infra* and accompanying text. Protest demonstrations at colleges in the 1960s and early 1970s often developed internally although they may have been sparked or exacerbated by external events. See generally C. FRANKEL, *EDUCATION AND THE BARRICADES* (1968); S. HOOK, *ACADEMIC FREEDOM AND ACADEMIC ANARCHY* (1969); Committee on Freedom of Expression at Yale, *Report*, reprinted in 4 HUMAN RIGHTS BULL. 357 (1975). Campus disruptions resulted in some attempts at government intervention by way of threats to cut off funds to schools which failed to keep their students under control. See, e.g., *Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971). See generally Comment, *Aid to Education, Student Unrest, and Cutoff Legislation: An Overview*, 119 U. PA. L. REV. 1003 (1971).

¹¹ See notes 6-9 *supra* and accompanying text.

American educators are now concerned about over control, over regulation, over bureaucratization and a multitude of what they consider to be improper intrusions. It is important to note that these intrusions are not the crass invasions of political leaders seeking to use universities for partisan purposes but rather managerial dictates from representatives of the public whose primary interest seems to be not in advancing but in *controlling* education, much as if it were a public utility.¹²

This paper does not consider the entire spectrum of the university-state relationship; rather, it focuses on complaints of students about discriminatory treatment. Such complaints raise problems central to the general questions of institutional autonomy and academic freedom.

After a brief survey, in Section II, of the principal antibias statutes at issue here and their implementing regulations, Section III deals with the general issue of academic freedom and the impact of federal antibias regulations on that freedom. Section IV focuses on the acute and sometimes ironic dilemmas posed by conflicts between a federal antibias investigation, and the policies of the Family Education Rights and Privacy Act of 1974, more commonly known as the Buckley Amendment.¹³

II. NONDISCRIMINATION STATUTES AND THE APPLICABLE REGULATIONS

The three federal statutes imposing the most direct limitations on university policies concerning personnel decisions, student admis-

¹² D. Mathews, Report to the Second International Conference of the International Council on the Future of the University 2 (Sept. 1, 1977) (unpublished paper presented at Second International Conference of the International Council on the Future of the University, Toronto, Canada, Aug. 29-Sept. 1, 1977) (emphasis in original). The problem of government intervention can be overstated. The partnership between private universities and the government has contributed to significant research and has made higher education available to a wide cross-section of the populace. At the same time, universities have retained a remarkable degree of autonomy. As one commentator has observed:

Still, it is arguable that the core activities of the university, teaching and research, have been largely untouched by the direct hand of public regulation. That is emphatically not to say that the substance of the institution's work has been unaffected by government funding decisions and priorities. Clearly it has been, and the hand of the government has been largely absent from the classroom, the laboratory, and even the admission committee—despite the enormous sums of federal money spent on teaching, research and student assistance.

Rosenzweig, *An End to Autonomy: Who Pulls the Strings?*, CHANGE, Mar., 1978, at 29.

¹³ 20 U.S.C. §§ 1232g-1232i (1976).

sions, and student discipline are Title VI of the 1964 Civil Rights Act,¹⁴ dealing with race; Title IX of the Education Amendments of 1972,¹⁵ dealing with sex; and section 504 of the Rehabilitation Act of 1973,¹⁶ dealing with physical and mental handicaps. These statutes evidence a pervasive federal interest in removing discriminatory policies and practices which have denied opportunities to individuals on the basis of factors they cannot control.

The ultimate sanction for violating an antibias statute is loss of federal funding.¹⁷ To ensure compliance and to provide a mechanism for enforcement, the Department of Health, Education, and Welfare (HEW) has promulgated extensive regulations applicable to all three statutes.¹⁸ Although voluntary compliance is the stated goal of the regulatory scheme,¹⁹ an institution must document its compliance by submitting "timely, complete and accurate reports *at such times, and in such form and containing such information,* as the responsible Department official or his designee *may determine to be necessary* to enable him to ascertain whether the recipient has complied or is complying with this part."²⁰ The government,

¹⁴ 42 U.S.C. §§ 2000d-2000d-6 (1976).

¹⁵ 20 U.S.C. §§ 1681-1686 (1976).

¹⁶ 29 U.S.C. § 794 (1976). As originally enacted this law was inapplicable to university policies toward students. Section 7(6) of the Rehabilitation Act of 1973 defined a "handicapped individual" as one "who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to *employment* and (B) can reasonably be expected to benefit *in terms of employability* from vocational rehabilitation services." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355 (1973) (emphasis added) (current version at 29 U.S.C. § 706(6) (1976)). This effectively limited the impact upon educational institutions. An amendment to the Act in 1974 brought educational institutions within the Act's reach by additionally defining a handicapped person as one "who (A) has a physical or mental impairment which substantially limits one or more of such person's *major life activities*, (B) has a record of such impairment, or (C) is regarded as having such an impairment." Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619 (1974) (emphasis added) (codified at 29 U.S.C. § 706(6) (1976)). See generally S. REP. NO. 1297, 93d Cong., 2d Sess. 37-41, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388-91.

On April 28, 1976, President Ford issued an executive order directing the Secretary of Health, Education, and Welfare to promulgate enforcement and compliance regulations to be applicable to "any recipient of, or applicant for, federal financial assistance." Exec. Order No. 11,914, 3 C.F.R. 117 (1977), *reprinted in* 29 U.S.C. § 794 note (1976).

¹⁷ See, e.g., 42 U.S.C. § 2000d-1 (1976).

¹⁸ 45 C.F.R. §§ 80.6-80.10, 81.1-81.131 were drafted for use in connection with Title VI of the 1964 Civil Rights Act. They have also been adopted for use in connection with sex and handicap discrimination problems. See 45 C.F.R. §§ 84.61, 86.71 (1977).

¹⁹ See 42 U.S.C. § 2000d-1 (1976); 45 C.F.R. § 80.6(a) (1977).

²⁰ 45 C.F.R. § 80.6(b) (1977) (emphasis added).

not the institution, decides what information is necessary and when and how it should be made available. The regulations also provide that the recipient institution must allow government representatives access “to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. . . . Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part.”²¹ Again, the regulation grants government agents discretion to determine the time, place, and manner for obtaining access to information. In addition, the regulations expressly disallow privacy defenses to requests for information, although they do provide that such information shall not be disclosed by government officials “except where necessary in formal enforcement proceedings or where otherwise required by law.”²²

Both the statutes and their implementing regulations contain a number of procedural safeguards intended to protect institutions from an arbitrary cut-off of federal financial assistance.²³ A recipient’s assistance cannot be terminated until: (1) the recipient has been advised of its failure to comply with an antibias provision and

²¹ *Id.* § 80.6(c).

²² *Id.* The regulations amplify the bare statutory language. Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976), does not explicitly require institutions to maintain specific records, but it does refer to voluntary compliance and a duty of the appropriate government authorities to make a thorough investigation before imposing sanctions. Such language at least implies that it would be wise for a university to maintain records with respect to policies and programs for minorities. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (1976), is similar. Section 9 of the Rehabilitation Act of 1973, 29 U.S.C. § 708 (1976), specifically requires the maintenance of various records.

²³ *See* 20 U.S.C. § 1682 (1976); 42 U.S.C. § 2000d-1 (1970); 45 C.F.R. § 80.8(c) (1977). Funding terminations are supposed to be limited to the particular program in which the act of discrimination has taken place. *See id.* Whether a finding of discrimination in a particular department of a university would justify a cut-off of funds to the whole university, or just to the undergraduate college, or just to that department, is an open question. *See generally* notes 195-200 *infra* and accompanying text.

A collateral question is whether grants to students—for example, loans under the National Defense Education Act, 20 U.S.C. §§ 401-602 (1976), or veterans’ benefits—are equivalent to grants to the student’s institution for purposes of federal antibias legislation. At least one court has answered in the affirmative. *Bob Jones Univ. v. Johnson*, 396 F. Supp 597 (D.S.C. 1974), *aff’d mem.* 529 F.2d 514 (4th Cir. 1975). *Bob Jones* is consistent with the Supreme Court’s determination that tuition reimbursement grants to parents of parochial school students violate the First Amendment’s establishment of religion clause. *See Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

it has been determined that voluntary compliance is not possible; (2) there has been an express finding of a failure to comply after an opportunity for hearing; and (3) there has been a full report filed with the appropriate House and Senate Committees, and thirty days have passed with no action having been taken.²⁴ While the ultimate sanction of lost federal assistance is a severe one, a recipient institution has a number of opportunities to plead its case. Both Title VI and Title IX have expressly provided for judicial review.²⁵ The Rehabilitation Act of 1973 does not contain such an express provision, but judicial review of an administrative decision may be available pursuant to the Administrative Procedure Act.²⁶

Although there are procedural safeguards to prevent an arbitrary and sudden termination of funding, the more immediate problem may lie at the level of the initial investigation itself. Requests by federal enforcement agents for information of a confidential nature raise fundamental problems of intrusion into the private affairs of individual students, administrators, and faculty members, and could improperly affect the important and often delicate student-teacher relationship. Moreover, such requests may run directly counter to the policies enunciated by the Buckley Amendment.²⁷

²⁴ See 20 U.S.C. § 1682 (1976); 42 U.S.C. § 2000d-1 (1976); 45 C.F.R. § 80.9(c) (1977).

²⁵ See 20 U.S.C. § 1683 (1976) (Title IX); 42 U.S.C. § 2000d-2 (1976) (Title VI).

²⁶ See 5 U.S.C. § 704 (1976).

²⁷ 20 U.S.C. §§ 1232g-1232i (1976). Similar problems may also arise from private litigation involving allegations of discrimination. Suits against educational institutions have been brought under 42 U.S.C. §§ 1981 and 1983. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976) (§ 1981); *Papish v. Board of Curators*, 331 F. Supp. 1321 (W.D. Mo. 1971) (§ 1983), *aff'd*, 464 F.2d 136 (8th Cir. 1972), *rev'd*, 410 U.S. 667 (1973). In *Runyon* § 1981 provided a cause of action for black students who were denied admission to private, nonsectarian elementary schools. Whether it could be used as a basis for challenging the admissions policies of a private institution of higher education is unclear. In *Papish* the Supreme Court held that a student expelled from the University of Missouri for publishing an allegedly obscene newspaper could maintain an action under § 1983 for an impermissible restraint on free speech. 410 U.S. at 674. For further discussion of *Papish*, see Note, *The First Amendment, Due Process and the University*, 42 U. MO.-KAN. CITY L. REV. 390 (1974). Because § 1983 requires state action it has not been used with much success against private colleges and universities. For cases involving the state action requirement in the university context, see *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Braden v. University of Pittsburgh*, 392 F. Supp. 118 (W.D. Pa. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974); *Isaacs v. Board of Trustees*, 385 F. Supp. 473 (E.D. Pa. 1974); *Furumoto v. Lyman*, 362 F. Supp. 1267 (N.D. Cal. 1973); *Powe v. Miles*, 294 F. Supp. 1269 (W.D.N.Y.), *aff'd as modified*, 407 F.2d 73 (2d Cir. 1968); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

III. CONSTITUTIONAL AND OTHER CONCERNS

A. *Academic Freedom—The Concept*

The term "academic freedom" encompasses a group of interests important to teachers, scholars, students, and administrators from elementary to graduate and professional schools.²⁸ The interests all relate, to a greater or lesser degree, to the transmission of knowledge and the nourishment of creative thought. The modern concept of academic freedom in the university context derives principally from the nineteenth century German ideal of the academy.²⁹ *Lehrfreiheit*, the freedom to teach, and *Lernfreiheit*, the freedom to learn, were the twin principles of the German ideal.³⁰ A professor was allowed to structure his own scholarly research and teaching without inter-

Universities are also subject to the normal contract and tort suits that might be brought against any institution. Some disgruntled students have sued for breach of contract for their school's alleged failure to live up to its educational responsibilities. Such suits have not met with much success on the merits, but there has been judicial recognition of a contract, the basic terms of which are contained in the school's bulletin. *See, e.g., Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977). *See generally* Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973). One commentator has even suggested that a student has a property interest in his status; that such a status is inherently worthwhile in the prevailing social ethic; and therefore, that a student is entitled to constitutional due process even in the absence of state action. *See* Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974). The issue was briefly raised but not considered in *Board of Curators v. Horowitz*, 435 U.S. 78, 82 (1978). The Supreme Court, however, has held that education is not a fundamental right entitled to First Amendment protection. *See, e.g., San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁸ There have been many scholarly considerations of academic freedom as it has been understood in this country. *See, e.g., H. BEALE, A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS* (1941); H. BEALE, *ARE AMERICAN TEACHERS FREE?* (1936); C. BYSE & L. JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW* (1959); R. HOFSTADTER & W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); R. HUTCHINS, *THE UNIVERSITY OF UTOPIA* (1953); R. KIRK, *ACADEMIC FREEDOM* (1955); R. LESTER, *ANTIBIAS REGULATION OF UNIVERSITIES* (1974); J. NELSON & G. ROBERTS, *THE CENSORS AND THE SCHOOLS* (1963); F. OPPENHEIM, *DIMENSIONS OF FREEDOM* (1961); *ACADEMIC FREEDOM AND TENURE L.* (L. Joughin ed. 1969).

²⁹ *See* Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROB. 431, 435-38 (1963); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968) [hereinafter cited as *Academic Freedom*].

³⁰ This article provides only an outline of the German university ideal. For a more detailed analysis, see Nisbet, *Max Weber and the Roots of Academic Freedom*, in *CONTROVERSIES AND DECISIONS* 103 (C. Frankel ed. 1976). The seminal work behind the development of the nineteenth century ideal of the university in Germany was Wilhelm von Humboldt's *THE SPHERE AND DUTIES OF GOVERNMENT* (London 1854).

ference from the university or from anyone outside the university.³¹ Students chose to attend lectures as they saw fit, and to take their degree examinations when they felt sufficiently prepared.³² The privileges of *Lehrfreiheit* and *Lernfreiheit* did not extend into society at large; the prestige of professors allowed them social privileges unavailable to most Germans.³³ The special position of the German scholar within his society, however, was viewed as a privilege created specifically in the context of the academy.³⁴

Although American scholars and educators have looked to the German ideal as a model to be imitated in part, the American experience in higher education has been fundamentally different. Students and professors in the United States have never enjoyed the special privileges or the autonomy of nineteenth century German academics. American universities have traditionally had more structured curricula; students have been limited in their choices of courses, programs, and institutions; and professors have had to accept specified teaching responsibilities as a trade-off for the freedom to pursue individual intellectual interests. The American scholar has, in part because he has lived in a democratic republic, been more “of the world.” He has tended to view academic freedom as a concept related not only to his work in the academy, but also to his role as a citizen.³⁵

³¹ See *Academic Freedom*, *supra* note 29, at 1048.

³² See *id.* at 1049.

³³ Imperial Germany was a highly structured and hierarchical society, and the freedom accorded professors and students in the university was unusual. As one commentator observed:

The virtual unassailability of a German scholar in his chair, once he had been appointed to the rank of professor, from either local or national pressures gave him a degree of personal autonomy sufficient to cover just about whatever he wanted it to cover. Granted the purely academic character of the beginnings of each aspect of the doctrine of academic freedom and its value in light of early nineteenth-century firings of faculty members and dismissals of students for political reasons, the fact is that by Weber's day the double-barreled doctrine of academic freedom in Germany had become the basis of declared right to teach however a professor wished, no matter how ideologically, politically, or prophetically, and, on the student side, of declared right to engage in whatever activities one wished, no matter how militant and potentially destructive of academic rectitudes these might be. Long before Nazi students began to use the idea of *Lernfreiheit* as a means of bullying professors beginning in the 1920s, there were student groups in one or other German university to adopt the same kinds of tactics in behalf of pacifism, socialism, and other political doctrines.

Nisbet, *supra* note 30, at 120-21.

³⁴ See *Academic Freedom*, *supra* note 29, at 1048.

³⁵ See *id.* at 1048-51. The American approach to academic freedom has been influenced

Limitations defining the parameters of teaching within the classroom, narrowing the scope of research, and restricting the expression of political, social, or cultural ideas have caused teachers particular worry.³⁶ There are substantial reasons for imposing some limitations on the educational process: teachers are important role models; society benefits from having citizens who are educated in the basic skills of language, mathematics, and science; and the stability of the social and political order depends on the training of each generation in the means of its operation. With mass public education from kindergarten to graduate school, public concern with curricula and with the character of those who are engaged in the educational process is clearly justified. This concern, however, may often be difficult to reconcile with individual interests in intellectual autonomy.

In the United States, the concept of academic freedom has its roots not only in traditional concepts of the university and of teaching, but also in the constitutionally-based system of free expression. Although it has not always been so, it may now be said that a high school or college teacher who voices a criticism of government policies in a political meeting may not be punished by his employer, for he has done precisely what the Constitution allows citizens to do.³⁷

by the work of American education theorists, notably John Dewey, who wrote in the early part of this century:

Since education is a social process, and there are many kinds of societies, a criterion for educational criticism and construction implies a *particular* social ideal. The two points selected by which to measure the worth of a form of social life are the extent in which the interests of a group are shared by all its members, and the fullness and freedom with which it interacts with other groups. An undesirable society, in other words, is one which internally and externally sets up barriers to free intercourse and communication of experience. A society which makes provision for participation in its good of all its members on equal terms and which secures flexible readjustment of its institutions through interaction of the different forms of associated life is in so far democratic. Such a society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder.

J. DEWEY, *DEMOCRACY AND EDUCATION* 99 (Free Press ed. 1966) (emphasis in original). The impact of the outside world on the academy continues to be recognized in the legislation which is the primary focus of this article.

³⁶ See generally Fuchs, *supra* note 29; Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 *LAW & CONTEMP. PROB.* 447 (1963); O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 *U. CIN. L. REV.* 525 (1975).

³⁷ This has been more of a problem for public employees than for teachers at private institutions. It is now settled, however, that public employment may not be conditioned upon the surrender of First Amendment rights, see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), although this has not always been true. See note 53 *infra* and accompanying text.

Indeed, teachers arguably should be encouraged to be activists because, as role models, they will encourage their students to be active participants in the processes of democracy.³⁸

Teaching is nothing more than speaking with a particular purpose, and scholarly writing, regardless of its subject, is generally within the scope of constitutional protection.³⁹ The essential elements of academic freedom—speaking, thinking, and writing—are all constitutionally protected areas of activity. The Supreme Court has considered a number of cases involving academic freedom issues, but it has not straightforwardly applied the First Amendment to protect the concept. Three reasons have been important in the refusal of the Court to put academic freedom clearly within the protection of the First Amendment. First, many of the cases have involved elementary or secondary schools, and there is a justifiable basis for limiting the First Amendment rights, including the right to receive information, of minors who have not yet developed the sophistication necessary to deal with conflicting arguments.⁴⁰ Sec-

³⁸ As one author noted: "[T]he professor is entitled to the same freedom to advocate ideas and join causes enjoyed by his fellow citizens; indeed, because of his position as intellectual leader, the scholar is especially encouraged to participate in the public forum." *Academic Freedom*, *supra* note 29, at 1048; see Fuchs, *supra* note 29, at 436. See generally Murphy, *supra* note 36; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

Professor Emerson has characterized our entire political system as one based on a model of the academy. Free speech is valuable because it is the best method for attaining knowledge and for ensuring the continued vitality of the basic democratic political structure. See T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7-8 (Vintage ed. 1967).

³⁹ This is somewhat of an overstatement. Libelous or obscene writing is not constitutionally protected, even when presented in the guise of a work of scholarship. See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974).

⁴⁰ The Supreme Court's position on this issue is not altogether clear. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), the Court held that public school officials could not prohibit elementary and secondary school students from wearing black armbands to protest the Vietnam War. *Id.* at 513-14. The majority opinion by Justice Fortas stated that these students who, for the most part, were minors, were "'persons' under our Constitution" and that they were entitled to exercise "fundamental rights" protected by the Constitution. *Id.* at 511. Justice Stewart concurred in the result, but he disagreed with the majority's premise that "the First Amendment rights of children are co-extensive with those of adults." *Id.* at 515 (Stewart, J., concurring). Justice Black dissented and shared Justice Stewart's reservation. See *id.* at 521-22 (Black, J., dissenting). But in *Ginsberg v. New York*, 390 U.S. 629, 634-35 (1968), the Court upheld a New York statute which forbade the distribution of sexually oriented materials to minors, even though the materials were not considered obscene for adults. See generally Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (plurality agreed that a ban on the sale

ond, when a First Amendment question has been squarely presented to the Court, it has usually been possible to decide the case on narrow grounds without creating a broad and undefined new area of separate constitutional interest.⁴¹ Third, the Court has adopted a kind of abstention doctrine⁴² with respect to university matters and has tended to defer to intra-academy methods of resolving disputes.⁴³ Nevertheless, if the Court has not expressly embraced the concept of academic freedom as a constitutional right, neither has the Court wholly rejected it.⁴⁴ Although many of the cases have dealt with problems in elementary or secondary schools, their rationales are generally applicable to universities.

B. *Academic Freedom—The Major Cases*

The starting point is *Meyer v. Nebraska*.⁴⁵ In the midwestern United States there were large groups of Scandinavian, East European, and German immigrants who did not speak English or spoke it haltingly. In order to ensure language homogeneity and to integrate the children of these immigrants into American society,⁴⁶ Ohio, Nebraska, and Iowa enacted statutes prohibiting the teaching of any language except English until children reached a certain grade level. In Nebraska a parochial school teacher named Meyer was convicted for teaching German to a ten-year-old boy; the Su-

of contraceptives to minors unconstitutionally interfered with right to privacy); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute requiring parental consent to minor's abortion held unconstitutional).

⁴¹ The federal courts traditionally have followed a policy of avoiding broad constitutional pronouncements if a narrow and satisfactory alternative is available. This approach was clearly enunciated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and has been followed since then. *See, e.g.,* *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Ashwander v. T.V.A.*, 297 U.S. 288 (1936). *See generally* A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 83-85 (1978).

⁴² The federal abstention doctrine is a corollary to the principle discussed in note 41 *supra*. Federal courts will generally defer to state courts if there is an available state remedy for the problem presented. *See, e.g.,* *Martin v. Creasy*, 360 U.S. 219 (1959); *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 41, at 85-100.

⁴³ *See* notes 95-99 *infra* and accompanying text.

⁴⁴ *See generally* text accompanying notes 45-94 *infra*.

⁴⁵ 262 U.S. 390 (1923).

⁴⁶ At least this was the argument advanced in favor of the statutes. *See id.* at 397-98. The statutes in question were 1919 Neb. Laws ch. 249; 1919 Iowa Laws ch. 198; and 1919 Ohio Laws ch. 249.

preme Court, however, held the statute to be unconstitutional and reversed his conviction.⁴⁷ Justice McReynolds, writing for the Court, based the reversal on the concept of substantive due process inherent in the Fourteenth Amendment.⁴⁸ He considered teaching, including the teaching of German, to be a perfectly legitimate occupation and found the state statutes "without reasonable relation to some purpose within the competency of the State to effect."⁴⁹

During the 1950s the Supreme Court had occasion to consider several problems arising from various attempts to prevent communists from invading the educational system. One of the best known statutory responses to the perceived menace of communism was New York's so-called Feinberg Law,⁵⁰ which provided that a member of an organization which advocated the overthrow of the government "by force, violence or any unlawful means"⁵¹ was ineligible for employment in a publicly supported school. The constitutionality of this law was challenged in *Adler v. Board of Education*,⁵² a declaratory judgment action. The Supreme Court upheld the law, dismissing First Amendment arguments on the grounds that reasonable limitations could be placed on the constitutional rights of public employees as a condition of such employment and that the state was validly concerned with the ideology of teachers.⁵³

⁴⁷ A similar statute was struck down in *Bartels v. Iowa*, 262 U.S. 404 (1923).

⁴⁸ See 262 U.S. at 399-400. Justice McReynolds' opinion defined the meaning of "liberty" in the Fourteenth Amendment as follows:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 598-600 (1970).

⁴⁹ 262 U.S. at 400; see *id.* at 402-03. Justice McReynolds noted that the corollary of Meyer's right to teach was "the right of parents to engage him . . . to instruct their children." *Id.* at 400. The Court's comment concerning parental rights anticipated its decision two years later in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-36 (1925). In that case the Court invalidated an Oregon law which effectively outlawed parochial schools because the law improperly interfered with parents' decisions regarding child rearing. These earlier cases were decided on the basis of substantive due process; the First Amendment was not at issue because it had not yet been applied to the states via the Fourteenth Amendment. That was to come later in a rather offhand manner. See *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵⁰ 1949 N.Y. Laws ch. 360 (current version at N.Y. EDUC. LAW § 3022 (McKinney 1970)).

⁵¹ N.Y. EDUC. LAW § 3022(2) (McKinney 1970).

⁵² 342 U.S. 485 (1952).

⁵³ The Court reasoned that

Although the Court did not accept the concept of academic freedom as a constitutional principle, *Adler* stands as one of the first significant decisions to consider the impact of the First Amendment in the context of the academy. The majority did not deny the relevance of the First Amendment as a matter of principle; rather, they tacitly accepted its applicability and concluded that the Feinberg Law was a rational limitation on the exercise of First Amendment freedoms by public servants.⁵⁴

Justice Frankfurter dissented for technical and procedural reasons,⁵⁵ but Justices Black and Douglas dissented on the constitutional issue.⁵⁶ Justice Douglas disagreed on a basic point: in his view a public employee did not abdicate his constitutional rights upon entering public service.⁵⁷

During the same year the Court in *Wieman v. Updegraff*⁵⁸ overturned an Oklahoma statute that excluded persons from public employment by reason of membership in a "communist front or subversive organization."⁵⁹ According to the Court, the New York statute in *Adler* required knowing, intentional membership, while the Oklahoma law punished innocent or unwitting membership.⁶⁰ This distinction proved fatal to the Oklahoma law. The Court's analysis rested on the Fourteenth Amendment's due process

[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.

Id. at 493.

⁵⁴ *Id.* at 492-93; *cf. id.* at 496-97 (Black, J., dissenting) (characterizing the act as contrary to the policy of the First Amendment).

⁵⁵ *Id.* at 497-508 (Frankfurter, J., dissenting). Justice Frankfurter believed that the parties lacked standing and that the case was not yet ripe because there had been no application of the law in question. *See id.* at 497-98.

⁵⁶ *See* 342 U.S. at 496-97 (Black, J., dissenting); *id.* at 508-11 (Douglas, J., dissenting). Justice Black viewed the Feinberg Law as another attempt by government to "supervise and limit the flow of ideas into the minds of men," the tendency of which "is to mould people into a common intellectual pattern." *Id.* at 497 (Black, J., dissenting).

⁵⁷ *See id.* at 508 (Douglas, J., dissenting). This position was later adopted by the majority. *See, e.g.,* *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

⁵⁸ 344 U.S. 183 (1952).

⁵⁹ *Id.* at 184 n.1 (quoting OKLA. STAT. ANN. tit. 51, §§ 37.1-.8 (West Supp. 1952) (repealed 1953)).

⁶⁰ *See* 344 U.S. at 188-91.

clause,⁶¹ and the three dissenters in *Adler* concurred in the judgment.⁶² Justice Frankfurter's eloquent concurring opinion supported the concept of academic freedom as a separate and identifiable constitutional interest.⁶³

The most significant academic freedom decision is *Sweezy v. New Hampshire*,⁶⁴ which involved another attempt to purge communists. The New Hampshire Attorney General undertook, on behalf of the legislature, an investigation of subversives in the state.⁶⁵ Mr. Sweezy, summoned to answer questions, refused to discuss a lecture he had given at the University of New Hampshire or to answer questions about the Progressive Party. He based his refusal on two grounds: (1) the irrelevance of the questions;⁶⁶ and (2) a First Amendment right not to be questioned about matters of personal politics or philosophy.⁶⁷ He did not invoke the Fifth Amendment and, after defying a court order to answer, he was held in contempt.⁶⁸ The Supreme Court reversed. Chief Justice Warren announced the result and read an opinion in which Justices Black,

⁶¹ See *id.* at 190-92.

⁶² See *id.* at 192-98. The majority did not extend the full protection of the Constitution to public employees, but it did recognize that such persons were not entirely bereft of constitutional rights. "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

⁶³ *Id.* at 194-98 (Frankfurter, J., concurring). Justice Frankfurter wrote:

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

Id. at 196-97.

⁶⁴ 354 U.S. 234 (1957).

⁶⁵ See *id.* at 236-38, 245-46.

⁶⁶ See *id.* at 239-40.

⁶⁷ See *id.* at 244.

⁶⁸ See *id.* at 244-45.

Douglas, and Brennan joined. The opinion recognized academic freedom as an important concept in the democratic process,⁶⁹ but the plurality based its decision on a determination that the prosecution had failed to prove that the legislature wanted answers to the particular questions at issue⁷⁰ or that the legislature had even authorized the state attorney general to inquire into these matters.⁷¹ Due process—not the First Amendment or academic freedom—saved Mr. Sweezy from contempt.

Justice Frankfurter's concurrence, in which Justice Harlan joined, dealt specifically with the fundamental issues of intellectual freedom⁷² and political privacy.⁷³ In his view, limitations on freedom of thought and inquiry could be justified only in limited circumstances.⁷⁴

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.⁷⁵

⁶⁹ See *id.* at 250.

⁷⁰ See *id.* at 253-55.

⁷¹ See *id.*

⁷² See *id.* at 261-64 (Frankfurter, J., concurring).

⁷³ See *id.* at 266-67 (Frankfurter, J., concurring).

⁷⁴ See *id.* at 261-62 (Frankfurter, J., concurring).

⁷⁵ *Id.* at 261-62 (Frankfurter, J., concurring). Justice Frankfurter's "exigent and obviously compelling" test is akin to the "clear and present danger" standard suggested by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919). In *Schenck* limitations on speech were said to be justified only when there was a clear and present danger that the speech in question would cause "substantive evils" which the government might prohibit. *Id.* The Holmes test has been refined in subsequent decisions. See, e.g., *New York Times Co. v.*

Sweezy was hardly a smashing victory for academic freedom. The plurality's opinion was limited to rather technical questions of due process, and the rationale would apply to any person regardless of his connection with education. Moreover, only Justices Frankfurter and Harlan considered Mr. Sweezy's status as a member of the academic community to be a central concern.⁷⁶ Nevertheless, Justice Frankfurter's opinions in *Sweezy* and *Wieman* did begin to provide a constitutional framework for the recognition of academic freedom as a protectable right.

The tenuous nature of the "right" became apparent the next term in *Beilan v. Board of Public Education*,⁷⁷ which involved a public school teacher who refused to answer questions posed to him by his superintendent about reports of his association with communists. He was warned that the inquiry concerned his fitness as a teacher and might lead to his dismissal, but he still refused to answer. In a subsequent administrative review of the matter, his refusal to answer was found to be sufficient evidence of incompetence to justify dismissal, regardless of his beliefs. The Supreme Court affirmed the dismissal,⁷⁸ reasoning that due process had been afforded the teacher and that he had a duty, which he had not fulfilled, to be frank and candid in responding to questions.⁷⁹ The Court seemed unaware that inquiries into personal beliefs and activities may themselves impermissibly chill constitutional rights, especially when an inquiry is made by one's superior and a wrong answer may lead to dismissal. Justices Frankfurter and Harlan voted with the majority. Apparently the superintendent's methods of inquiry were, in their view, "exigent and compelling."⁸⁰

United States, 403 U.S. 713 (1971) (per curiam); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

⁷⁶ See 354 U.S. at 262-67 (Frankfurter, J., concurring). Justice Whittaker took no part in the decision. *Id.* at 255. Justices Clark and Burton dissented. *Id.* at 267.

⁷⁷ 357 U.S. 399 (1958).

⁷⁸ *Id.* at 409.

⁷⁹ See *id.* at 405-07.

⁸⁰ See 354 U.S. 262 (Frankfurter, J., concurring); text accompanying note 75 *supra*. Chief Justice Warren dissented, 357 U.S. at 411-12, as did Justices Douglas and Black, *id.* at 412-16, and Brennan, *id.* at 417-25. In a companion case, the Court upheld the dismissal of a subway conductor for his refusal to discuss allegations of his communist connections. *Lerner v. Casey*, 357 U.S. 468 (1958). The impact of *Sweezy* was further limited by *Barenblatt v. United States*, 360 U.S. 109 (1959), in which the Court upheld the contempt conviction of a college psychology professor for his refusal to answer questions posed by the House Committee on Un-American Activities.

For nearly a decade, few cases of significance to the issue of academic freedom were decided. In 1967 New York's Feinberg Law⁸¹ was again challenged in *Keyishian v. Board of Regents*.⁸² Although *Adler* was not expressly overruled, its precedential value was certainly minimized. The majority specifically agreed that public employment could not be conditioned upon the surrender of constitutional rights that could not otherwise be abridged by direct government action.⁸³ The law was found to be impermissibly vague;⁸⁴ such a law could only be enforced if its sanctions were limited to knowing membership *and* a specific intent to further illegal aims.⁸⁵ The majority also noted the existence of academic freedom as a definable legal interest:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.⁸⁶

The four dissenters, Justices Clark, Harlan, Stewart, and White, did not agree that the First Amendment was implicated by the Feinberg Law. They viewed the case as posing the question whether a government was required to employ persons who advocated the overthrow of the government—not just the particular governing officials but the form of government itself—to teach its next generation of citizens.⁸⁷

⁸¹ See notes 50-53 *supra* and accompanying text.

⁸² 385 U.S. 589 (1967).

⁸³ See *id.* at 605-08.

⁸⁴ See *id.* at 598-99, 604.

⁸⁵ See *id.* at 606-09.

⁸⁶ *Id.* at 603.

⁸⁷ The dissenting opinion by Justice Clark, in which the other three dissenters joined, defined the issue as follows:

The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have wilfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means; or to have wilfully and deliberately printed, published, etc., any book or paper that so advocated *and to have personally* advocated such doctrine himself; or to have wilfully and deliberately become a member of an organization that advocates such doctrine, is *prima facie* disqualified from teaching in its university?

Id. at 628-29 (Clark, J., dissenting) (emphasis in original). The dissenters answered this rhetorical question in the affirmative.

The last of the major communist and loyalty oath cases to reach the Court was *Whitehill v. Elkins*,⁸⁸ decided the same year as *Keyishian*. The petitioner in *Whitehill* had been offered a university teaching position in Maryland. He brought a declaratory judgment action seeking to be relieved of the state requirement that teachers take a loyalty oath as a condition of employment. The Supreme Court invalidated the Maryland statute because the definition of subversive groups was unconstitutionally vague.⁸⁹ One could honestly believe himself not to be a member of any subversive group, and so swear, and yet be found guilty of membership under the statute. Thus, the fear of perjury alone could have a "chilling effect." In his opinion for the Court, Justice Douglas also noted that loyalty oaths created a continuing problem of surveillance which was destructive to the teaching profession.⁹⁰

During the 1960s and early 1970s, several cases dealt with issues of considerable significance to teachers and scholars. In *Epperson v. Arkansas*⁹¹ the Supreme Court finally agreed that a state could not prohibit the teaching of evolution.⁹² The Court found the Arkansas statute violative of the First Amendment's prohibition of an establishment of religion without ruling on the question of academic freedom. Another notable decision was *Tinker v. Des Moines Independent School District*,⁹³ in which the Court gave constitutional sanction to students who wore black armbands as a symbol of protest against the Vietnam War.⁹⁴

Although the Supreme Court has never explicitly recognized aca-

⁸⁸ 389 U.S. 54 (1967).

⁸⁹ See *id.* at 61-62.

⁹⁰ See *id.* at 59-60.

⁹¹ 393 U.S. 97 (1968).

⁹² See *id.* at 103, 109. See also *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

⁹³ 393 U.S. 503, 514 (1969).

⁹⁴ *Id.* at 514. The proper role of secondary school teachers became a much debated issue in the late 1960s and early 1970s. See generally Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971). Other cases considering significant constitutional issues in an academic context included *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Cary v. Board of Educ.*, 427 F. Supp. 945 (D. Colo. 1977); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976).

demic freedom as a constitutional right, the foregoing decisions demonstrate that the concept is inextricably intertwined with clearly identified and traditionally respected constitutional interests that are protected by the First or Fourteenth Amendments. Thus, academic freedom may fairly be characterized as having a constitutional dimension and the aura of a constitutional right.

Perhaps the most significant legal recognition of academic freedom has developed collaterally through the application of a judicial "abstention doctrine" in cases involving universities, especially in matters related to questions of scholastic standards.⁹⁵ The reason for this approach was simply stated by a federal court in Vermont: "[I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals."⁹⁶ The Supreme Court recently applied this "abstention doctrine" in a university context in *Board of Curators v. Horowitz*.⁹⁷ Charlotte Horowitz, a student at the University of Missouri-Kansas City Medical School, was dismissed for academic reasons. After exhausting her intra-university appeals for reinstatement, she filed a civil rights action against the university in which she contended that she had not been afforded constitutionally mandated standards of due process.⁹⁸ The Supreme Court upheld the medical school's dismissal of Ms. Horowitz:

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute." . . . This is espe-

⁹⁵ See, e.g., *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Mustell v. Rose*, 282 Ala. 358, 211 So. 2d 489, cert. denied, 393 U.S. 936 (1968); *Coffelt v. Nicholson*, 224 Ark. 176, 272 S.W.2d 309 (1954); *Militana v. University of Miami*, 236 So. 2d 162 (Fla. Dist. Ct. App. 1970), cert. denied, 401 U.S. 962 (1971); *Bluet v. Board of Trustees*, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); *Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822, cert. denied, 319 U.S. 748 (1942); *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932); *Frank v. Marquette Univ.*, 209 Wis. 372, 245 N.W. 125 (1932).

⁹⁶ *Connelly v. University of Vt.*, 244 F. Supp. 156, 160 (D. Vt. 1965).

⁹⁷ 435 U.S. 78 (1978).

⁹⁸ The suit was based on 42 U.S.C. § 1983 (1976). The University of Missouri-Kansas City is a public institution and therefore the state action requirement was satisfied.

cially true as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized. . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.⁹⁹

Academic freedom may not have been accorded the status of a separately recognized constitutional right, but it has had a *de facto* recognition through this type of judicial abstention. The courts have at least recognized that some matters are peculiarly within the province of the academy rather than the judiciary.

C. *Academic Freedom—The Current Legal Status*

Judicial reluctance to recognize academic freedom as a separate constitutional right is not necessarily to be condemned, however, because such recognition could raise serious problems. To create a newly defined "right" of a constitutional dimension would be unnecessary and possibly harmful for three reasons: (1) a democratic society should not as a general rule create castes whose members acquire certain constitutional rights unavailable to society at large;¹⁰⁰ (2) the definition of such a right may narrow its protection by impliedly, if not expressly, excluding interests, activities, or per-

⁹⁹ 435 U.S. at 90 (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting)). The Court reaffirmed that at least minimal due process standards should be followed in conducting disciplinary proceedings because there the relationship is more clearly adversarial. In *Goss v. Lopez*, 419 U.S. 565 (1975), a case involving the suspension of a student from public school, the Court ruled that the Constitution requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. Similarly, a teacher who has a contract, or at least a clearly implied promise of continued employment in a public institution, is entitled to due process in connection with a dismissal or the nonrenewal of employment. See *Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971); cf. *Board of Regents v. Roth*, 408 U.S. 564, 569-75 (1972) (professor not entitled to hearing on nonrenewal of his contract in the absence of express or implied promise of continued employment, despite allegations that he was dismissed for expressing controversial views).

¹⁰⁰ The equal protection and due process provisions of the Fifth and Fourteenth Amendments provide a general framework for ensuring that the constitutional rights of various groups are not arbitrarily removed or limited. Nevertheless, there has been a long debate over whether the acceptance of certain privileges, for example, government employment, justifies limitations on the exercise of rights enjoyed by other citizens. See, e.g., *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 226-27 (1977); *Elrod v. Burns*, 427 U.S. 347, 355-60 (1976). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

sons who are not within the definition;¹⁰¹ and (3) the interests with which academics are concerned can receive adequate constitutional protection through a thoughtful and sophisticated application of traditionally recognized First Amendment rights.¹⁰²

The first reason is based on the simple proposition that in a democracy all citizens have equal citizenship rights. The antibias legislation discussed in this article is part of a continuing effort to vindicate that notion. Equality among citizens is inconsistent with the idea that one class of citizens is entitled to a certain *constitutional* right to which other citizens are not entitled.¹⁰³ Certainly there are inequities in the privileges, usually economic, accorded certain individuals, but whatever those inequities may be they are not usually matters of constitutional concern.¹⁰⁴

¹⁰¹ This point is similar to the arguments against a detailed Bill of Rights made by various framers of the Constitution who feared that the concept of liberty might be narrowed by a listing of its components. See, e.g., THE FEDERALIST NO. 84 (A. Hamilton); *Debates, The Pennsylvania Convention, November 28, 1787*, in II THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (M. Jensen ed. 1976). The supporters of the Bill of Rights obviously prevailed, and the Amendments have provided a reasonably effective means of protection against inappropriate governmental intrusions. Thus the opponents were arguably mistaken, but we do not know what the result might have been had a "natural rights" concept of liberty prevailed, nor do we know how successful the opposition was in causing the various amendments to be as broadly worded as they are. The breadth of the concepts contained in the simple language of the amendments did a great deal to provide a basis for an expansive reading.

In a more modern context there has been considerable debate about the desirability of shield laws and court decisions for the protection of reporters' confidential sources. See, e.g., Houston, *Editors Split Over Need For Absolute Shield Law*, 106 EDITOR AND PUBLISHER 9 (1973); *Symposium—The Question of Federal "Newsmen's Shield" Legislation*, 52 CONG. DIG. 131 (1973). This is one aspect of the ongoing argument about the status of the press under the First Amendment, a debate which is particularly instructive on the question of whether defining rights necessarily limits them. Compare Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975) with *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring).

¹⁰² This point is taken basically from the ideas expressed by Professor Emerson. See T. EMERSON, *supra* note 48, at 616-26.

¹⁰³ This does not mean that societal institutions should not reward individuals or groups in return for meritorious service or for quality work. Democratic theory does not preclude the New York Yankees from paying Ron Guidry more than a minor league relief pitcher. In addition, the important and often desirable use of status as an ordering construct should not be overlooked. See generally Friedmann, *Some Reflections on Status and Freedom*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 222 (R. Newman ed. 1962); Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941 (1971).

¹⁰⁴ The Supreme Court has indicated that wealth (or poverty) is not a "suspect" classification for purposes of equal protection or due process analysis. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973). Indigency may, however, give rise to a

A pragmatic reason for refusing to create a separate constitutional right of academic freedom is that the existence of a privileged class of academics might raise the ire of those not privileged.¹⁰⁵ Since universities are dependent for their very existence upon the good will of the society in which they are situated, such a privileged class might alienate public and private benefactors. To regain their favor, universities would have to tailor their policies to please the money-givers. Such indirect control is the essence of the current dilemma facing universities, and there is no reason to exacerbate the problem by seeking a 'constitutionally privileged status.

The second reason—that defining a right of academic freedom might narrow the concept—derives, in part, from the problem of determining who is entitled to enjoy the new right. Would there be a hierarchy of statuses from kindergarten instructor through tenured full professor? What would be the relative rights and privileges of students, administrators, and staff personnel? Would university trustees share in the privilege? Would it be lost upon retirement or during a leave of absence? To ask the questions makes the point.¹⁰⁶

constitutional claim if it causes one to be denied a protected opportunity, such as access to civil courts or the appeal of a criminal case. See *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971); *Douglas v. California*, 372 U.S. 353, 356-57 (1963). There is certainly no doubt that a poor person may have more difficulty in vindicating his rights than a wealthy person, but the rights themselves are identical regardless of the economic situation of the citizen.

¹⁰⁵ See Comment, *Academic Freedom—Its Constitutional Context*, 40 U. COLO. L. REV. 600 (1968).

¹⁰⁶ From a technical point of view, there is also the problem of deciding which constitutional provision to use for the creation of such a new right. A separately recognized right might be a derivative of several provisions found in the "penumbra" of explicit rights, much like the concept of privacy. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). Academics, unlike journalists, do not have their own specific constitutional clause. The press can claim a special status by pointing to language in the Constitution directly relating to journalism. See Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Stewart, *supra* note 101. But see *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring). Nevertheless, the establishment of constitutional protection for the privileges claimed as incidental to that status is not easy. The cases on reporters' refusals to disclose their sources are illustrative. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Note, *Constitutional Law—Evidence—No Testimonial Privilege for Newsmen*, 51 N.C.L. REV. 562 (1973); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970). Attempts to assert a similar privilege for academic researchers have not met with much success, although it should be noted that the courts have not unqualifiedly rejected the constitutional arguments in favor of extending such a privilege to professors. See, e.g., *United States v. Doe*, 460 F.2d 328 (1st Cir. 1972), *cert. denied.*, 411 U.S. 909 (1973); *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976); *United States v. Doe*, 332 F. Supp.

The focus should be on the protection of academic freedom interests regardless of the particular status of the individual. At stake is the freedom to engage in unfettered inquiry and creative intellectual pursuits and to take part in the whole array of cultural, social, political, intellectual, and religious activities offered by our society without fear of job reprisals so long as professional responsibilities are fulfilled.

The third reason for denying academic freedom constitutional status is premised on the idea, advanced most eloquently by Thomas Emerson, that the First Amendment is intended to protect not only speech, newspapers, or religious groups, but also to protect and promote the development of an entire system of free expression and free inquiry including all the necessary components of such a system.¹⁰⁷ Emerson identifies the university as an important component in this scheme.¹⁰⁸ He does not disavow the notion of a separate

930 (D. Mass. 1971), *vacated and remanded sub nom.* Gravel v. United States, 408 U.S. 606 (1972); United States v. Doe, 332 F. Supp. 938 (D. Mass. 1971). See generally Note, *The Public Scholar and The First Amendment: A Compelling Need for Compelling Testimony?*, 40 GEO. WASH. L. REV. 995 (1972); Comment, *Academic Researchers and the First Amendment: Constitutional Protection for Their Confidential Sources?*, 14 SAN DIEGO L. REV. 876 (1977).

¹⁰⁷ See notes 38 & 48 *supra* and accompanying text. There have been many splendid writings on First Amendment theory. Three of the best are Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960); and the most recent by Thomas Emerson, where the author states:

A system of freedom of expression, operating in a modern democratic society, is a complex mechanism. At its core is a group of rights assured to individual members of the society. This set of rights, which makes up our present-day concept of free expression, includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium—in speech, writing, music, art, or in other ways. To some extent it involves the right to remain silent. From the obverse side it includes the right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information. As a necessary corollary, it embraces the right to assemble and to form associations, that is, to combine with others in joint expression. . . . This interrelated set of rights, principles, practices, and institutions can be considered a system, at least in a rough way, because it has an overall unity of purpose and operation. To view it in this manner facilitates the development of the rules for its governance, for such rules must be derived from the basic functions and dynamics of the system. Furthermore, they must accommodate the system of freedom of expression to other features of our national life.

T. EMERSON, *supra* note 48, at 3-4.

¹⁰⁸ In Emerson's view:

ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry. Consequently realization of the objectives of the First Amendment requires educational institutions that produce gradu-

and identifiable right;¹⁰⁹ rather, he argues that the existing constitutional structure is sufficient to provide a basis for protecting the essential principles of academic freedom.¹¹⁰ Protecting academic freedom by integrating its components into the array of interests that fall under the general protection of the First Amendment is more conducive to the ultimate safeguarding of that freedom, as a matter of both constitutional and societal concern, than would be the creation of some new and undefined right for a small, privileged class.¹¹¹

D. Academic Freedom—The Interests Involved and Federal Intrusion

What are the activities in the university that require the development of a system conducive to intellectual freedom? How may the intrusive impact of federal enforcement procedures be minimized in such a system? Taking the first question, let us consider the range of interests in a university.

Paramount among the purposes of an educational institution is the transmittal of knowledge.¹¹² The state has a direct interest in this purpose because society profits from an educated population, and there is a need to maintain minimal standards.¹¹³ Nevertheless,

ates who are trained in handling ideas, judging facts and argument, thinking independently, and generally participating effectively in the marketplace of ideas. Hence the First Amendment could be said to require the kind of educational institutions that are capable of producing such results.

T. EMERSON, *supra* note 48, at 613.

¹⁰⁹ See *id.* at 611-16.

¹¹⁰ See *id.* at 616-26.

¹¹¹ A systematic approach serves to integrate the interests of the university community more effectively into the value system of society at large. Teaching and research are valuable to society; they help create an educated citizenry which is useful for the maintenance of a rational social order. They lead to new discoveries and to the full development of individual creativity. Admittedly, this is a utilitarian approach. For those who wish to pursue the problems of liberal democracies in the context of philosophical and jurisprudential arguments concerning theories of social contract, natural rights and the like, there is a lively literature. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971); *Symposium—Jurisprudence*, 11 GA. L. REV. 969 (1977).

¹¹² Governmental policies may directly interfere with this most fundamental aspect of the educational process even at the most elementary levels. The debate over whether to allow the teaching of theories of evolution is a good example. See notes 91-92 *supra* and accompanying text.

¹¹³ Even the simplest kinds of commercial transactions—buying car insurance or groceries—require minimal levels of literacy and arithmetic skills. Moreover, responsible citizen-

state intrusions, whether through direct regulation or the implementation of some other policy or program, can be destructive to the teaching function unless they are carefully circumscribed.¹¹⁴

At the university level, where there is less direct interference with the teaching function,¹¹⁵ research is the more likely area for controversy because creative intellectual inquiry often challenges the status quo. As one commentator has noted, "the scholar is necessarily a disturbing person, since he is professionally committed to raising questions about accepted ideas and institutions which, as in the case of Socrates, are bound to evoke reactions ranging from uneasiness to alarm."¹¹⁶

ship depends upon an ability to understand issues and to articulate opinions, which ability depends in turn upon a sound education. *See generally* *Wieman v. Updegraff*, 344 U.S. 183, 196-98 (1952) (Frankfurter, J., concurring).

¹¹⁴ *See* notes 133-35 *infra* and accompanying text. A recent article is instructive on this point. *See* Hodgson, *Sex, Texts and the First Amendment*, 5 J.L. & Educ. 173 (1976). Hodgson argued that HEW regulations issued pursuant to Title IX of the 1972 Education Act Amendment, 20 U.S.C. § 1681 (1976), should be broadened to govern the selection of texts for elementary and secondary schools in order to minimize "sex-role stereotyping," which the author considered to be widespread in teaching materials. The author summarily dismissed First Amendment arguments to the contrary: "Since school board members select texts in their capacities as officials charged with educational judgments, not as individuals engaged in self-expression, they have no protected First Amendment interest in non-regulation of sex-stereotyping in the texts they select." *Id.* at 180. The commentator thus ignored the implications of such an approach for the First Amendment rights of teachers. *See generally* *Academic Freedom*, *supra* note 29, at 1080-81; notes 45-49 *supra* and accompanying text.

¹¹⁵ There is no requirement that persons attend college and there is no state mandated curriculum, although the requirements for certification in particular professions may have an impact on curricula.

¹¹⁶ Fellman, *Academic Freedom in American Law*, 1961 Wis. L. REV. 3, 9 (1961). Governing authorities are not the only ones who may be disturbed by research activities. The ongoing debate about the Jensen-Shockley race intelligence theory is an example of an intra-academy furor which has sometimes been as destructive of individual free expression as any governmental intrusion. Dr. William Shockley became the central figure in a *cause célèbre* at Yale several years ago. After a series of invitations and revocations of invitations, Dr. Shockley finally appeared on campus to address a student group. His thesis was that intelligence is genetically based and that it varies from race to race by reason of genetic coding regardless of cultural or environmental factors. There were demonstrations in advance of Shockley's appearance, he was shouted down when he arrived in the lecture hall, and he was never allowed to speak. The affair was of considerable concern to all segments of the university, and Yale's President Brewster appointed a special committee to investigate the vitality of free speech on the campus. The committee's report, known generally as the "Woodward Report" after the distinguished historian C. Vann Woodward who chaired the committee, concluded that

[t]he primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It

In addition to teaching, researching, writing, and learning,¹¹⁷ members of an academic community may be engaged in political, artistic, religious, or cultural pursuits within and without the confines of the university. Such activities directly or indirectly further the central purposes of teaching and learning by enriching the lives of the participants and by contributing to society at large.

How are these various activities to be encouraged and protected so that teachers and students can most effectively approach the ideal of the university? Each intrusion by the government into the academy to effect some governmental policy should be analyzed in terms of its impact on the various components of the system which exists for the protection and nurture of intellectual freedom. In the context of the enforcement of antibias legislation, this problem may be addressed by considering a hypothetical case of alleged discrimination and the possible procedures for its investigation.

To take a fairly typical problem, assume that a student who has been dismissed for academic reasons files a complaint with the ap-

follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.

Committee on Freedom of Expression at Yale, *Report*, 4 HUMAN RIGHTS 357 (1975). See generally Cronbach, *Five Decades of Public Controversy Over Mental Testing*, in *CONTROVERSIES AND DECISIONS: THE SOCIAL SCIENCES AND PUBLIC POLICY* 123 (C. Frankel ed. 1976); Ezrahi, *The Jensen Controversy: A Study in the Ethics and Politics of Knowledge in Democracy*, in *id.* at 149.

¹¹⁷ Although learning never ceases, it is obvious that the greatest number of "learners" at any educational institution are the students, and it is important to recognize their roles in both teaching and research. Some students, particularly at the graduate level, may be engaged in teaching and in significant independent research. Insofar as those functions are concerned, the students' interests are essentially coextensive with those of their professors. In addition, there is a definable interest in learning that is as much a part of a system of free expression as is teaching. The Germans certainly recognized this interest in the concept of *Lernfreiheit*, see notes 28-35 *supra* and accompanying text, and it is consistent with the developing constitutional protection of the "right to know" as a necessary component of free expression. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374-75 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 821-22 (1975). *But see* *Houchins v. KQED, Inc.*, 98 S. Ct. 2588 (1978), in which the Supreme Court decided that the right to know does not require governments to grant access to information and facilities under their control. See also *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Baker, Do Lawyers Have a First Amendment Right to Solicit?*, 64 A.B.A.J. 364 (1978).

propriate government agency, claiming that his dismissal was racially motivated. What kinds of information will government investigators want in order to determine whether or not there is any basis for the charge?¹¹⁸ Clearly the government agents will want to review the complainant's own file and, presumably, the complainant will waive his own rights of confidentiality under the Buckley Amendment.¹¹⁹ In addition, the following kinds of records may be useful:

- (1) Regulations concerning academic standards;
- (2) Regulations governing the procedures for academic dismissals;
- (3) Minutes of any committee concerned with the dismissal of the complainant, including all records available to the committee;
- (4) Minutes of the groups adopting the pertinent regulations and approving the ultimate dismissal of the student;
- (5) Statistics broken down by race as to: (a) number of students admitted; (b) number of matriculants; (c) number of students in academic difficulty; and (d) number of students excluded for academic reasons, all for a certain period of time prior to the alleged instance of discrimination;
- (6) Grades of all students in the courses taken by the complainant, by race;
- (7) Access to the examination questions and answers of all students in the courses taken by the complainant;
- (8) Records pertaining to the disposition of other "academic" cases considered by the appropriate individuals or committees for a certain period of time.¹²⁰

Furthermore, the investigators may want to interview the complainant's teachers, some of his fellow students, and the members of the faculty or administration who have responsibility for academic dismissals. A charge of discrimination necessarily implies a difference

¹¹⁸ Racial discrimination is simply an example. Similar questions could arise in connection with charges of sex or handicap discrimination, although the investigation of the latter might require a review of medical records. Such review would involve doctor-patient problems of confidentiality as well.

¹¹⁹ See Section IV, *infra*.

¹²⁰ This list is illustrative, not exhaustive. It reflects the actual requests made by HEW officials in connection with the investigation of a similar case.

in treatment; therefore, data concerning the treatment of the complainant's peers will be especially useful.

Such requests for information will be disruptive of normal schedules and will require the time of administrative personnel and various faculty members. A refusal to comply with a request solely because it is bothersome, however, would not be justified. Instead, the reasonableness of the request must be determined in the context of the purpose for which the request is made. Is the requested information relevant to the inquiry? Is it likely to lead to an answer to the allegation of racial bias? If the request is reasonable because it relates to data which are, or may be, relevant, then it must be asked whether requiring the institution, or certain of its personnel, to provide the information will be unduly burdensome. To make this determination, the academic community's interest in maintaining an environment conducive to intellectual pursuits must be balanced against the government's need to effectuate its policies by obtaining the data in the form requested. If academic freedom is a component of a system of free expression, and if the university is the environment in which that component exists, then the interest on that side of the balance is one of constitutional dimensions. Thus, the balance should weigh in favor of the university.

The antibias statutes and regulations provide a framework for assisting certain groups of individuals who have been denied opportunities to obtain education and employment. These statutes manifest governmental attempts to secure equality of opportunity and are consistent with the basic purposes of the equal protection and due process clauses.¹²¹ The statutes and regulations are not, however, enabling acts for specific constitutional rights, even though their policies seek to vindicate constitutionally protected interests. Academic freedom, as a component of a system of free expression, must be balanced against the pursuit of important statutory policies. If all else is equal, the balance must be struck in favor of protecting the constitutional interest in free expression.¹²²

¹²¹ Works discussing the meanings and purposes of the due process and equal protection clauses are numerous. See, e.g., Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

¹²² Otherwise the supremacy clause, U.S. CONST. art. VI, cl. 2, would be meaningless. It is necessary, however, to distinguish between public and private institutions. A violation of an antibias statute by a public university may be an unconstitutional violation of equal

Aside from the constitutional issue, a practical reason for skewing the balance in favor of the university is that some information might be useful but not *necessary* to the investigation of the matter. Comparative data—grades by race, matriculants and graduates by race, and academic dismissals by race—may certainly be relevant and helpful in ascertaining the truth of the complaint. If, however, the complaint's validity may be determined by a review of procedures that are a matter of public record and by a few interviews, then the university should be justified in refusing to provide additional information. Such a limitation on inquiry would serve the basic purpose of the investigation and would avoid confrontations between the government and the university on the issue of academic freedom.

Many cases have used a balancing test to determine whether a particular statute, policy, or procedure is consistent with the First Amendment.¹²³ These cases provide a useful framework for analyzing the initial conflict between academic freedom and the government's interest in pursuing a certain social policy. They are not very useful, however, in determining the factual issues of relevance and burdensomeness which may be involved in a particular case. The only sources of significant help in this determination are the numerous cases dealing with issues of relevance and burdensomeness in discovery proceedings pursuant to the Federal Rules of Civil Procedure or similar state procedural rules.¹²⁴ The general purpose of discovery is to ensure that each party knows as much as possible about the adversary's case in order to simplify trials, avoid surprise, and provide a basis for settlement.¹²⁵ The tendency is, therefore, to

protection rights. The balance would then have to be struck evenly, and the outcome would vary from case to case depending on the degree to which one right as opposed to another had been invaded.

¹²³ There are dozens of First Amendment cases in which the Supreme Court has directly or indirectly applied a balancing test. *See, e.g.,* *Procurier v. Martinez*, 416 U.S. 396, 409-14 (1974); *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506-07 (1969). Even the "clear and present danger" test suggested by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), is itself a form of balancing test. The Holmes test has been substantially modified. *See, e.g.,* *Dennis v. United States*, 341 U.S. 494 (1951). For an application of balancing in a different context, see *Bigelow v. Virginia*, 421 U.S. 809 (1975). One of the classic statements in support of a balancing theory appears in Justice Frankfurter's concurring opinion in *Dennis*, 341 U.S. at 517-61 (Frankfurter, J., concurring).

¹²⁴ FED. R. CIV. P. 26(b)(1) establishes the general threshold criterion of relevance. For a collection of the cases discussing relevance under rule 26, see 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2008-2009 (1970 & Supp. 1977). As to burdensomeness, see *id.* § 2174.

¹²⁵ *See generally* 8 C. WRIGHT & A. MILLER, *supra* note 124, § 2001; 4 MOORE'S FEDERAL

put a heavier burden on the party seeking to avoid discovery than on the requesting party,¹²⁶ but the contrary is usually true when the resisting party invokes a well-recognized privilege, such as that of attorney and client.¹²⁷ Cases in this latter category may provide the best analogy to the university-government conflict.

Once limitations on governmental inquiries are proposed, how are they to be implemented? The regulations simply direct the government to investigate, without providing a mechanism to resolve conflicts arising from an objection to a request for data. If a university refuses to provide the requested materials, it risks an unfavorable report which may eventually lead to financial sanctions. Thus, an institution is faced with the necessity of seeking an immediate judicial determination.¹²⁸ The most likely action would be a suit to enjoin the investigation pending a decision on the validity of the university's refusal to answer the interrogatories. An alternative would be a suit for declaratory relief, if the prerequisites of the Declaratory Judgment Act¹²⁹ could be met. Such expensive and time-consuming litigation could be largely avoided by the promulgation of an additional regulation creating a mechanism for challenging information requests. The institution should be required to give specific reasons for nondisclosure, and if the matter is not resolved informally, it could be submitted to an administrative law judge. The government should have the burden of proving the necessity of the disclosure, and a regulatory or statutory mechanism for judicial review should be required. The administrative law judge's decision should be treated as an interlocutory order which, under appropriate circumstances, could be certified for immediate review by the Secretary of Health, Education, and Welfare or, if Congress should so provide, for direct judicial review.¹³⁰

PRACTICE, ¶ 26.02 (1976).

¹²⁶ For a general discussion and a collection of the cases, see 8 C. WRIGHT & A. MILLER, *supra* note 126, §§ 2007-2009.

¹²⁷ See 8 C. WRIGHT & A. MILLER, *supra* note 124, §§ 2016-2020; 4 MOORE'S FEDERAL PRACTICE, *supra* note 125, ¶ 26.60.

¹²⁸ Ironically, the Buckley Amendment, discussed in Section IV *infra*, may turn out to be helpful. If there is a reasonable basis for refusing to disclose materials that come within the protection of the Buckley Amendment, then it may currently provide the safest and, practically speaking, one of the most effective means for avoiding government inquiries. Another obvious escape from the dilemma is through negotiation. This discussion assumes that negotiations have proven unsatisfactory.

¹²⁹ 28 U.S.C. §§ 2201-2202 (1976).

¹³⁰ Both sides will usually benefit if the dispute can be kept from the courts, not because

To this point the principal focus has been on institutional responses to government requests and institutional attempts to maintain a system conducive to intellectual liberty. In addition to the protection of the system as a whole, however, the university must be sensitive to the particular interests and rights of its individual members.¹³¹ A request for information by government investigators may directly intrude upon an individual's intellectual freedom. A request to review examination questions and answers illustrates the principal issues involved. If a charge of bias derives from an academic problem, then the student's examination performance is directly implicated, and the investigators may wish to undertake a comparative study of examinations.¹³²

The relationship between a teacher and student is delicate and sensitive. If the relationship is to be effective, the teacher must be able to rely upon the fundamental honesty of the students. The students must trust the professor to write an examination which fairly tests them on the materials covered and to grade the results as objectively as possible.¹³³ When a third party enters the relationship to review the questions and answers, the implication arises that one party in the relationship has violated the trust. Care should be taken to avoid such an implication unless clearly warranted, because it will limit the intellectual freedom of both teachers and students by reducing their relationship to one of mutual mistrust in which learning becomes an adversarial process with a third party sitting in judgment. When the third party is an outside agent of the federal government, the possibility of destroying the trust is greater, because government intervention suggests that the alleged abuse is significant enough to be a matter of public concern at the federal level.

of any lack of faith in judges, but rather because most litigation takes such an extraordinarily long time to be completed that it has generally become an unsatisfactory means of resolving disputes.

¹³¹ See, e.g., O'Neil, *supra* note 36, at 538-43. See generally *Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971); *Parrish v. Civil Serv. Comm'n*, 66 Cal.2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

¹³² A specific request for exam papers and questions was made by HEW investigators in one case in which the author was briefly involved. The request was refused. As of this writing, nothing further has come of the refusal.

¹³³ This model supposes essay type examinations. Clearly, objective examinations in a quantifiable discipline should not be subject to any of the personal prejudices of the grader, though the questions which are asked may tend to reflect the bias of the professor.

Furthermore, the review of examination questions and answers by an agent of the federal government insults the intellectual integrity of both teachers and students. How is an agent of the Office of Civil Rights to make a valid determination of what constitutes a fair question or answer in a course he has not taken? Similarly, he is not in a position to compare with any degree of certainty the relative merits of different papers. From a purely practical point of view, little can be gleaned from such review unless there are egregious examples of bias.¹³⁴

Allowing government investigators access upon request to examination questions and answers in the investigation of a bias complaint can lead to several results, any of which will be detrimental to the system of academic freedom:

(1) The trust between professor and student will be lessened because each student might become the source of an adversarial inquiry. This will be particularly true of female, handicapped, or minority students, and will thereby highlight the presence of such students in a way which impedes their full integration into the academic system.

(2) Students and professors will be aware that their work might be subject to review by an outsider. The impact of this awareness will be most clearly felt by the professor. The result will likely be mediocrity and a minimization of creative exploration of new techniques and ideas.

(3) Professors, in particular, may have a continuing fear of reprisal for the exercise of personal judgment.

(4) Professors may tend to discard examination papers and questions soon after the examination period, and the availability of these papers to students as pedagogical tools will be lost.¹³⁵

¹³⁴ The method of examination is a different question, but it stands to reason that a deaf student should not be given an oral exam, that a blind student should have a reader and the option to dictate his responses, and that special accommodations should be afforded a quadriplegic. If one professor consistently gives bad grades to all his female students and the performance of those women is demonstrably better than average, further investigation would be warranted.

¹³⁵ This would be a normal response. Even if there is no reason to hide anything in the exams, there may be a desire to avoid the inconvenience of disputes about whether they should be reviewed.

The examination issue is one of many that might be raised. It is conceivable that investigators may want to review reading lists, curricula, degree requirements, teaching methods, and other matters which bear directly upon the relationship of student and teacher. Comparative review of such matters by an outsider will drive another wedge into the student-teacher relationship and will be contrary to the usual judicial response of abstention from academic matters.¹³⁶

In summary, the concept of academic freedom and the various interests subsumed therein should be considered as one of the many components of a system of free expression.¹³⁷ Scholars and students regularly engage in the clearly protected forms of expression that are at the heart of the First Amendment. The university has primary responsibility for nurturing and protecting academic freedom. To do so, the university should borrow from the model developed by the Supreme Court and various commentators for the general protection of First Amendment freedoms: a given activity—lecturing, writing, learning—should be presumed to be protected, subject only to regulations reasonably calculated to maintain order and rational intercourse.¹³⁸ Any inquiry, regulation, or investigation which intrudes into one of these protected areas should be presumed to be improper, and the burden of justification should shift to the person or agency making the intrusion. This model will give constitutional protection to academic freedom and will avoid the problems likely to result from the recognition of a separate and identifiable right.

E. *Institutional Autonomy—A Separate Right?*

Almost fifty years ago, Professor Zechariah Chafee published a provocative article in which he argued that, as a general rule, the state had no business intruding into the private affairs of nonprofit associations.¹³⁹ He suggested that there are four issues to be considered before a court or a legislature interferes with the internal governance of such an organization:

- (1) The seriousness of the consequences of an association's ac-

¹³⁶ See notes 42-43, 95-99 *supra* and accompanying text.

¹³⁷ See notes 37-44 *supra* and accompanying text.

¹³⁸ See generally notes 45-94 *supra* and accompanying text.

¹³⁹ Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

tions—for example, expulsion from membership in the Moose Lodge may be socially humiliating, but expulsion from the Plumber's Union may be financially devastating;

(2) The degree to which the procedural rules of the organization are open and conform with usual business rules;

(3) The resentment which interference is likely to cause, balanced against the possible good that may result; and

(4) The value of the institution's autonomy to the health of society.¹⁴⁰

Chafee specifically included universities among the associations which should generally be free from governmental interference.¹⁴¹ As Chafee stated, "The courts, like the legislatures, can hardly profess to be better qualified to decide how teaching shall be carried on than are the teachers and their administrative associates."¹⁴²

To some extent, courts have followed the general line of Chafee's arguments¹⁴³ and have been reluctant to impose policies such as racial tolerance on purely private associations,¹⁴⁴ although federal money has been denied to institutions that practice racial discrimination.¹⁴⁵ The state action requirement has facilitated the decision to abstain when courts have been faced with suits against private colleges,¹⁴⁶ but Chafee's basic argument in favor of institutional au-

¹⁴⁰ See *id.* at 1020-29.

¹⁴¹ See *id.* at 1028-29.

¹⁴² *Id.* Chafee's whole thesis becomes quite clear in light of the following:

We shall be more doubtful of the probable wisdom of state participation in the affairs of such a group if we are accustomed to think of the state itself as just one more kind of association, which, like the others, should keep to its own functions, and which must be judged according to the value and efficiency of the services it renders us in return for rather high annual dues.

Id. at 1029.

¹⁴³ See notes 95-99 *supra* and accompanying text.

¹⁴⁴ See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private clubs); *Falkenstein v. Department of Revenue*, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973) (fraternal organizations); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (fraternal and nonprofit organizations); *Pitts v. Department of Revenue*, 333 F. Supp. 662 (E.D. Wis. 1971) (private organizations). *But see Runyon v. McCrary*, 427 U.S. 160 (1976) (private schools); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (community swimming pools).

¹⁴⁵ See, e.g., *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

¹⁴⁶ See note 27 *supra*.

tonomy for private associations has continued to have considerable impact.¹⁴⁷

The concept of institutional autonomy is closely related to the right of association recognized by the Supreme Court as protected by the First Amendment.¹⁴⁸ Joining others in a common venture is a means of individual expression, and a group effort will often be successful in the vindication of a particular interest where an individual effort will fail. Universities, however, are in a significantly different posture from many other private associations and institutions¹⁴⁹ because of education's importance in American society.¹⁵⁰

¹⁴⁷ The strength of the idea is apparent even in an article which argued that there is little reason to be overly careful of the distinctions between private and state institutions in the application of general due process requirements. See O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970). O'Neil was unwilling to go so far as to suggest that the distinction between private and public be entirely disregarded. There is, he recognized, a value in autonomy in that it allows Antioch to try experimental programs that might not be appropriate for Ohio State. *Id.* at 191-92.

In another fairly recent article Chafee's concerns were reiterated in the context of making a judicial determination whether to accept certain types of cases. See *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963):

In making the threshold determination whether the controversy in question is judicially cognizable, the court must weigh conflicting considerations of policy at a high level of generality, in much the same way as if it were deliberating whether to recognize a novel cause of action. Consideration should be given not only to the seriousness of the injury to the particular plaintiff, but also to the harm with which such conduct threatens others in the plaintiff's position, the extent to which workable standards might be formulated for adjudicating such disputes, and whether judicial action could afford meaningful relief; the court should also give consideration to the weight of any existing social interest in permitting the type of conduct of which the plaintiff complains, the burden which would be imposed on such an association by judicial intervention in similar cases in the future, the burden on courts were they to take cognizance of such disputes, and the extent to which such intervention might interfere with other socially recognized values promoted by such associations. These same considerations, but at a lower level of generality, will influence the formulation of standards for decision on the merits.

Id. at 990.

¹⁴⁸ See *NAACP v. Alabama ex rel Flowers*, 377 U.S. 288 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958). See generally T. EMERSON, *supra* note 48, at 425-33; Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

¹⁴⁹ State supported schools, while not "private," are meant to be included among universities or institutions.

¹⁵⁰ The proposition that education is itself a constitutional right has never commanded the support of a majority of the Supreme Court, but it has received significant minority support. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 110-17 (1973) (Marshall, J., dissenting).

The societal interest in education means that governmental intrusion, as a general proposition, is more easily justified when the institution is a university than when it is a social club.

Despite the government's legitimate interest in education, the institutional autonomy of schools should be recognized as necessary to the nourishment of diversity and creative intellectual pursuits for two reasons: (1) such recognition is consistent with the right of association; and (2) the institution often provides a means for vindicating an individual's right of free expression. No longer does the romantic ideal of the lonesome scientist in his garage laboratory comport with reality. Even a simple humanist needs a library. Both are in need of the university, which often has the resources to protect a right that might be abdicated by an individual if he were left alone.¹⁵¹

Questions concerning institutional autonomy will arise most often in connection with the initial issue whether the government should become involved at all. Since, in the case of antibias legislation, the government is already very much involved, the question becomes one of balancing government intervention against the institution's interest in autonomy. The means of enforcement can bring into question the policies and procedures of the university in a way that challenges the autonomy of the institution as well as the individual rights of members of the university community. Inquiries into the racial or sexual composition of committees on academic standing or discipline, for example, might impliedly challenge the institution's own organizational processes. The inquiry may be valid, but there must be a recognition of its impact on the university's autonomy and on the totality of the academic environment.

F. *The Impact of Intrusions on Privacy*

Cases involving the tort of invasion of privacy have developed a relatively broad interest in individual control over personal mat-

¹⁵¹ In fairness it should be noted that the government, as an institution, is often on the side of the individual. This is especially true in bias cases involving the hiring and promotion of faculty members. See generally Bienen, Ostriker, & Ostriker, *Sex Discrimination in the Universities: Faculty Problems and No Solution*, 2 WOMEN'S RIGHTS L. REP., No. 3 at 3 (1975); Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & EDUC. 429 (1976); Note, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URBAN L. ANN. 107 (1977).

ters,¹⁵² but those cases have dealt with common law or statutory causes of action rather than constitutional rights, and they therefore provide no protection against governmental invasions.¹⁵³ Indeed, it has been argued that recognition of a privacy tort may contradict the First Amendment's protection of free expression.¹⁵⁴

On a constitutional level, Fourth Amendment protection against unreasonable searches and seizures by the government¹⁵⁵ is available to any member of the academic community to prevent gross invasions of an individual's physical space or body.¹⁵⁶ The more important concern, however, is whether the penumbral constitutional right to privacy created by the Supreme Court in the past dozen years¹⁵⁷ has any applicability. The cases forming the basis of the right of privacy all relate to personal matters of marriage, family, or home,¹⁵⁸ and while information sought in a federal investigation

¹⁵² For a general history of the privacy tort and its current status in American law, see Fried, *Privacy*, 77 YALE L.J. 475 (1968); Hill, *Defamation and Privacy*, 76 COLUM. L. REV. 1205, 1253-1313 (1976); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROB. 281 (1966); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁵³ Presumably, there could be an action against a particular official who acted beyond the scope of his official authority and who, therefore, lost the protection of sovereign immunity.

¹⁵⁴ See, e.g., Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?*, 46 TEX. L. REV. 611 (1968); Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543 (1976). The tension between the privacy tort and free expression was made particularly clear in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), a case which involved the publication of a rape-murder victim's name in violation of a Georgia statute. The publication was considered to be privileged. See generally Hill, *supra* note 152, at 1257 & n. 243, 1258-64. See also Hunter v. Washington Post, 102 DAILY WASH. L. REP. 1561 (D.C. Sup. Ct. 1974).

¹⁵⁵ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹⁵⁶ See generally *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁵⁷ See note 106 *supra*.

¹⁵⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Stanley v. Georgia*, 394 U.S. 557 (1969) (possession of pornographic materials at home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception by married couples). See generally Greenawalt, *Personal Privacy and the Law*, WILSON Q., Spring 1978, at 67; Howard, *The Supreme Court and Modern Lifestyles*, *id.*, at 55. See also *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (sale of contraceptives to minors); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (abortion);

may be private in the sense that one does not want it publicly disclosed, the governmental inquiries are not likely to intrude into domestic affairs, sexual relationships, marital concerns, or decisions about childbearing.¹⁵⁹ Although the Court might expand the scope of the right to include student-teacher relationships or other activities of persons engaged in the academic process, such expansion is unlikely because the focus in privacy cases has been on the peculiarly personal and intimate.

A more likely protection for academic privacy interests is the First Amendment. Privacy protects, among other things, an individual's use of the products of a system of free expression. To the extent that the First Amendment protects the right to receive information,¹⁶⁰ and thereby the right to make personal decisions on the basis of what has been communicated, it may serve as a constitutional basis for the right to privacy.¹⁶¹ Viewed in this way, privacy can be treated as yet another component of the system for the protection of academic freedom. If privacy is so treated, then the traditional balancing test can be applied to determine whether necessity demands disclosure.

The Buckley Amendment manifests a particular federal concern with problems of privacy for students. Aside from the protection expressly provided by the statute, it may also serve as a basis for the development of a privacy interest for students and teachers that can be invoked in response to a governmental investigation.

IV. DILEMMAS POSED BY THE BUCKLEY AMENDMENT

A. *Background of the Act and Pertinent Regulations*

While the Constitution provides no greater protection for the pri-

Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education).

¹⁵⁹ There is the possibility that such matters might become the subject of inquiry if the government insisted on reviewing the files of cases involving comparative academic standings. Nevertheless, there is a difference between a review of a file and a statute which prohibits or punishes a certain activity, such as a law banning the use of contraceptives. What might give rise to an action for the tort of privacy invasion would not necessarily be a constitutional violation.

¹⁶⁰ See note 117 *supra*.

¹⁶¹ See generally Lehmann, *supra* note 154, at 155-56; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 770-72 (1973); Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1464-68 (1973).

vacy of students than it provides for anyone else, the Family Educational Rights and Privacy Act of 1974,¹⁶² generally known as the Buckley Amendment,¹⁶³ creates a comprehensive framework for the protection of the privacy of students in connection with their academic activities. The Amendment prohibits educational institutions receiving federal financial assistance from disclosing much of their information about students.¹⁶⁴ The Act serves two functions: (1) it grants a student, or his parents in the case of a minor, access to his educational records;¹⁶⁵ and (2) it limits the distribution of information about a student to third parties without his prior consent.¹⁶⁶ There are limitations on a student's access to confidential letters of recommendation and to financial information provided by his parents,¹⁶⁷ but more important for this discussion are the exceptions to the rules prohibiting disclosure.¹⁶⁸

The Act classifies the kinds of information kept by educational institutions in two broad categories: education records¹⁶⁹ and directory information.¹⁷⁰ Education records include all files, documents, and other materials which an institution maintains in the normal course of its business and which "contain information directly related to a student."¹⁷¹ Directory information includes ordinary facts about a student such as name, address, telephone number, degrees received, his size and weight if on an athletic team, major field of study, and awards.¹⁷² A university may not release education records

¹⁶² 20 U.S.C. §§ 1232g-1232i (1976).

¹⁶³ The principal sponsor of the legislation was former Senator James L. Buckley of New York.

¹⁶⁴ For instance, a college may not send grade records of a student aged 18 or older to his parents without the student's prior written consent. *See* 20 U.S.C. § 1232g(b)(1), (b)(2), (d) (1976). The term "student" is defined as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." *Id.* § 1232g(a)(6). For further discussion of "education records," see notes 169-74 *infra* and accompanying text. Eighteen is specifically set as the age of majority for the purposes of the statute. *See* 20 U.S.C. § 1232g(d) (1976).

¹⁶⁵ *See* 20 U.S.C. § 1232g(a)(1)(A) (1976).

¹⁶⁶ *See id.* § 1232g(b)(1).

¹⁶⁷ *See id.* § 1232g(a)(1)(B). The right of access may be waived. *See id.* § 1232g (a)(1)(C).

¹⁶⁸ *See id.* § 1232g(b)(1)(A)-(I).

¹⁶⁹ *See id.* § 1232g(a)(4).

¹⁷⁰ *See id.* § 1232g(a)(5).

¹⁷¹ *Id.* § 1232g(a)(4)(A)(i). The statute excludes from the definition of "education records" materials kept by individual teachers or administrators, certain law enforcement records, certain employee records, and medical records. *See id.* § 1232g(a)(4)(B)(i)-(iv).

¹⁷² *See id.* § 1232g(a)(5)(A) (1976).

or any "personally identifiable information"¹⁷³ contained therein, other than "directory information," without the prior written consent of the student.¹⁷⁴

The limitations on disclosure, however, do not apply to requests for information by representatives of the Comptroller General, the Secretary of Health, Education, and Welfare, administrative heads of federal educational agencies, or state educational authorities¹⁷⁵ to the extent that the requested information "may be necessary in connection with the audit and evaluation of Federally-supported education programs or in connection with the enforcement of the Federal legal requirements which relate to such programs."¹⁷⁶ Government officials are, nevertheless, required to maintain the confidentiality of those records to which they do gain access.¹⁷⁷

Neither the statute nor the regulations define the categories of data which "may be necessary" for the audit or the enforcement of government programs. This omission could produce a dilemma for an institution asked to divulge information that is otherwise clearly within the protection of the Buckley Amendment. The statute provides, however, that a refusal to supply personally identifiable information "*as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents,*"¹⁷⁸ shall not be sufficient justification for a termination of funds or for a delay in the consideration of funding for the next fiscal period.¹⁷⁹ Thus, a university is partially protected in pleading confidentiality when information is required to be furnished in the normal course of a federally funded education program. Whether this protection extends to requests for information in connection with an investigation of an alleged violation of anti-

¹⁷³ The term "personally identifiable" is defined by the implementing regulations to mean "that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable." 45 C.F.R. § 99.3 (1977).

¹⁷⁴ See 20 U.S.C. § 1232g(b)(2) (1976).

¹⁷⁵ See *id.* § 1232g(b)(1)(C); 45 C.F.R. § 99.31(a)(3) (1977).

¹⁷⁶ See 20 U.S.C. § 1232g(b)(3) (1976); 45 C.F.R. § 99.35(a) (1977).

¹⁷⁷ See 20 U.S.C. § 1232g(b)(3) (1976); 45 C.F.R. § 99.35(b) (1977).

¹⁷⁸ 20 U.S.C. § 1232i(a) (1976) (emphasis added).

¹⁷⁹ See *id.*

bias regulations is unclear. Such investigative requests may not be within the scope of the protection given universities,¹⁸⁰ but there have been no clarifying cases or regulations.

B. *Application of the Regulations in a Hypothetical Case of Racial Discrimination*

If a university is charged with a discriminatory practice, it may wish to volunteer information to refute the charge in an effort to terminate the proceedings expeditiously. Unfortunately, the desire to be cooperative and to flood the investigators with evidence supporting the university's position may violate the Buckley Amendment.¹⁸¹ Some of the problems that may arise can be identified by considering the hypothetical set out in Section III.¹⁸² The categories of information requested by HEW officials would present a university with an immediate and direct conflict with the policies of the Buckley Amendment. If this conflict is to be avoided a careful analysis of the statute is necessary to determine what kinds of records may or may not be covered. Deciding what constitutes an "education record" and what is "necessary" for "the enforcement of the Federal legal requirements"¹⁸³ is crucial.

Referring to the hypothetical list of records in Section III,¹⁸⁴ categories (1)¹⁸⁵ and (2)¹⁸⁶ should raise no problems; this information is public and generally available. The minutes or other records of the committee responsible for the complainant's dismissal¹⁸⁷ are clearly relevant and, if the complainant has executed a proper waiver, these records should be made available.¹⁸⁸ The minutes of the fac-

¹⁸⁰ The protection afforded by § 1232i(a) is limited to the provision of data "as a part of any applicable program." If read narrowly, it might be applied only to programs which require the provision of information to the government in the normal course of their operation. The protection may not extend to a refusal to supply data about allegations of bias pursuant to an investigation which was not a normal part of the operation of the funding program.

¹⁸¹ The wholesale production of the requested information may also constitute an improper intrusion into the privacy and academic freedom of other members of the university community, as discussed in Section III, *supra*.

¹⁸² See text accompanying notes 119-20 *supra*.

¹⁸³ 20 U.S.C. § 1232g(b)(3) (1976).

¹⁸⁴ The list is set out in text accompanying note 120 *supra*.

¹⁸⁵ Category (1) records are copies of regulations governing academic standing. See text accompanying note 120 *supra*.

¹⁸⁶ Category (2) records are copies of regulations governing the procedures for academic dismissals. See *id.*

¹⁸⁷ These records comprise category (3).

¹⁸⁸ Specifically excluded from the definition of "education records" are: "records of in-

ulty or other group which has final authority over dismissals¹⁸⁹ probably raise no serious questions under the Buckley Amendment provided that unrelated materials are removed prior to disclosure.¹⁹⁰

Categories (5) through (8)¹⁹¹ pose the most difficult problems. Some means of comparing the relative treatment of students is often necessary to determine the validity of the complaint, unless the racism or other discriminatory behavior is blatant.¹⁹² The first problem is to define the scope of the investigation. If the student is in a professional or graduate school which has its own admissions policies, academic standards, and dismissal procedures, the investigation logically should be limited to that school.¹⁹³ If, however, the student is an undergraduate history major, should the inquiry be directed only to the history department, or to the entire undergraduate program?

structional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i) (1976). This exception includes materials such as a professor's notes, class records, and personal memoranda. If a professor who had taught the complainant also sat on the committee which considered his dismissal, that instructor might have personal records which influenced his own decision but which are excepted from the definition of "education records." The Buckley Amendment apparently would not preclude the disclosure of such information. The decision would be up to the individual professor rather than to the institution. Strangely, the disclosure by the professor of any such records to his colleagues might trigger the application of the Buckley Amendment and transform private records of a teacher into "education records." See Carter, Harris, & Brown, *Privacy in Education: Legal Implications for Educational Researchers*, 5 J.L. & Educ. 465 (1976).

¹⁸⁹ These records comprise category (4).

¹⁹⁰ Unless the faculty is meeting in executive session to consider a confidential matter, such as one relating to hiring, there is not likely to be any reason why minutes of faculty meetings, as the official records of proceedings, should not be made available. Generally, confidential information can be deleted.

¹⁹¹ Records in categories (5) through (8) include the following:

(5) Statistics broken down by race as to: (a) number of students admitted; (b) number of matriculants; (c) number of students in academic difficulty; and (d) number of students excluded for academic reasons, all for a certain period of time prior to the alleged instance of discrimination;

(6) Grades of all students in the courses taken by the complainant, by race;

(7) Access to the examination questions and answers of all students in the courses taken by the complainant;

(8) Records pertaining to the disposition of other "academic" cases considered by the appropriate individuals or committees for a certain period of time. See text accompanying note 120 *supra*.

¹⁹² For an example of overtly racist policies by a university, see *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

¹⁹³ The inquiry could be broadened were evidence uncovered which implicated other parts of the university.

Without some initial limitations an investigation can become involved in the pursuit of information of little relevance to the subject matter of the complaint. The argument that the scope of such an investigation should be carefully circumscribed is closely related to the argument that sanctions for a violation of an antibias statute should be limited to the particular school or program in which the violation occurs.¹⁹⁴ Professor O'Neil argues that discrimination in one department may justify funding terminations that affect wholly unrelated sections of an educational institution.¹⁹⁵ In O'Neil's view, racism in the history department could be a sufficient justification for a termination of federal funding to the chemistry department even if the complainant had never taken chemistry. His concern is the protection of institutional autonomy,¹⁹⁶ and he fears that challenges which seek to narrow the application of regulations to a particular department or even to a specific program within a department may result in an unrealistic atomization of university activities. Students take courses in a variety of areas, administrative support crosses internal boundaries, and departments have joint interdisciplinary programs.¹⁹⁷ Professor O'Neil argues that an attempt to narrow the impact of such regulations may involve courts and government agencies in an examination of university organization and governance that would be significantly more intrusive than the general application of restrictive regulations.¹⁹⁸ He does not suggest, however, that universities should acquiesce in the wholesale application of pervasive federal regulations that intrude upon areas within the autonomy of the institution. Rather, he simply suggests that the argument for limiting the regulatory impact to the specific

¹⁹⁴ For a more complete development of this argument, see the comments of former President Kingman Brewster of Yale University and President Derek Bok of Harvard University reprinted, respectively, in the *YALE ALUMNI MAGAZINE*, Apr., 1976, at 34-35, and the *Harvard University Gazette*, June 13, 1975, at 1, col. 2. President Davison of the University of Georgia apparently shares the opinion of Messrs. Brewster and Bok. See note 10 *supra*.

¹⁹⁵ O'Neil, *supra* note 36. This article was written, in part, as a response to Presidents Brewster and Bok. *Id.* at 529.

¹⁹⁶ *Id.* at 530-38.

¹⁹⁷ *Id.* at 530-36. Typical of the kinds of joint programs are those offered by some law and business schools which make it possible to earn both a J.D. and an M.B.A. in four years rather than five. In cross-departmental programs such as American Studies or East European Studies, the faculty members may be in two departments—the specialized area and a more traditional one, such as history, economics, or political science.

¹⁹⁸ In O'Neil's words, "any judicial approach that requires the fragmentation of an educational institution or its functions may well increase the risk of governmental intrusion." *Id.* at 534.

program where a complaint arose has weak underpinnings and may lead to more serious problems.¹⁹⁹

Certainly there is an argument that the cross-fertilization often significant to creative scholarship will be chilled by a fragmentation resulting from attempts to limit the impact of government regulations. Moreover, much governmental assistance supports general university activities which are not easily separated out for investigatory purposes. Insofar as regulatory enforcement procedures are concerned, however, O'Neil's argument may prove too much. O'Neil is correct that the determination of what is and what is not a federally assisted program may require direct judicial or administrative interference with the university's internal organization, but an initial limitation on the scope of an inquiry can generally lessen its disruptive impact and minimize the possibility of conflicts with the policies of the Buckley Amendment.

Consider the hypothetical claim of racial discrimination by a history student. The student himself may be able to give some direction to government investigators, but the disruptive effects of an investigation could be lessened by limiting inquiries to the undergraduate history department, or perhaps to those courses in which the student had been enrolled. This limited approach would make it easier to justify disclosures as "necessary" within the meaning of an exception to the Buckley Amendment,²⁰⁰ and it would not create the problems of structural fragmentation feared by O'Neil. Nevertheless, the manner of recordkeeping may preclude this approach, because it may be easier to provide information with respect to the entire undergraduate program. If comprehensive disclosure is easier, the university may again find itself in conflict with the "necessity" requirement of the Buckley Amendment.

¹⁹⁹ For instance, O'Neil argues that there is a strong defense to the enforcement of any regulation that requires an institution to curtail individual rights. *Id.* at 538. He gives as an example a sexist professor. A professor may not discriminate against women in grading or in course selection without jeopardizing his employer's right to continue to receive federal funds. However, he may be constitutionally entitled to be a sexist, to make disparaging remarks and to assign texts which question the competence of women. *Id.* For a challenge to the argument that textbook selection in elementary and secondary schools should be left to teachers and schools, see Hodgson, *supra* note 114.

²⁰⁰ 20 U.S.C. § 1232g(b)(3) (1976). Disclosures relative to the complainant's curriculum and teachers in the history department would logically be easier to justify as necessary than disclosures relating to, for example, hiring and personnel policies in the medical school.

The statistical information and other records requested in categories (5) through (8)²⁰¹ could be "sanitized" to remove identifying data, such as names, student numbers, and social security numbers. In smaller schools, however, even sanitized statistical data organized by race and sex might provide enough information for names to be ascertained with only minimal detective work.²⁰² Since the regulations define confidential data to include "other information which would make the student's identity easily traceable,"²⁰³ it may be virtually impossible to cleanse the records in category (8) of all information which could help to identify a specific student. Typically, a committee considering the dismissal of a student will gather as much information as possible to determine whether mitigating factors might excuse the student's poor performance, thereby justifying an academic warning or a probationary period rather than dismissal. Illness, death in the family, financial problems, or domestic difficulties are factors which might be considered. The student will probably consider such material highly confidential, and the letters, memoranda, medical records, and other documents supporting the petition are likely to contain information which would make it easy to determine the identity of the individual even if the name has been removed from the file.

The dilemma for an educational institution is obvious. Although the regulations do not expressly place the burden of proof of innocence on the recipient, the effect is essentially the same. When a complaint is filed, the recipient is given an opportunity to respond by cooperating with the investigating officials.²⁰⁴ The investigation normally requires a review of the recipient's files. The school's initial defense, therefore, is based upon the information and records which it makes available to the government.²⁰⁵ Because most institutions will want to terminate the investigation quickly, it may be

²⁰¹ See notes 120, 191 *supra*.

²⁰² As an example, assume that there are twenty black matriculants in a class of 500. Three of these black students experience academic difficulties. Two of the three are excluded for academic reasons, and one of the two files a complaint with HEW. Very little effort would be required to identify all of those who experienced academic problems. The detective work would be made even simpler if the institution were to publish, as many do, class directories with photographs of the students.

²⁰³ 45 C.F.R. § 99.3 (1977).

²⁰⁴ *Id.* § 80.7.

²⁰⁵ See *id.* § 80.7(b)(c). The regulations are vague, but generally the investigation centers on the practices and files of the university, which places the university in the position of having to prove its good faith compliance.

desirable to provide the investigating officials with substantial amounts of information supporting the university's denial of discrimination. Providing such information, however, may place the institution between the Scylla of antibias legislation and the Charybdis of the Buckley Amendment. In the institution's desire to respond fully and adequately to the discrimination charge, it may create more problems for itself by disclosing information arguably covered by the Buckley Amendment, and a violation of the Buckley Amendment can result in a termination of funds even if the discrimination charge is proven to be false.²⁰⁶ The limited protection against loss of funding prior to a determination of the validity of a refusal to disclose information on grounds of privacy²⁰⁷ is of some aid and comfort, but the resolution of that issue may itself involve lengthy and expensive proceedings.

The crux of the problem—deciding what is necessary for the investigation of a discrimination charge—is apparently left to government agents by the applicable regulations.²⁰⁸ What a government investigator decides is useful for a discrimination inquiry may not, however, be within the “necessity” exception to the Buckley Amendment. In the absence of any cases directly on point, some guidance may be obtained from a review of the legislative history of the Buckley Amendment, and by analogy to cases dealing with disclosure-versus-privacy problems under the Freedom of Information Act²⁰⁹ (FOIA) and the Privacy Act of 1974.²¹⁰

C. *Legislative History of the Buckley Amendment*

The legislative history of the Buckley Amendment does not directly address the question of access to information for the purpose of enforcing antibias legislation;²¹¹ however, it does consider the

²⁰⁶ See 20 U.S.C. § 1232g(b)(1) (1976). A violation of the Buckley Amendment could also arouse the ire of other students who do not want their privacy invaded.

²⁰⁷ See *id.* § 1232i(b).

²⁰⁸ See, e.g., 45 C.F.R. § 80.7(c) (1977).

²⁰⁹ 5 U.S.C. § 552 (1976).

²¹⁰ *Id.* § 552a.

²¹¹ The legislative history is sparse. The statute was tacked onto a lengthy Senate education bill passed in August 1974. Education Amendments of 1974, Pub. L. No. 93-380, § 513(a), 88 Stat. 571. The legislative history of the entire education bill is reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4093. In December 1974 a rider to a bill setting up a White House Conference on Libraries and Information Services amended the Act to clarify some terms and to correct inconsistencies. Act of Dec. 31, 1974, Pub. L. No. 93-568, § 2(a), 88 Stat. 1858. For the legislative history of this Amendment, see [1974] U.S. CODE CONG. & AD. NEWS 6779.

problem of maintaining confidentiality in the audit or evaluation of federally supported educational programs.²¹² The Conference Committee that considered the Amendment specifically suggested balancing the government's need for certain data against the student's right to privacy.²¹³ The right to privacy which seemed to concern the conferees, however, was not privacy in the common law or constitutional sense, but rather a very narrow concept of privacy embracing the right to be free from psychological intrusions which might result from questions asked or evaluations done during the testing of particular students.²¹⁴ The language of the statute, however, is not so constricted.²¹⁵ The most useful suggestion in the Conference Report is that a balancing test might be used which would recognize both the government's need for data and a student's right to privacy. The government's need and the student's privacy are such nebulous terms, however, that applications of such a test must be made on an ad hoc basis.

The December 1974 amendments to the Buckley Amendment²¹⁶ attempted to clarify some terms, but did not effect any substantive changes.²¹⁷ The House and Senate conferees, however, again made

²¹² See S. REP. No. 1026, 93d Cong., 2d Sess. 187, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4206, 4251.

²¹³ The Conference Report stated:

In approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out the evaluations, as is clear from the sections of the amendment which give the Comptroller General and the Secretary of HEW access to otherwise private information about students. *The need to protect students' rights must be balanced against legitimate Federal needs for information.* Under the amendment, an educational agency would have to administer a Federal test or project unless the anticipated invasion of privacy or potential harm was determined to be real and significant, as corroborated by a generally accepted body of opinion within the psychological and mental health professions. In short, the amendment is intended to protect the legitimate rights of students to be free from unwarranted intrusions; it is not intended to provide a blanket and automatic justification for a school system's refusal to administer achievement tests and related instruments necessary to the evaluation of an applicable program.

Id. (emphasis added).

²¹⁴ See notes 152-58 *supra* and accompanying text.

²¹⁵ See generally 20 U.S.C. §§ 1232g(a)(2), (b)(3), 1232i(a) (1976).

²¹⁶ Act of Dec. 31, 1974, Pub. L. No. 93-568, § 2(a), 88 Stat. 1858.

²¹⁷ The single term "education records" was substituted for various other terms, such as "school records" and "personally identifiable information." See *id.*

reference to the general disclosure/confidentiality problem. Their report said that

nothing in the section should be construed to alter the confidentiality of communications otherwise protected by law. The conferees, in agreeing to this amendment, did so because State laws and court decisions vary so widely that the section's potential effects were uncertain. In doing so, the conferees did not intend to disrupt existing parental and student rights to confidentiality.²¹⁸

The legislative history at least manifests an intent to respect previously existing statutory and common law privacy rights. This does not necessarily solve any problems for an institution, but it does give an additional basis for resisting federal requests for data.²¹⁹

D. *Analogies from the Interplay of the FOIA and the Privacy Act*

The Freedom of Information Act became law in 1966.²²⁰ It was enacted as an amendment to the Administrative Procedure Act²²¹ and was intended to substitute a policy favoring general disclosure of administrative agency action for what was perceived to be a prevailing policy of nondisclosure.²²² The Act establishes disclosure as the rule and nondisclosure as the exception, although there are nine categories of information which are specifically exempted from the disclosure requirements.²²³ These exceptions do not prevent disclo-

²¹⁸ S. REP. No. 1409, 93d Cong., 2d Sess. 10, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6793, 6794.

²¹⁹ The university may be faced with another problem. A certain document, for instance, may be necessary to the investigation of a bias complaint, but it may also be privileged under state law. If it is disclosed, the university may be liable for an invasion of the privacy of the person to whom the privilege attaches, but if it does not disclose the document the university may be subjected to governmental pressures. To solve such a dilemma, litigation might be necessary.

²²⁰ Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified at 5 U.S.C. § 552 (1976)).

²²¹ Administrative Procedure Act, ch. 324, 60 Stat. 238 (1946) (codified at 5 U.S.C. §§ 551-706 (1976)).

²²² See H.R. REP. No. 1497, 89th Cong., 2d Sess. 2-6, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2419-23. See generally *EPA v. Mink*, 410 U.S. 73, 79-80 (1973).

²²³ See 5 U.S.C. § 552(b)(1)-(9) (1976). Summarized, the materials exempted from disclosure are:

- (1) those classified as secret by Executive Order in the interest of national defense;
- (2) those dealing purely with agency personnel and practices;
- (3) those specifically exempted by statute;

sure; they merely provide exemptions from mandatory disclosure.²²⁴ Nevertheless, agencies have repeatedly relied upon the various exemptions to withhold requested data.²²⁵

The FOIA's sixth category of exceptions exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."²²⁶ Litigation concerning that exemption has resulted in a series of decisions which shed some light on Buckley Amendment problems. Disputes have focused on the definition of "similar files" and on what constitutes a "clearly unwarranted" privacy invasion.

An expansive reading of "similar files" was adopted by the Third Circuit in *Wine Hobby USA, Inc. v. IRS*.²²⁷ The plaintiffs, manufacturers of winemaking equipment, wanted a list of all persons within a certain geographic area who had registered as amateur, noncommercial wine makers with the Bureau of Alcohol, Tobacco, and Firearms. Wine Hobby wanted to use the list for merchandising purposes, but the court upheld the government's refusal to divulge the information, stating, "We do not believe that the use of the term 'similar' was intended to narrow the exemption from disclosure and

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- (4) privileged or confidential trade secrets;
 - (5) inter-agency and intra-agency memoranda;
 - (6) private personnel and medical files;
 - (7) law enforcement investigation files;
 - (8) reports on financial institutions for or by agencies regulating such institutions;

and

- (9) geological information regarding wells.

See *id.*

²²¹ Professor Kenneth Culp Davis states: "The Act contains no provision forbidding disclosure. It requires disclosure of all records except what is 'specifically' within the nine exemptions and other provisions. The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967). This view has received specific judicial approval. See *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945 (4th Cir. 1974); *Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm.*, 555 F.2d 82 (3d Cir. 1977).

²²² Indeed, some observers have suggested that the FOIA has not really caused any significant increase in the disclosure of useful and important information. Bureaucratic inertia tends to support a policy of nondisclosure, and the cost of pursuing an FOIA suit is so high that all but wealthy firms and zealots are discouraged from litigation. See *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974).

²²³ 5 U.S.C. § 552(b)(6) (1976).

²²⁷ 502 F.2d 133 (3d Cir. 1974).

permit the release of files which would otherwise be exempt because of the resultant invasion of privacy."²²⁸ The court, in effect, read "similar files" to mean any file containing personal information which might be private regardless of its relation to employment history or medical problems.²²⁹

In *Rural Housing Alliance v. United States Department of Agriculture*²³⁰ the FOIA's sixth exemption was held applicable to information collected from individuals by the United States Department of Agriculture, including facts about marital status, child legitimacy, medical conditions, alcohol consumption, and welfare benefits.²³¹ The trial court found exemption six inapplicable,²³² but the Court of Appeals for the District of Columbia Circuit reversed, reasoning that the exemption "was designed to protect individuals from public disclosure of intimate details of their lives"²³³ and "from a wide range of embarrassing disclosures."²³⁴ This finding, however, did not forbid disclosure; instead, it required a remand to the district court to determine if disclosure would, in this instance, constitute a "clearly unwarranted invasion of personal privacy."²³⁵ Thus, in both *Rural Housing* and *Wine Hobby* the courts indicated a willingness to treat the sixth exemption as applying generally to data of a personal nature regardless of the relation to employment or medical history.

The parameters of the exemption were further clarified by *Robles v. EPA*.²³⁶ The plaintiff in *Robles* sought disclosure of reports concerning the radioactivity levels in houses in Grand Junction, Colorado, a town which had been built atop a disposal area for radioactive wastes.²³⁷ The government argued that the reports were exempted from disclosure because the data concerning radiation exposures were important only as they related to people and thus were

²²⁸ *Id.* at 135.

²²⁹ *See id.* Although the decision may have broadened the intended scope of the exemption, it was clearly justifiable. Submitting requested information to government agencies should not make one fair game for mail-order solicitations.

²³⁰ 498 F.2d 73 (D.C. Cir.), *supplemented*, 511 F.2d 1347 (D.C. Cir. 1974).

²³¹ *See id.* at 76.

²³² *See id.*

²³³ *Id.* at 77.

²³⁴ *Id.*

²³⁵ *Id.* (quoting 5 U.S.C. § 552(b)(6) (1976)).

²³⁶ 484 F.2d 843 (4th Cir. 1973).

²³⁷ *See id.* at 844.

of a private medical nature.²³⁸ The court was unimpressed:

[T]he exemption applies only to information which relates to a specific person or individual, to "intimate details" of a "highly personal nature" in that individual's employment record or health history or the like, and has no relevancy to information that deals with physical things, such as structures as in this case.²³⁹

Both the Buckley Amendment and FOIA exemption six evidence a concern for protecting significant areas of privacy. Various institutions in our society, specifically government agencies and recipients of federal financial assistance, continually amass great quantities of information about the personal lives of individuals. Much of this material would normally be kept confidential, but it is disclosed to an agency or an institution for some particular use.²⁴⁰ Wholesale dissemination could unreasonably violate individual interests in privacy. Rather than adopting a laundry list of items which might overlook some categories that should be included, both the Buckley Amendment and the FOIA use generic terms and leave actual classifications to decisions made on an ad hoc basis.²⁴¹

The FOIA does not, however, preclude the disclosure of personal information if there is a sound reason for such disclosure.²⁴² An unsettled question is whether the test for determining the existence of a sound reason is one of general public interest in the specific data

²³⁸ See *id.* at 845.

²³⁹ *Id.* The court's dismissal of the medical files argument might have been too glib. The information requested was certainly more closely related to health questions than to "physical things," but the result was justifiable. Some of the data may have related to individual medical problems, but these were of an unusual nature and were caused by inadequate government controls over dangerous substances. See *id.* at 844. The danger to the people of Grand Junction was created by a shortcoming of the governmental process, and the public interest in knowing how and what happened, in order to prevent recurrences, outweighs an individual's interest in keeping confidential the fact of possible exposure to radiation.

²⁴⁰ Personal income, for instance, is usually considered to be confidential, but it must be disclosed to the Internal Revenue Service. Students and parents must often provide extensive information about their personal financial status to schools in order to qualify for scholarship assistance.

²⁴¹ There are some limitations. For instance, in the FOIA's sixth category of exemptions the examples of employment and health records limit the term "similar files" to those which contain individualized, personal data. See 5 U.S.C. § 552(b)(6) (1976). The exclusion of "directory information" and the requirement that files contain "personally identifiable" information similarly limit the term "education records" as used in the Buckley Amendment.

²⁴² See note 225 *supra*.

or in the use to which the requesting party intends to put the information.²⁴³ Differing approaches are illustrated by the Fourth Circuit Court of Appeals' opinion in *Robles*²⁴⁴ and the decision of the Court of Appeals for the District of Columbia Circuit in *Getman v. NLRB*.²⁴⁵ The *Robles* court adopted a general public interest test, stating that "disclosure was never to 'depend upon the interest or lack of interest of the party seeking disclosure.'" ²⁴⁶ In *Getman* the government sought to resist a request for disclosure by invoking the exclusion for trade secrets and competitive information.²⁴⁷ The plaintiffs were two law professors who requested copies of name and address lists of workers at certain plants where union elections were about to be held in order to solicit the workers to participate in a study of the election process.²⁴⁸ In granting the professors' request the court focused on the intended use of the material rather than on the public interest in the data or the interest of the individual workers in being free from telephone or mail solicitations.²⁴⁹ Thus, the court implied that the appropriate test was not the general public interest in the material, but the purposes for which the requesting parties sought the information. The identity of the recipient and the intended use, rather than the nature of the information itself, were the keys to disclosure.²⁵⁰

²⁴³ See J. Gerberg, *Shielding Personal Information from Public Scrutiny* (Dec. 16, 1977) (unpublished paper on file with the author). Mr. Gerberg's paper was submitted in partial fulfillment of the requirements for an advanced course at Emory Law School. He concluded that this is still an open question which could only be definitively answered by "an amendment to the Act or a Supreme Court decision." *Id.* at 22.

²⁴⁴ *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973); see text accompanying notes 236-39 *supra*.

²⁴⁵ 450 F.2d 670 (D.C. Cir. 1971).

²⁴⁶ 484 F.2d at 847 (quoting K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3A.4 at 120 (Supp. 1970)).

²⁴⁷ 5 U.S.C. § 552(b)(4) (1976); see 450 F.2d at 672.

²⁴⁸ See 450 F.2d at 671-72.

²⁴⁹ See *id.* at 675-76. The information requested was not private, and it could have been obtained from other sources such as the city directory, the unions, or even the employees. This decision, however, gave the professors what they wanted at the public's expense.

²⁵⁰ One commentator has suggested that the question should simply be whether the information is exempt or not, and if it is not exempt, it should be disclosed regardless of the identity of the recipient. See Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 596, 619-20 (1976).

The Third Circuit Court of Appeals has followed the general approach taken by the Fourth Circuit in *Robles* and has focused on the benefit to the public generally rather than on the benefit to the individual who seeks to obtain the information. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974). The Fourth Circuit has reaffirmed its decision in *Robles*. See *Deering*

The Supreme Court offered some guidance in *Department of the Air Force v. Rose*²⁵¹ but did not finally decide the issue. The plaintiffs were New York University law students working on an article about discipline at the military academies, and they requested case summaries of honor code violations at the Air Force Academy.²⁵² The Air Force resisted the request on the grounds that the files contained sensitive personal information.²⁵³ The Supreme Court ordered disclosure of the files, but only after information identifying the individuals involved had been removed.²⁵⁴ Although the Court did not specifically consider the conflict between *Getman* and *Robles*, it did couch its decision in terms of the general public interest rather than the specific interest of the plaintiffs or the social value of their intended use of the information.²⁵⁵

Rose is of particular interest to university officials because it deals with an institution of higher education, albeit a highly specialized one, and because it is concerned with the kinds of files which might be important in an antibias investigation. The Air Force Academy is a tax-supported institution in which there is an obvious public interest. Honor code and ethical violations by potential officers in the United States Air Force are a matter of legitimate concern to the taxpaying public. Cadets are on the public payroll and have legal obligations to the government which make their status fundamentally different from that of ordinary university students. On the other hand, the disciplinary system at the service academies is unique; matters which might be considered minor indiscretions in civilian life may result in disciplinary action against cadets. Because the stigma of such a proceeding may far exceed the seriousness of the particular offense, there is a strong argument in favor of maintaining some degree of confidentiality. This argument is especially strong when there is an accusation but no adjudication of

Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977). The District of Columbia Circuit has backed away from *Getman* to a certain extent but has not unqualifiedly repudiated that approach. See *Ditlow v. Shultz*, 517 F.2d 166, 171 (D.C. Cir. 1975). In *Rural Housing Alliance* the court generally followed *Getman*, but in dictum in *Ditlow v. Shultz*, 517 F.2d 166 (D.C. Cir. 1975), the court admitted that it was uncertain "whether the balancing is to be performed in the context of unrestricted disclosure to the public or of a use-specified release confined to the requesting parties." *Id.* at 171.

²⁵¹ 425 U.S. 352 (1976).

²⁵² See *id.* at 354-55, 355 nn.1 & 2.

²⁵³ See *id.* at 355 n.2, 357.

²⁵⁴ See *id.* at 358, 380-82.

²⁵⁵ See *id.* at 372-73, 381.

guilt. The Supreme Court believed that the public interest in obtaining information about the internal affairs of the Air Force Academy should be balanced against the privacy interests of individual cadets to determine whether disclosure should be required.²⁵⁶ Applying this balancing test, the Court concluded that both interests could be served by requiring the disclosure of files only after personal identifiers had been removed.²⁵⁷ It should be noted, however, that the removal of personal identifiers might not be enough to satisfy the Buckley Amendment regulations if the data still make a student's identity easily traceable.²⁵⁸

To the extent that analogies may be drawn between FOIA cases and Buckley Amendment disputes, it may be argued that the public interest, measured by the government's need for the data, should be balanced against the student's privacy interests. Since the government investigators seek to carry out a legislative mandate, a public interest is clearly involved. The necessity may be determined by a consideration of whether other sources of information are readily available to the government, whether these sources have been exhausted, and whether they will reasonably suffice for a determination of the issue. Individual privacy may be protected to a certain extent by the removal of personal identifiers, and the question whether the remaining information will make an identity easily traceable will require a factual, case-by-case analysis.

Significantly different philosophies underlying the two statutes may cause different "tilts" in the balancing test. Since the FOIA fosters a general policy of disclosure,²⁵⁹ the courts are disposed to lean toward disclosure.²⁶⁰ The Buckley Amendment, on the other hand, is founded upon a general policy of nondisclosure.²⁶¹ The tendency in a case based on the FOIA, therefore, should be to require disclosure, while the tendency in a Buckley Amendment case should

²⁵⁶ See *id.* at 372-73.

²⁵⁷ See *id.* at 358; text accompanying note 254 *supra*.

²⁵⁸ See notes 173, 201-03 *supra* and accompanying text. Some detective work would be required, but the disclosures ordered by the Court in *Rose* could provide good leads to someone who wanted to learn the names of the individual cadets who were involved.

²⁵⁹ See note 222 *supra* and accompanying text.

²⁶⁰ See generally *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

²⁶¹ See notes 162-64 *supra* and accompanying text.

be the opposite. The tendency toward nondisclosure in a Buckley Amendment case, however, need not be as strong as the tendency toward disclosure in FOIA actions. This is because those entitled to receive confidential information about a student under one of the Buckley exceptions are subject to limitations on further disclosure. The material does not become open to the public as does FOIA information.²⁶²

A rather interesting question is whether a private action might lie to prevent the disclosure by a university of information contained in education records which a student considers to be confidential. The Buckley Amendment does not provide for such an action except by way of complaint to the appropriate government agency, which might then begin an investigation to determine whether a termination of funds would be advisable.²⁶³ Similarly, the FOIA does not provide a specific means for a private party to prevent disclosure. Courts have, however, approved a number of "reverse FOIA" suits brought to stop the government from releasing sensitive information.²⁶⁴ Such suits provide a reasonably effective means for the protection of confidentiality. The government is required by the statute to defend FOIA suits, and thereby to represent the interests of individuals or firms which would prefer to avoid disclosure, but the government agency will usually not have the same commitment to the protection of confidentiality as the one who has provided the data. Similar logic might support actions by students who fear a loss of protection of the Buckley Amendment.²⁶⁵

²⁶² See 20 U.S.C. § 1232g(b)(3) (1976).

²⁶³ See 45 C.F.R. §§ 99.63, .64 (1977).

²⁶⁴ See, e.g., *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977); *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Sears, Roebuck & Co. v. EEOC*, 435 F. Supp. 751 (D.D.C. 1977); *Parkridge Hosp., Inc. v. Blue Cross & Blue Shield*, 430 F. Supp. 1093 (E.D. Tenn. 1977); *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975); *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444 (D.D.C. 1975); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974); *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996 (D.D.C.), *aff'd in part, rev'd in part*, 509 F.2d 527 (D.C. Cir. 1974), *reconsidered*, 402 F. Supp. 378 (D.D.C. 1975); *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973), *remanded for reconsideration*, 519 F.2d 935 (D.C. Cir. 1975). See generally Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. REV. 995 (1976).

²⁶⁵ In one case, a district court held that the Buckley Amendment would not support a private action to compel the release of transcripts. See *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977). This was a consolidated appeal from two similar cases. Robert Girardier

In 1974, Congress enacted the Privacy Act²⁶⁶ which, although much more comprehensive, applies many of the same limitations to federal agencies that the Buckley Amendment applies to federal aid recipients.²⁶⁷ The Act generally recognizes privacy as a constitu-

graduated from Webster College in 1972 and Susan Luzkow received her degree from Webster the following year. Both had financed their undergraduate educations with federally guaranteed loans. Each defaulted and filed for personal bankruptcy listing Webster College as an unsecured creditor, and each was discharged in bankruptcy. After leaving Webster, Ms. Luzkow made applications to graduate school and Mr. Girardier attended the University of Missouri at St. Louis where he completed the requirements of that institution for the Master's degree. Missouri-St. Louis, however, would not issue a degree to Mr. Girardier without his official transcript from Webster, nor could Ms. Luzkow complete her applications without a transcript. Webster refused to issue a transcript to either student, citing a provision in the college bulletin that "[n]o transcript is released until all accounts are paid." *Id.* at 1269. Mr. Girardier and Ms. Luzkow brought suit to compel Webster to release their transcripts. The district court granted Webster's motion to dismiss on jurisdictional grounds, *Girardier v. Webster College*, 421 F. Supp. 45, 48 (E.D. Mo. 1976), but the court of appeals vacated that order and remanded with directions to dismiss on the merits. *See* 563 F.2d at 1277. The opinion centered on the effect of the discharge in bankruptcy which was found not to prohibit Webster from refusing to issue a transcript to a defaulting student-debtor. The students also advanced the theory that the Buckley Amendment provided a basis for a right, not only to review "education records," but also to *compel* the release of such records. The court disagreed: "The statute does not say that a private remedy is given. Enforcement is solely in the hands of the Secretary of Health, Education and Welfare under subsection (f). Under such circumstances, no private cause of action arises by inference." *Id.* at 1276-77 (footnote omitted).

The result in *Girardier* does not necessarily preclude the possibility of a suit to prevent disclosure similar to a reverse-FOIA action. The students in *Girardier* were not prevented from seeing their records nor was there an issue of unauthorized disclosure. The real issue was simply whether such a "self-help" procedure on the part of a private creditor would be countenanced in the context of a bankruptcy discharge. That issue is altogether different from the issue in an action alleging, as a basis for jurisdiction, a threat of disclosure of information covered by the Buckley Amendment and a failure of the Secretary of Health, Education, and Welfare to prevent an unauthorized disclosure. If HEW agents are seeking the disclosures, the conflict of interest between the individual student and the government is particularly apparent.

²⁶⁶ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a (1976)).

²⁶⁷ Congress stated the purpose of the Privacy Act in the following terms:

The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

- (1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
- (2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;
- (3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

tional right²⁶⁸ and provides a means for an individual to learn what the government knows about him, to correct mistakes, and to prevent the disclosure of information which he considers to be private, subject only to a countervailing public interest in disclosure.²⁶⁹

On its face the Privacy Act presents a conflict with the FOIA, at least with respect to fundamental policies, but the Privacy Act was meant to be subordinated to the FOIA.²⁷⁰ The interplay between the statutes arises when information is exempt from mandatory FOIA disclosure and yet may be disclosed in the agency's discretion. An agency employee may find himself in a position similar to that of a university official. He has records which may fall within one of the exemptions from mandatory disclosure, and if so, the information probably falls within the ambit of the Privacy Act. If the employee wrongly discloses the information, he may find himself *personally* liable,²⁷¹ but if he refuses to disclose, someone may try to compel disclosure through a civil suit against the agency. Since the greater risk of personal exposure lies in disclosure, the tendency will be to refuse to disclose. Therefore, even if the Privacy Act is subordinate to the FOIA, it may effectively undermine the application of the FOIA.²⁷²

(4) collect, maintain, use or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, *reprinted in* 5 U.S.C. § 552a app., at 317-18 (1976).

²⁶⁸ *See id.* § 2(a)(4).

²⁶⁹ *See* 5 U.S.C. § 552a(b) (1976). An individual aggrieved by a wrongful disclosure may file a civil damages action against the United States. *See id.* § 552a(g)(1). An employee who violates the Act may be found guilty of a misdemeanor and fined up to \$5,000. *See id.* § 552a(i).

²⁷⁰ *See* 5 U.S.C. §§ 552a(b)(2), (c)(1), (e)(6) (1976).

²⁷¹ *See id.* § 552a(i).

²⁷² *See Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 596, 627 (1976). The standards decided upon by various agencies are so different, and it is necessary to wade through such a complex web of conflicting regulations to determine what information may be obtained under what circumstances, that two commentators have gone so far as to suggest that yet another federal agency should be established solely for the purpose of handling FOIA-Privacy Act matters. *See Hanus & Relyea, A Policy Assessment of the Privacy Act of 1974*, 25 AM. U.L. REV. 555, 591

There is one peculiarly limiting provision of the Privacy Act. It applies only to information contained in a "system of records," in other words, files containing information which may be retrieved by the use of "personal identifiers" which refer to specific individuals.²⁷³ An example would be files ordered according to social security numbers. Material which is simply collected and maintained in statistical form without reference to individual citizens or firms apparently is not covered, nor is *personal* information which is not maintained as a part of a *system* of records. There have been no judicial interpretations of these statutory provisions and it is unclear whether the term "system of records" will be given a narrow or expansive reading. What is interesting, however, is that "system of records" as used in the Privacy Act is strikingly similar to "education records" as used in the Buckley Amendment.²⁷⁴ Both apparently refer to a collection of files maintained in the ordinary course of business which contain data identifying specific individuals to whom the files relate. If the records are not systematized, or if they are merely collections of anonymous statistical information, they arguably are covered neither by the Privacy Act nor by the Buckley Amendment.

Unfortunately, there is little statutory or case law guidance for university officials who are faced with federal requests for files which are within the scope of the Buckley Amendment's protection. There may be analogies to decisions involving the FOIA, but university administrators and federal bureaucrats may find themselves in greater sympathy with one another as they both have to contend with conflicting statutes and regulations. This shared dilemma, however, is not likely to lessen the potential for litigation because in any comprehensive federal investigation of alleged discrimination the investigators will seek information that falls within the coverage

(1976). This would be a questionable use of taxpayers' money and probably would do nothing more than create another bureaucratic level of insulation. For more on the Privacy Act, see Note, *The Privacy Act of 1974: An Overview and Critique*, 1976 WASH. U.L.Q. 667.

An interesting case illustrating the problem was *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318 (M.D. Tenn. 1975). A United States Attorney stopped his routine release of information about arrests and indictments to the press on the grounds that to do so would violate the Privacy Act. The local press brought an FOIA suit to compel disclosure and won. There are other federal statutes which also limit disclosure, and an FOIA request may also raise questions about the scope of these other laws. See generally *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977).

²⁷³ See 5 U.S.C. § 552a(a)(5) (1976).

²⁷⁴ See notes 169-72 *supra* and accompanying text.

of the Buckley Amendment. Prudent university officials are unlikely to want to risk violating one federal statute while attempting to comply with another. The investigator's job may prove to be as difficult as that of the individual citizen who seeks disclosure pursuant to the FOIA but finds agency employees fearful of violating the Privacy Act.

Although the FOIA, on the one hand, and the Buckley Amendment and the Privacy Act, on the other, proceed from different conceptual bases, the three statutes manifest a similar mistrust of institutional processes. The FOIA is apparently designed to open the records of federal agencies to the public on the assumption that the agencies will be more careful of the public trust if their operations are open to public scrutiny.²⁷⁵ The Privacy Act and the Buckley Amendment reflect a concern with the improper use of the personal information collected by private and governmental institutions, and they provide mechanisms for the correction of inaccurate data.²⁷⁶ All three acts, therefore, are intended to assist in the protection of the individual against large organizations and in the development of more open and responsive institutions. Experience with the Privacy Act or the Buckley Amendment is insufficient to form concrete conclusions, but a review of the impact of the FOIA indicates that it has not been altogether successful in promoting either of these goals, and the Privacy Act may further diminish the effectiveness of the FOIA.²⁷⁷ There should be a basic reconsideration of the interplay between the Privacy Act and the FOIA and possibly an amalgamation of them into one statute providing a single set of standards for disclosure and nondisclosure.

The Buckley Amendment should simply be repealed. It imposes an unnecessary layer of regulatory control that creates confusion, requires additional record keeping, and places universities in danger of losing federal assistance through clerical error or compliance with

²⁷⁵ See notes 222-23 *supra* and accompanying text.

²⁷⁶ See 5 U.S.C. § 552a(d)(2), (3) (1976) (Privacy Act); 20 U.S.C. § 1232g(a)(2) (1976) (Buckley Amendment).

²⁷⁷ See generally Hirschhorn, *Sunshine for Federal Agencies*, 63 A.B.A.J. 55 (1977); Kovach, *A Retrospective Look at the Privacy and Freedom of Information Acts*, 27 LABOR L.J. 548 (1976); Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?*, 28 ADMIN. L. REV. 463 (1976); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974); Comment, *Informational Privacy and Public Records*, 8 PAC. L.J. 25 (1977); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951 (1975).

other regulatory schemes. Common law and constitutional bases are available for the protection of significant privacy interests of students, teachers, administrators, and others engaged in the educational process.²⁷⁸ Information provided to federal investigators in connection with a discrimination investigation or an audit would be protected from general disclosure by the Privacy Act,²⁷⁹ or perhaps by one of the exemptions to the FOIA.²⁸⁰

V. CONCLUSION

The federal government is deeply involved in American higher education, an involvement unlikely to end in the foreseeable future. Although the relationship has generally been beneficial to universities,²⁸¹ the government may at times unnecessarily intrude into areas which should properly be handled by the university. The pursuit of one goal or policy may become so particularized that other significant values and interests are injured.

The wholesale dissemination of the enormous quantities of information routinely collected by major institutions, including universities, may in some instances constitute an unreasonable invasion of privacy. Nevertheless, the danger of an invasion of privacy resulting from the release of information about students by schools, colleges, and universities is not great enough to warrant a federal nondisclosure statute, the violation of which could result in a termination of federal financial assistance. The conflicts that arise between the enforcement of other federal policies and the Buckley Amendment further diminish its utility and suggest that the Amendment should be repealed.

The problem is to ensure that the pursuit of equality of opportunity does not unreasonably intrude into the educational process, thereby interfering with the creative intellectual inquiry essential to free expression. Both interests can be served if the concept of academic freedom is treated as one of several components in a system of free expression and the university is viewed as the environment in which that component exists and is nurtured. Intrusions into the university environment should be minimized, and the burden

²⁷⁸ See notes 152-58 *supra* and accompanying text.

²⁷⁹ See 5 U.S.C. § 552a(b) (1976).

²⁸⁰ See, e.g., *id.* § 552a(b)(6).

²⁸¹ See note 10 *supra*.

should be on the government to justify an intrusion. Constant interference with education for the purpose of policing allegedly discriminatory behavior will unnecessarily politicize the university and lead to an adversarial environment destructive of the rational pursuit of learning.

