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The E.R.A.-Private Schools Connection

Testimony of Professor Jeremy A. Rabkin, Cornell University, to the U.S. Senate Judiciary Committee, Constitution Subcommittee September 13, 1983

The language of the proposed Equal Rights Amendment is addressed to the state and federal governments. Many people therefore assume that its effects will be limited to public schools and state universities. This view is certainly mistaken. In fact, because most public educational institutions are already subject to statutory prohibitions on sex discrimination, private institutions may be much more seriously and directly affected by the E.R.A. than their public counterparts. Proponents of the amendment may welcome all the changes it would bring to private education. My own view is that the scale of these changes ought to give us some pause. But I will try to report my analysis of the likely consequences here as impartially as I can.

Effect on Direct Subsidies

It is already illegal for educational institutions to practice sex discrimination if they are recipients of direct federal grants. Title IX of the Education Amendments of 1972 prohibits sex discrimination in "any education program or activity receiving federal financial assistance." The language was modeled on Title VI of the Civil Rights Act of 1964, which prohibits discrimination "on the basis of race, color or national origin" in any federally funded program. Title VI was understood at the time of its adoption to embody a constitutional requirement that government not give direct aid to racial discrimination. Title IX was not conceived as implementing a constitutional obligation in regard to sex discrimination, however. Thus, while the prohibition against funding of race discrimination is cast in absolute terms in Title VI, the prohibition in Title IX is subject to numerous exceptions. By constitutionalizing an absolute prohibition of government involvement in discrimination, the Equal Rights Amendment would effectively eliminate these exceptions in Title IX.

At present, Title IX does not apply to *admissions* decisions in any elementary or secondary school (except for "institutions of vocational education") nor in any private college. In other words, it permits private schools, up to the level of undergraduate college training, to operate as single-sex institutions and still remain eligible for federal funding. It also exempts any school controlled by a "religious organization" to the extent that its prohibition on sex discrimination "would not be consistent with the religious tenets of such organization." By contrast, the E.R.A. would almost certainly prohibit direct federal — or for that matter, state — grants to any single-sex institution. Nor has any commentator argued that it would provide any exemption for religious schools.

As it is, the Supreme Court has held that the First Amendment prohibits direct government grants to any religious school at the elementary or secondary level. And direct grants to nonsectarian private schools at this level are not very common or very extensive. But the Supreme Court has allowed religious institutions of higher education to receive substantial government assistance and many of these schools may not be able to comply with a requirement of absolute non-discrimination or non-differentiation. These colleges, along with secular women's colleges and any schools that try to maintain a fixed sexual ratio in their student body, may thus face some painful financial sacrifices to retain their established character. But this is only the beginning of the difficulties that the E.R.A. is likely to pose for unconventional private schools.

Effect on Tax Exemptions

Apart from its effects on direct subsidies, the Equal Rights Amendment may have its greatest impact on private schools through its implications for tax policy.

Since 1970 the Internal Revenue Service has been denying tax exempt status to private schools that practice racial discrimination. This policy was initiated in response to a successful 1969 suit by civil rights groups in *Green v. Kennedy* and subsequently affirmed by the same three-judge district court in *Green v. Connally* in 1971. As this subcommittee is doubtless aware, the Supreme Court emphatically endorsed the IRS policy this spring in *Bob Jones University v. Regan*.

Several aspects of the Court's decision in *Bob Jones* deserve special notice. First, the Court held that recognition as a "charitable" organization — one eligible for tax exempt status — must be withheld from institutions involved in any activity that is "contrary to a fundamental public policy." The tax code need not directly prohibit this activity: it does not expressly prohibit racial discrimination. And this activity need not actually be illegal in itself: no law prohibits Bob Jones University from maintaining the ban on interracial dating that got it into trouble with the IRS. The Supreme Court held that the IRS was nonetheless justified in revoking the tax-exempt status of Bob Jones University because, if it had been a state institution, constitutional rulings would plainly have prohibited the school from maintaining a ban on interracial dating. This was enough to prove, as the court saw it, that Bob Jones University was acting "contrary to fundamental public policy."

Now I think it is indisputable that, if the E.R.A. is added to the Constitution, it will make opposition to sex discrimination a matter of "fundamental public policy." Following the Court's ruling in *Bob Jones*, then, it seems inescapable that all single-sex institutions must be denied tax exemptions. Thus the E.R.A. would not only make all-women colleges ineligible for tax exemptions, but also Catholic seminaries, for example, unless they admit women for training to the priesthood.

Indeed, admitting applicants of both sexes would not be sufficient, according to the *Bob Jones* ruling, unless the institution is oblivious to gender in all its activities. It did not save Bob Jones University, after all, that its ban on interracial dating was rather incidental to its basic educational program — which was, it appears, fully integrated after 1976. Thus it seems inescapable that an institution like Yeshivah University in New York, which does have coeducational programs, must still forfeit its tax exemption if it maintains separate seating for men and women in religious services. That this practice is required by Orthodox Jewish tradition would be of no relevance to the operation of the tax law. In the *Bob Jones* case, the Court emphatically rejected the claim that Bob Jones University had any First Amendment right to exemption from the IRS policy even though its ban on interracial dating derived from the school's understanding of Biblical precepts. The Court insisted that the government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioner's exercise of their religious beliefs."

It is tempting to regard these conclusions as simply too absurd or too extreme for the Supreme Court to embrace. The Court would surely try to avoid the onus of ordering Catholic seminaries to admit women candidates for the priesthood or forfeit their tax exemptions. And I would be the first to admit that the Court has often sacrificed logical or doctrinal consistency in the past to avoid unpopular or unpalatable results. Perhaps it would do so here, but one cannot be at all confident of that. To avoid this result, the Court would have to denigrate the E.R.A. itself by maintaining that it had not, after all, made opposition to sex discrimination such a "fundamental public policy" as opposition to race discrimination. Or it would have to repudiate the *Bob Jones* decision — which was hailed on almost every side as expressing the evident, common sense of the law.

The Court did leave itself a possible escape hatch by resting its decision in *Bob Jones* on a statutory interpretation of the tax code rather than voicing direct constitutional standards. This may leave room for Congress to rescue the Court, by amending the tax code to clarify that — the E.R.A. notwithstanding — the "fundamental public policy" against sex discrimination should not extend to religious institutions or to various other private organizations. Yet a Congress which had recently reendorsed the E.R.A. might not feel at all comfortable in enacting such a disclaimer. And I think it is fair to say that many E.R.A. proponents would lobby hard to defeat such an amendment to the tax code — not from any particular desire to deny tax benefits to Catholic seminaries or Orthodox Jewish day schools, but from a general commitment to the notion that tax benefits should not be available to institutions practicing sex discrimination. Even without ratification of the E.R.A., the U.S. Commission on Civil Rights urged as far back as 1975 that the IRS had the authority and the obligation under existing laws to deny tax exemptions to sexually discriminatory schools. Proponents of this view will be greatly fortified in their conviction if E.R.A. is finally added to the Constitution.

In fact, there is already a substantial body of precedent and opinion to support the view that tax exemptions are a form of "state action" and that the constitutional prohibitions against discrimination by the government must equally apply to all recipients of governmental tax benefits. In the *Bob Jones* case the Court noted that many of the amicus briefs it received — including the one submitted by William Coleman, who was appointed by the Court, itself — argued that, whatever the Court's interpretation of existing tax law, the "denial of tax-exempt status is independently required by the equal protection component of the Fifth Amendment." The Court's reliance on statutory interpretation of the tax code made it unnecessary for it to reach the constitutional issue, but it did not dispute the force of the argument. In fact, the Court's statutory interpretation — which was otherwise rather strained

and unconvincing in important respects — seemed to reflect the Court's conviction that any other interpretation of the tax code would render it constitutionally defective. The *Green court*, which first advanced this interpretation of the tax code, stated explicitly that any other approach would raise "grave unconstitutional issues." In *McGlotten v. Connally* another three judge court subsequently provided a direct holding that the Constitution forbids tax exemptions for discriminatory institutions. The *McGlotten* decision was never overruled and its reasoning has indeed been cited with approval by several other courts and a considerable number of scholarly commentators.

Even before the recent decision in *Bob Jones v. Regan*, several commentators had already predicted that ratification of the Equal Rights Amendment would require the withdrawal of tax exemptions for single-sex schools and for schools practicing any form of sex discrimination. After *Bob Jones*, this seems even more likely — even for religious institutions.

Effects on Other Assistance

First, it is worth noting that the *Bob Jones* case dealt not only with direct tax exemptions but with tax-exempt status generally. Institutions which qualify for tax exemptions under §501(c)(3) of the Internal Revenue Code do not have to pay any form of income tax themselves. But they also benefit indirectly from this classification, because it allows private contributors to these institutions to take deductions on their own taxes for such contributions (under §170). The *Bob Jones* decision, like the IRS policy that preceded it, prohibited deductions for "charitable" contributions to discriminatory schools — thus undermining the fundraising capacity of these schools by depriving would-be donors of a major incentive for making contributions. The E.R.A. would certainly have the same effect on single-sex (or sexually discriminatory) schools if it is held to prohibit their own tax exemptions.

But tax subsidies are not the only form of state assistance threatened by the E.R.A. In *Norwood v. Harrison*, the Supreme Court held that states may not provide textbooks to private schools practicing race discrimination. The fact that the books were loaned directly to the students made no difference; nor did it make any difference that the books were available on the same basis to all students at all schools in the state. Moreover, the constitutional ban on participation in this program was extended to religious schools, without any hesitation or qualification. The conclusion again seems inescapable that, if the E.R.A. is ratified, single-sex private schools or private schools practicing any form of sexual differentiation would also have to forgo the benefits of such programs. This may affect a considerable number of private elementary and secondary schools, since many states have adopted such textbook or equipment loan programs since 1968, when the Supreme Court declared these programs to be a permissible form of state aid to sectarian schools.

At institutions of higher education, state and federal loan and grant programs will probably have to exclude students who attend single-sex or sexually discriminatory schools on the same reasoning. The Department of Education (and before 1979, the Department of Health, Education and Welfare) has indeed maintained that if a college enrolls students who participate in a federal student loan or grant program, *the entire college* and *all its activities* must comply with the federal law prohibiting sex discrimination in "any program or activity receiving federal financial assistance." Colleges that did not want to comply with HEW's elaborate regulations on sex discrimination were told that their students could no longer qualify for federal grants and loans. The Supreme Court has not yet endorsed this approach as a proper interpretation of Title IX (the statute involved), but it would certainly have very great difficulty in disavowing the policy under the E.R.A.

If loans to students are threatened, it is hard to see how loans to single-sex institutions themselves can be exempt from challenge. Thus it seems quite possible that such institutions would be forced to withdraw from special library loan arrangements with state universities and other joint ventures with public institutions. Nor is this all.

In *Gilmore v. City of Montgomery*, the Supreme Court held that a racially segregated private school could not be given special hours to use the playing fields in a public park, because this would constitute unconstitutional state involvement with racial discrimination. Under the E.R.A., therefore, it would seem that private schools must be excluded from using any public facility — using a municipal auditorium for a graduation exercise or student concert, for example — if the school itself does not observe approved standards of nondiscrimination in regard to sex. Further it would seem that private organizations cannot maintain any link with public schools or state universities if they fail to meet E.R.A. standards of non-discrimination. Thus, Boy Scout and Girl Scout troops may have to be excluded from public school facilities and fraternities and sororities banished from state college campuses (or at least from college owned facilities).

Burden on Private Education

A few commentators have suggested that, despite its apparent limitation to governmental activity, the Equal Rights Amendment could directly reach all

schools, public and private. There are a few strands of constitutional doctrine and a few precedents that can be invoked to support this claim. I think it is very unlikely, however, that the Supreme Court would give broader reach to a constitutional ban on sex discrimination than it has accorded to the existing prohibitions on race discrimination in the Fourteenth and Fifth Amendments. And the Court has never held that racially discriminatory private schools are per se unconstitutional.

If the Court's approach to race discrimination is any guide, however, the Equal Rights Amendment will impose very considerable constraints on private schools. Schools that are not prepared to forgo all forms of government assistance will have to be sexually integrated. This does not simply mean that single-sex schools will have to admit students of the opposite sex. This probably means that from kindergarten to post-graduate training all classes will have to be sexually integrated and all school-sponsored activities as well: gym classes and athletic programs, classes on "health" or on "women's issues" or on religion or on fatherhood, baking clubs and "consciousness-raising" groups and so on and so on. Indeed the implementing regulations for Title IX suggest that even sexually differentiating "dress codes" or counseling services may be considered "sex discrimination." I do not offer these examples to caricature or denigrate the goal of sexual equality, and I do not mean to say that there is anything wrong with running schools in this way. The question is simply whether all educational institutions should be pressured to conduct themselves according to such patterns.

The E.R.A. would doubtless permit many single-sex institutions to continue, along with many schools that hold to traditional patterns of sexual separation or differentiation. But it would place great financial strain on such schools and a large number may not survive. It has been estimated, for example, that loss of tax exempt status would cost the average private school (at the elementary and secondary level) over 20 pecent of its annual income. That exceeds the margin for survival for many schools and those that are able to absorb such a loss will be forced to curtail their programs and limit access (by increased tuition and/or reduced scholarship aid provisions). Private colleges may be even more hard hit and become even less accessible — those that survive. And beyond all the financial blows, unconventional private schools and colleges will suffer the stigma of public quarantine, treated as too tainted, in effect, for any contact or cooperation with public institutions. Those schools that can still attract students under these conditions will surely be driven to embittered isolation.

Now we have done all this to private schools that persist in racial discrimination precisely to express an unyielding abhorence to racist practices. The question again is whether we want to oppose all aspects of sexual separation or differentiation with equally uncompromising condemnation, imposing the same financial penalties and the same moral stigma. My own view is that there is something terribly wrong with a constitution that puts the sexual exclusion of a Catholic seminary or a traditional women's college on the same plane with the racial bigotry of a white supremacist "segregation academy."

I will not here attempt to argue the moral differences between race discrimination and sexual exclusion, however. I will simply record my strong impression that Americans now seem to share this sense that sexual differentiation should not be regarded with the same intolerance as race discrimination. Thus Title IX, enacted within a year of the original congressional submission of the Equal Rights Amendment, expressed strong opposition to public funding of sex discrimination in education, but the general policy was understood to require exceptions and qualifications. In addition to the original statutory exemptions for religious schools and for most kinds of single sex schools, Congress has added numerous amendments to prevent dogmatic applications of general policy by civil rights officials. Congress has acted, for example, to exempt school sponsorship of Boy Scout and Girl Scout troops, of all-female beauty pageants, of separate mother-daughter and father-son banquets, and of social sororities and fraternities. Most people seem to want this flexibility even in public schools and are certainly prepared to tolerate greater diversity along these lines in private education.

The Equal Rights Amendment will almost certainly eliminate such flexibility and greatly reduce such diversity. And this will not be the effect of sloppy draftsmanship by its current sponsors or errant dogmatism by its subsequent judicial interpreters. Many sincere and thoughtful people support the Equal Rights Amendment precisely because they desire the kinds of legal consequences I have tried to sketch out in this statement. Many people do believe that opposition to sexual differentiation, like opposition to race discrimination, must override our traditional regard for religious pluralism and educational diversity. The country as a whole should consider what this means, however, before the Equal Rights Amendment is resubmitted to the states.

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